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REVIEW ESSAY

THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*: DAWN OF A NEW ERA?

Chief Justice Brian Dickson (Retired)*

This is the text of Merv Leitch Q.C. Memorial Lecture, delivered by the Right Honourable Brian Dickson on November 15, 1993. The author poses the question whether the adoption of the Charter of Rights and Freedoms *heralds the "dawn" of a new era in Canadian judicial history, particularly with regard to the relationship between government and the courts. In responding to this question, he concludes that the* Charter *has not radically altered the role of the judiciary. Rather, it has simply extended the responsibilities already exercised by the courts within their mandate of judicial review of legislation on constitutional grounds. In reaching this conclusion, the author examines the role of the judiciary in the pre-*charter *context, the inter-relationship of the* Charter, *the judiciary and government, and the background of social and political values that form the context into which the* Charter *fits. Finally, the author states that if the* Charter *has in any way signalled the beginning of a new period in Canadian constitutional history, it has done so by forcing the government to live up to its responsibility under the* Charter *to enact legislation that is consistent with the rights and freedoms that it enshrines.*

Voici le texte de la conférence commémorative de Merv Leitch, c.r., présentée par le très honorable Brian Dickson, le 15 novembre 1993. L'auteur se demande si l'adoption de la Charte des droits et libertés *annonce une ère nouvelle dans l'histoire de la magistrature canadienne, en ce qui touche les rapports du gouvernement avec les tribunaux. En réponse à cette question, il note que la* Charte *n'a pas fondamentalement modifié le rôle du pouvoir judiciaire. Elle élargit simplement les responsabilités qui incombaient déjà aux tribunaux, leur mandat consistant à revoir les lois dans une perspective constitutionnelle. Ce faisant, l'auteur examine le rôle du pouvoir judiciaire avant la* Charte, *les liens existant entre la* Charte, *le pouvoir judiciaire et le gouvernement, et les valeurs sociales et politiques qui constituent le contexte de la* Charte. *Finalement, l'auteur déclare que, si la* Charte *marque bien le début d'une ère nouvelle, c'est en forçant le gouvernement à assumer ses responsabilités et à légiférer conformément aux droits et garanties enchâssés dans la* Charte.

I am deeply honoured to have been asked to give this year's Merv Leitch Q.C. Memorial Lecture. It gives me particular pleasure to be associated with a lecture series that honours the life of a great Canadian who rose from

* I would like to acknowledge the research assistance of Robert Yalden in the preparation of this paper.

humble beginnings to pursue a distinguished career of public service and in the law.

Merv Leitch was born in Creelman, Saskatchewan in 1926. He grew up through the worst of the depression years, watching his family struggle to keep their farm intact. Eventually, his family moved to Alberta. Merv lived in Alderson and then Redcliff before joining the Navy in 1943 at the ripe old age of seventeen! Upon discharge, he found his way to law school at the University of Alberta, graduating with the gold medal. From 1952 to 1971 Merv practised law with Macleod Dixon, the firm to which he would return in 1982 when he left public life. But, of course, he is best known to many of us as a man who held a number of key cabinet positions in the Lougheed government: first as Attorney General, later as Treasurer responsible for the Heritage Fund and finally as Minister of Energy. Merv Leitch's accomplishments truly were remarkable and I am pleased to be with you to pay tribute to him this evening.

Those who knew or worked with Merv Leitch are well aware that he had an abiding fascination for constitutional law. Indeed, it was his express wish that the Merv Leitch Scholarship Fund, with which this lecture is associated, reflect his interests and be awarded to students who excelled in constitutional law or natural resources law. Given Merv Leitch's profound interest in the events that led to the adoption of the *Canadian Charter of Rights and Freedoms*,[1] it is entirely fitting that we should spend some time this evening honouring his memory by reflecting on the impact that the *Charter* has had on our country. That is why I have chosen as my topic the question: does the *Charter* mark the dawn of a new era?

As many of you will already be aware, the *Charter* sets out a number of fundamental rights and freedoms. For example, the *Charter* protects the right not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice (section 7). It protects the right to be equal before and under the law and to receive equal benefit and protection of the law (section 15). A number of freedoms are guaranteed: freedom of speech (section 2(b)), freedom of assembly and association

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

(section 2(c)(d)), freedom of religion (section 2(a)). There are legal rights: the right to counsel (section 10(b)); the right not to be subjected to cruel or unusual punishment (section 12). In addition, the *Charter* contains provisions dealing with language rights, educational rights, and aboriginal rights.

If a party invoking one of these rights or freedoms succeeds in establishing an infringement, then the focus of analysis shifts to section 1 of the *Charter*. That is, the courts must then consider whether the infringement can be demonstrably justified in a free and democratic society. As first year law students know all too well, the Supreme Court of Canada has spelled out a three limbed test for assessing whether an infringement is justifiable; the objective giving rise to the impugned law must be pressing and substantial, there must be a rational connection between that objective and the impugned legislation, and the means that the legislation favours in order to realize its objective must be proportionate to the end that is sought.[2]

Should legislation fail to withstand scrutiny, the *Charter* then grants courts important powers. They may declare legislation to be of no force and effect. In addition, courts are given broad discretion to fashion appropriate remedies.

However, many of you will also know that the *Charter* contains a provision that enables governments to override judicial review of legislation. This power is found in section 33 of the *Charter* and is often referred to as the *non obstante* or "notwithstanding clause." In an outstanding address inaugurating the Merv Leitch Lecture Series, the Honourable Mr. Lougheed chose as his topic the *Charter*'s notwithstanding clause.[3] When the clause is invoked, legislation is effectively insulated for a five-year period from judicial review under some, but not all, of the *Charter*'s provisions. To date, the provision has been used relatively sparingly, the most notable instance being the action of the Quebec National Assembly in validating language legislation that the Supreme Court had held to be in breach of the *Charter*.[4]

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2 See: *R* v. *Oakes*, [1986] 1 S.C.R. 103 at 138-140.

3 The Honourable Peter Lougheed, "The Merv Leitch, Q.C. Memorial Lecture" (University of Calgary, 20 November 1991) [unpublished].

4 See: *Ford* v. *Quebec (Attorney General)*, [1988] 2 S.C.R. 712.

For those of us who have had the privilege of serving our country as members of its highest court and who sat on that court both before and after 1982, it was clear that the *Charter* had brought with it change. The Supreme Court of Canada moved from handling such dry matters as jurisdiction over the marketing of eggs or the regulation of transport to emotionally charged issues: those concerning abortion, euthanasia, prostitution, native rights, women's rights, language rights; questions concerning breathalysers, searches, seizures, Sunday shopping; and the list goes on. But did the advent of the *Charter*, as some have suggested, really mark the "dawn" of a new era? Was the relationship between the courts and the legislature so fundamentally and radically altered as to constitute a completely new chapter in our history?

One might be tempted to answer "yes" to these questions were one to limit oneself to the media's reaction to the *Charter*. Whereas in the past it was only the occasional case that attracted a journalist's attention, the press now covers the judiciary's activities on an ongoing basis. The attention garnered by the recent decision in Sue Rodriguez's case[5] concerning the *Criminal Code*[6] prohibition on assisted suicide is but the latest example of the coverage that *Charter* cases now regularly receive. Moreover, some of the Supreme Court's proceedings have now been televised and we will no doubt see other cases unfold on our TV screens. These are all quite dramatic developments for an institution that had gone largely unnoticed for the previous century. Indeed, if there was any doubt in my mind about the impact that the *Charter* might have on public debate, it was quickly resolved by the sight of television crews in front of the Supreme Court on days *Charter* cases were to be argued or *Charter* judgments handed down.

I do not doubt that the *Charter* brought with it new responsibilities for the judiciary. But it has long seemed to me that many commentators are unaware that since 1867 Canadian courts have, in division of powers cases, decided whether Parliament in a particular piece of legislation has infringed provincial authority under section 92 of the British North America Act or whether a provincial legislature has improperly entered the federal domain spelled out in section 91 of the Act. Such is a necessary and important judicial function in a federal state. Many commentators rush to assert that the *Charter* marks

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5 *Rodriguez* v. *British Columbia (Attorney General)* (1993), 158 N.R. 1 (S.C.C.).

6 *Criminal Code*, R.S.C. 1985, c.C-46.

the advent of a new era without fully exploring the nature of the era that preceded and the scope of the changes that the *Charter* has actually brought about. All too often, one reads grim stories to the effect that the *Charter* is an unfortunate and radical development: that it has given the courts power that is inconsistent with the history underlying our constitutional democracy; that it has somehow "Americanized" our judiciary;[7] that the voice of the people has been supplanted by that of a handful of unelected judges out of touch with the community's values.

In my view, although the *Charter* most certainly has ushered in important changes, we must be careful about jumping to the conclusion that they are so revolutionary as to have given rise to a new era. Before one can embrace such a conclusion, one must first place the *Charter* in its historical context. One must examine the way in which it has affected not only courts but the overall fabric of our governmental institutions. It is this exercise of placing the *Charter* in context that I want to explore — an exercise, in my view, essential if one is to gain a full appreciation of whether the *Charter* marks the dawn of a new era and, if so, what characteristics serve to define that new era.

I. The Pre-*Charter* Context

As every good anthropologist knows, one era is always preceded by another and is in many respects defined by the ways in which it differs from the preceding era. So it is important to come to terms with the *Charter*'s pre-history, so to speak. As the Supreme Court noted in its first *Charter* judgment,[8] to understand and to interpret the *Charter* effectively, it must first be placed in its proper linguistic, philosophical and historical context.

In an address in 1979, some three years before the *Charter* came into force, I observed that during most of the first one hundred years of its existence the Court attracted little public attention. But I then noted that this was changing. As constitutional, economic, and social problems revealed themselves in Canada in sharp relief, the relative anonymity and the tranquillity which had

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7 See, for example, R. Fulford, "Charter of Wrongs" *Saturday Night* (December 1986) 7; E. McWhinney, *Canada and the Constitution 1979-1982: Patriation and the Charter of Rights* (Toronto: University of Toronto Press, 1982) at 112.

8 *Law Society of Upper Canada* v. *Skapinker*, [1984] 1 S.C.R. 357.

theretofore characterized the Court and its operations was vanishing. I concluded it was plain that in the resolution of problems coming before the Supreme Court of Canada prodigious judicial statecraft would be essential.[9]

So even before the *Charter* came on the scene, I thought it clear that what was expected of the judiciary was changing. Indeed, I think it fair to say that the judiciary's role has never been static. The function Canadian courts fulfil has evolved as the very political fabric of the country has evolved. For example, the abolition in 1949 of appeals from Canada to England's Privy Council marked a major change in the role of our Supreme Court, establishing, as it did, that that Court was now Canada's highest appellate body. This formed an integral part of a deeper shift in our collective development, one that marked an important step on the road from colony to fully independent nation.

Similarly, our Supreme Court's development of a line of cases that gave rise to something known as the implied Bill of Rights theory in the 1930s and 1950s was a measure of the increased importance that courts were coming to play in our society. Cases like *Reference re: Alberta Statutes,*[10] *Saumur* v. *City of Quebec*[11] and *Roncarelli* v. *Duplessis*[12] developed the theory that because only the federal government may enact criminal law, provincial statutes that infringed individual liberty were unconstitutional. For those of us who had grown up with the British tradition of parliamentary sovereignty, in which courts were expected to respect the will of the legislature, this line of reasoning marked a rather novel development. It meant that our highest court was beginning to look at the nature of individual rights, even if it was through the lens of debates about the division of powers.

In my view, the development of this kind of rights-oriented jurisprudence was symptomatic of a more profound set of changes taking place at the international level, changes that gave birth to documents like the Universal

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9 "Comparison of the Role of the Supreme Court of Canada and the United States: Operations and Practice" (Paper presented to the Conference at Case Western Reserve University, Cleveland, Ohio, 20 October 1979).

10 [1938] S.C.R. 100.

11 [1953] 2 S.C.R. 299.

12 [1959] S.C.R. 121.

Declaration of Human Rights in 1948,[13] and that saw the United Nations adopt the Covenants on Economic, Social and Cultural Rights[14] and Civil and Political Rights[15] in 1966. It seems to me especially important to bear in mind when reviewing events leading up to the adoption of our *Charter* that, at the international level, it had long been accepted that rights documents backed by the rule of law are the sign of mature democracies rather than democracies in decline. As the former Secretary General of the United Nations, Javier Perez de Cuellar, recently observed:[16]

> Over the last 40 years the [Universal] Declaration [of Human Rights] has proved to be truly universal as the peoples of newly liberated colonial countries have found in its precepts the reflection of their deepest aspirations. The Declaration has inspired several other United Nations declarations and treaties, as well as regional systems for the protection of human rights. It has served as the foundation for numerous constitutional and national laws.

There is no doubt in my mind that Mr. Perez de Cuellar is right. Our move toward a *Charter of Rights and Freedoms* is but one very concrete illustration of his remarks. In moving toward the *Charter*, then, we simply were engaged in a healthy process of which many other nations were a part.

The tentative steps seen in Canada shortly before and after the Second World War were soon followed by more substantive measures, measures that were clearly influenced by developments at the international level. Prime Minister Diefenbaker introduced a *Canadian Bill of Rights* in 1960, a document that reflected a growing concern that an expanding modern government should respect the rights of those it was there to serve. To be sure, courts were cautious in their approach to the Bill of Rights — caught between a deference to the legislature and to their hesitatingly expanding mandate. Moreover, it was clear that the Bill of Rights had its limitations: it

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[13] UN GAOR, UN Doc. A/810 (1948), reproduced in I. Brownlie, ed., *Basic Documents on Human Rights*, 2d ed. (Oxford: Clarendon Press, 1981).

[14] UN GAOR, UN Doc. A/6316 (1967), 21 UN GAOR, Supp. (No.16) 52, 6 I.L.M. 360.

[15] UN GAOR, UN Doc. A/6316 (1967), 21 UN GAOR, Supp. (No.16) 52, 6 I.L.M. 368.

[16] Javier Perez de Cuellar, "Reflections on the United Nations" in I. Cottler & P. Eliadis, eds., *International Human Rights Law* (Montreal: The Canadian Human Rights Foundation, 1992) 41 at 44.

was not constitutionally entrenched, it touched only the laws of Canada and not those of the provinces. Moreover, it was never entirely clear whether the Bill of Rights empowered the judiciary to strike down federal legislation or whether it was simply an aid to statutory interpretation. Cases such as *R.* v. *Drybones*,[17] *Lavell* v. *A.G. Canada*,[18] and *A.G. Canada* v. *Canard*[19] reflect this uncertainty.

In the *Drybones* case, you will recall, the Supreme Court struck down a section of the *Indian Act*[20] which made it an offence for an Indian to be drunk off a reserve. Non-Indians were not subject to the section. In *Lavell*, decided a couple of years later, the Court declined to strike down a section of the *Indian Act* which permitted Indian men to bring non-Indian wives to live on a reserve but did not permit an Indian woman marrying a non-Indian to bring her husband to live on the reserve.[21] The third case to which I referred, that of Mrs. Canard, concerned a section of the *Indian Act* which permitted the Department of Indian Affairs to deny an Indian woman the right to administer the estate of her deceased husband.[22] I had a particular interest in this case because, while a judge in the Manitoba Court of Appeal, I wrote the judgment of the Court. Inspired by the *Drybones* case, I held in favour of Mrs. Canard. A majority of the Supreme Court thought otherwise and the decision was reversed on an appeal to that Court.[23] Yet, even though the Bill of Rights was not constitutionally entrenched, and despite the very real constraints that this placed on the development of meaningful limits on the legislature's ability to infringe rights, it is nonetheless evident that profound changes were underway well before the *Charter* arrived.

I think it also important to note Canada's ratification in 1976 of the U.N. Covenants on Economic, Social and Cultural Rights and Civil and Political Rights. This marked but one more step on our collective march toward a

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17 [1970] S.C.R. 282.

18 *Lavell* v. *Canada (Attorney General)*, [1974] S.C.R. 1349.

19 [1976] 1 S.C.R. 170.

20 R.S.C. 1952, c.149, s.94(b), as am. by R.S.C. 1985, c.I-5.

21 R.S.C. 1970, c.I-6, s.12(1)(b), as am. by R.S.C. 1985, c.I-5.

22 R.S.C. 1970, c.I-6 ss.4(3), 42, 43, as am. by R.S.C. 1985, c.I-5.

23 Of course, I did not sit as a member of the Court when the *Canard* appeal was argued in the Supreme Court of Canada.

country that accepted that it is noble to protect basic human rights and that an independent judiciary is essential to ensuring these rights *are* worth more than the paper on which they are written. Sadly, recent history has shown that too many countries have adopted a rights document only to discover that, absent an independent judiciary empowered to enforce that document, the rights and freedoms in question are hollow indeed.

We lose sight of our history, then, if we suggest that with the arrival of the *Charter*, suddenly, all has dramatically changed. The entrenchment of rights and freedoms in our constitution was, instead, part of an ongoing process shaped by constant pressure to protect the individual from a government progressively growing. So if one wishes to characterize the advent of the *Charter* as the dawn of a new era, then I think that it is extremely important to recognize that it is one with deep roots in our nation's history and not some sort of rude injection of notions that form no part of our heritage. The *Charter* emanated from a process that acquired momentum quite some time ago, fuelled by developments at an international level. Moreover, when one bears in mind that the *Charter* contains provisions that not only require courts to balance the rights of the individual with the needs of government, but that also enable governments to override some of these rights, it becomes clear that the advent of the *Charter* was a somewhat less radical development than might have been the case. The document continues to reflect some of our very deepest traditions, including a belief that, in some instances, courts must defer to the will of the legislature.

II. The *Charter*, the Judiciary and Government

Some of you may well be saying that that is all well and good, but are we in fact any better off for having the *Charter*? Have we, instead, simply given the courts too much power? Are courts not now in the business of policy making, something that properly belongs in the legislative sphere?

In response to concerns of this kind, Justice Rosalie Abella of the Ontario Court of Appeal has observed:[24]

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[24] R. Abella, "Public Policy and the Judicial Role" in M. McKenna, ed., *The Canadian and American Constitutions in Comparative Perspective* (Calgary: University of Calgary Press, 1993) 167 at 177. See also B.L. Strayer, "Life Under the Canadian

> Since 1867, Canada has lived with the concept that the legislature, although supreme, is itself subject to the constitution. This was particularly true with respect to the authority of respective legislatures according to the division of powers. The *Charter* does not, therefore, introduce the novel concept of constitutional supremacy. What it does is add the concept of constitutionally entrenched human rights to the content of that supremacy. The *Charter* is about human rights, not about judicial versus legislative roles, nor about judicial activism versus restraint, nor about the politicization of the judiciary.

In my view, Justice Abella is absolutely right. The *Charter* is first and foremost about government's obligation to respect human rights. It is at this level that the *Charter* represents real change. The *Charter* has *not* introduced particularly radical changes to the constitutionality of judicial review of legislative action. As I stated, Canadian courts have been engaged in this kind of review since 1867.

In this respect, I think it worthwhile to spend a moment considering the views of one of our most gifted constitutional scholars, William Lederman, a man who devoted considerable time to reflection about the relationship between the legislature and courts in our country. In a striking passage written just before the *Charter* came into force, Professor Lederman stated:[25]

> We often hear it said that special entrenchment of a charter of rights, such as that now impending for Canada, would shift the critical power of decision-making, on the many vital matters that are specified in the charter, in a wholesale way from parliamentary bodies to the courts. There has been much argument about whether this would be a good or a bad thing. More precisely, the issue is *said* to be whether, concerning the stated basic rights and freedoms, it is better to entrust life-appointed judges or periodically elected parliamentarians with the last word in their definition, interpretation and enforcement, as a matter of law.

He continued:

Charter: Adjusting the Balance between Legislatures and Courts" [1988] *Public Law* 347, who observes (at 349) that:

> ...legislative supremacy has never been an absolute principle of Canadian government, as the decisions of legislatures have always been subject to judicial review for the preservation of federalism, which is legally and politically the *sine qua non* of the Canadian state.

[25] W.R. Lederman, "The Power of the Judges and the New Canadian Charter of Rights and Freedoms" (1982) 16 U.B.C. L.Rev. Charter Ed. 3.

> I think myself that this way of putting the problem is somewhat misleading; in considerable measure I suggest that it poses a false dilemma. I believe that independent courts and democratic legislatures have been, are, and will be partners and not rivals as preliminary decision-makers in a very complex total process, with heavy demands being made on both institutions.

Professor Lederman stressed that we have always trusted both courts and the legislature and that we must continue to do so under the *Charter*. What I would refer to as Professor Lederman's "partnership thesis" has always seemed to me to capture the reality of our constitutional history and the practicalities of the moment. Moreover, his partnership thesis represents a particularly constructive way to look at the responsibility that *both* governments and courts have under the *Charter*.

I willingly acknowledge that courts *do* have new responsibilities under the *Charter*. But as Justice Lamer (as he then was) put it in his decision in the *B.C. Motor Vehicle Act Reference*:[26]

> It ought not to be forgotten that the historic decision to entrench the Charter in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility. Adjudication under the Charter must be approached free of any lingering doubts as to its legitimacy.

These words of Justice Lamer enunciate an entirely sound proposition. The courts did not seize new powers for themselves while the legislatures slept. The adoption of the *Charter* was solely and exclusively the decision of Parliament and the legislatures.

I would make one further point. It is often forgotten that there was more to the adoption of the *Charter* than simply providing the courts with new responsibilities. The advent of the *Charter also* reflected a decision on the part of government to subject *itself* to new responsibilities. The focus of the *Charter* is, after all, government activity, at the federal and provincial levels. At the end of the day, the extent to which courts are driven to strike down legislation ultimately depends on how successful governments are in living up to the obligations that they have imposed on themselves. The more successful

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[26] [1985] 2 S.C.R. 486 at 497.

they are in crafting laws consistent with this country's values, the less often courts will have to remind a government of its duties.

It is just too easy to say that with the advent of the *Charter*, all has been thrown into the judicial realm and that judges now have too much power. The fact of the matter is that the scope of judicial power under the *Charter* is very much dependent on the extent to which government takes the *Charter* seriously. The more that government works constructively in ensuring *Charter* values are taken into account in drafting and implementing legislation, the less courts will end up second-guessing the legislature's decisions. In a very important sense, then, it is misleading to focus immediately on the courts as soon as the word *Charter* is mentioned. The adoption of the *Charter* represented a decision on the part of legislatures about the standards to which they wished to be held. It simply was in order to ensure that they *would* abide by those standards that courts were entrusted with the job of enforcing the *Charter*.

The partnership between government and courts in our democracy will in fact work best when government does not wait until the courts invalidate legislation but, instead, strives to craft legislation consistent with our constitution. In an ideal world, it is government, not the courts, that should be the lead player in their partnership. The decision as to whether government will be the lead player lies very much in its own hands.

Is there reason to believe that government *is* sensitive to this understanding of the *Charter*? I am pleased to say that there is in fact a great deal of evidence that government has fundamentally reconsidered its approach to the preparation of legislation. If anything represents the dawn of a new era, it is the way in which government now approaches the business of drafting legislation. Parliamentarians are to be highly commended for the efforts made to give effect to the dictates of the *Charter* in new legislation and to refashion earlier legislation which might offend those basic constitutional principles.

But governments have gone even further. In a revealing article published last year,[27] Mary Dawson, the Associate Deputy Minister for Public Law in

[27] Mary Dawson, "The Impact of the Charter on the Public Policy Process and the Department of Justice" (1992) 30 Osgoode Hall L.J. 595.

the Federal Department of Justice, explains that it has taken considerable effort for policy planners in the federal government to come to grips with the *Charter*. In the beginning, many simply tried to wish the *Charter* away. Not surprisingly, government initially found itself in a reactive mode, with the government's policy agenda being shaped by court challenges.

Government had to respond and, to its great credit, it did. The Federal Department of Justice and its clients, the other federal departments, all took steps to ensure that *Charter* considerations are integrated into the policy development process. In 1991, the Clerk of the Privy Council wrote to all deputy ministers outlining steps to ensure that *Charter* issues are identified and assessed before any new policy proposal is considered by Cabinet. Documents sent to Cabinet that involve the consideration of new policy now include an assessment of the *Charter*'s impact on the way in which to formulate and implement that policy.

I should add that the Federal Government is not alone in working to change the way in which policy is crafted so as to reflect better the values embodied in the *Charter*. The government of Ontario, for example, has gone to considerable lengths to ensure that *Charter* concerns are accommodated in its policy process. Indeed, before a submission can reach Ontario's Cabinet, it must be certified as being in compliance with the *Charter*. As one author suggests, "the Attorney General [of Ontario] appears to have assumed the status of central agency within the government as a whole."[28] Other provinces have also made an effort to integrate better a *Charter* analysis in the policy process, although not all have adopted the formal structures seen in Ottawa or at Queen's Park.[29] Canada provides a spectrum of examples concerning ways in which the public policy process can be adapted to deal with the need to craft legislation in a manner consistent with a Charter of Rights. It is this, more than anything else, that marks the dawn of a new era in Canadian constitutional history.

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[28] P. Monahan and M. Finkelstein, "The Charter of Rights and Public Policy in Canada" (1992) 30 Osgoode Hall L.J. 501 at 523.

[29] See *ibid.* at 523-529 for an analysis of the situation in Saskatchewan and British Columbia.

III. Values and the *Charter*

Once we recognize both that governments have a challenging and complex role to play in ensuring that the *Charter* is respected, and that the *Charter* has not, in fact, radically altered the nature of the partnership between the legislature and the courts, the question remains whether it might not be the case that courts nonetheless are importing norms into the *Charter* that have little to do with the values that our parliamentary democracy has traditionally embraced. Perhaps it is in this sense that the will of the people is being usurped by the rule of judges or that we are somehow being "Americanized."

This is one of the most misguided arguments that has been advanced in support of the proposition that the *Charter* is a step backward for Canada. I say this for at least two reasons.

First, it is important to remember that the *Charter* is not something the courts drafted. Although its language is open-textured, the document nonetheless has a distinctive structure, reflecting the opinion of political leaders of the time. It embodies a constellation of rights and freedoms that mirror *our* Canadian social and political history. No one who followed the complex process of negotiations that led to the adoption of the *Charter* can deny that the document balances a number of different values dear to Canadians. Admittedly, notions like liberty and equality are concepts that are found in documents such as the Universal Declaration of Human Rights, documents that have been embraced by many countries. But the *Charter* also embodies a conception of language rights that is particularly Canadian and includes important interpretive provisions dealing with such matters as aboriginal rights (section 25) and multiculturalism (section 27), matters that reflect Canada's distinctive history. Together, its clauses form a package whose parts must be and have been interpreted in light of each other, such that the final result is a jurisprudence that *is* peculiarly Canadian. This jurisprudence reveals that the political fabric into which the *Charter* is woven is simply not the same as the one seen south of the border or elsewhere. These are just some of the reasons why the Supreme Court of Canada has warned about the need to interpret the *Charter* in light of Canada's traditions.

My second response to the proposition that the courts risk injecting American values foreign to our history into the *Charter* involves reiterating

the point that the Supreme Court of Canada made in its very first *Charter* decision: the *Charter* must be, and has been, interpreted in light of Canada's social and political history.

It is important to remember that Canada gained its independence from England in a much less abrupt manner than the United States. The break was not a sudden rupture, but the result of a series of gradual steps. This process did not involve an effort to reject the concept of parliamentary supremacy, although the parliamentary model was adapted to address the needs of our federation. Moreover, in the process of incorporating many aspects of Britain's parliamentary form of government, Canada could not help but absorb important parts of Britain's political culture. This culture included the view that courts of common law may have pre-existed Parliament but were now creatures of that legislature.

While freedom from state coercion is an important part of the values that make up our collective heritage, the tension between individual and state was never quite as developed in Canada as in the United States. As a result, liberty, although profoundly important to Canadians, has never been as prominently highlighted a feature in our discourse as in American constitutional discourse. Distrust of authority is also a less prevalent theme in Canada. Moreover, our judiciary was not initially given the tools with which to place significant constraints on government action. Admittedly, the implied Bill of Rights cases to which I referred earlier indicate that, even though less prominently highlighted, liberty was important to Canadians. But these cases were few and far between. Moreover, they have sometimes been perceived as strained in their reasoning precisely because the constitutional discourse of the time was stretched to deal with issues that courts had not traditionally felt able to confront. As a result, these cases never served as a complete code for the protection of rights and freedoms. Nor did canons of statutory interpretation in settings like the criminal law — canons that nonetheless reflect a commitment to liberty and provide accused parties with procedural protection. Even the failure of the *Canadian Bill of Rights*[30] to act as a real obstacle to the will of the legislature can be traced back to the deference that our courts have long shown to the legislature. As a result, prior to the *Charter*, we in

[30] *Canadian Bill of Rights*, R.S.C. 1960, c.44.

Canada never had a heritage in which rights were as prominently featured or a constitutional discourse which reflected a firm belief that there must be rigid boundaries protecting the individual from the state.

Justice Barry Strayer, who was intimately involved in the drafting of the *Charter*, has observed that the *Charter* was in fact designed to ensure that the partnership between the courts and the legislature remained a meaningful one that was in keeping with the tradition of Canadian parliamentary sovereignty that I have just described. Great care was taken to balance a finely tuned set of rights and freedoms consistent with our history with respect for the principle of legislative supremacy. Justice Strayer notes:[31]

> Thus, by these means — a negotiated definition of the individual rights to be protected, and the preservation of certain qualified legislative powers under sections 1 and 33 — it was thought that important elements of legislative supremacy had been preserved by the *Charter*.

And if we look at the jurisprudence concerning particular sections of the *Charter*, we see that Justice Strayer's observations are borne out.

For example, the Supreme Court of Canada has shown, in the course of interpreting the equality rights embodied in section 15 of the *Charter*, that it is well aware of the context in which this provision was enacted. Indeed, it has been particularly sensitive to the history of human rights legislation in this country. Thus, section 15 has been seen as building on this base and as designed to enable courts to continue the work begun through human rights codes. Justice Bertha Wilson, for instance, often stressed that section 15 was designed to supplement these codes. This is why she placed such emphasis on the proposition that it is not enough to establish that there has been a violation of one of the four basic equality rights set out in section 15 of the *Charter*: namely, the right to be equal before the law, to be equal under the law, to have equal protection of the law and to receive the equal benefit of the law. One also has to go on to demonstrate that the denial of one of these equality rights has resulted in discrimination before one can say that section 15 of the *Charter* has been infringed. Indeed, in her decision in the *Turpin* case, Justice

[31] *Supra* note 24 at 353.

Wilson spoke to the limits of the court's role in this context, when she observed that:[32]

> [I]t is only when one of the four equality rights has been denied with discrimination that the values protected by section 15 are threatened and that the court's legitimate role as the protector of such values comes into play.

In other words, the community, acting through Parliament, had chosen to enshrine a guarantee not to have certain equality rights violated in a way that gives rise to discrimination. Section 15 was designed to advance the purposes of "remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society."[33] The court's role was both to understand that it was in these terms that the community had defined their mandate and to respect the limits of that mandate.

The recent decision of the Supreme Court of Canada in the Sue Rodriguez appeal is another illustration of this point. You will recall that section 7 of the *Charter* protects the right not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice. The question in Ms. Rodriguez's case was whether the Criminal Code's prohibition on assisting a person to commit suicide infringed this provision. A majority of the Court held that the expression "principles of fundamental justice" implies that there is some consensus that these principles are vital or fundamental to our societal notion of justice. They must be capable of being identified with some precision and they must be legal principles. The majority was unable to conclude that there was any such principle that prohibited government from placing restrictions on assisted suicides. Regardless of whether one agrees with the majority's ultimate conclusion, it seems to me that the careful approach taken to defining the term "principles of fundamental justice" reflects a profound concern to be sensitive to basic Canadian values and is in keeping with the approach taken to equality rights. In neither case are we dealing with radical attempts to inject values into the *Charter* that have nothing to do with our heritage.

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[32] *R. v. Turpin*, [1989] 1 S.C.R. 1296 at 1331.

[33] *Ibid.* at 1333.

An even clearer example of the limits that are built into the *Charter* is, of course, to be found in section 1, a provision firmly rooted in a history that embodies the doctrine of parliamentary supremacy. The doctrine was obviously affected by the advent of the *Charter*, but the qualification embodied in section 1 of the *Charter* recognized that courts must be sensitive to the needs of government. Indeed, some have suggested that certain members of our judiciary may be too sensitive to government's justification for enacting measures that infringe particular rights or freedoms.[34] But regardless of whether these criticisms are warranted, underlying the whole debate are very Canadian questions: how sensible is the doctrine of parliamentary supremacy? Should courts continue to show a measure of deference to the legislature's views?

IV. Conclusion

What, then, is the answer to the question with which I began my remarks? Does the *Charter* mark the dawn of a new era? My answer consists of three propositions.

First, the *Charter* was the logical outcome of developments both at home and on the international stage. The document does give our courts new responsibilities, but these are but the extension of responsibilities that they were, in any event, slowly being asked to assume.

Second, the *Charter* has not radically altered the balance of power between courts and the legislature. The legislature remains the lead player in this partnership. But this does not mean that there have not been dramatic changes. Clearly there have been. The legislature has been forced to rethink major parts of the way it conducts its affairs in order to live up to the responsibilities it assumed when it enacted the *Charter*. The courts have on occasion had to force government to embark on this process of rethinking. But government *has* by and large shown that it is able to assume its responsibilities when it turns its mind to the *Charter*.

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[34] See, for example, D. Beatty, "A Conservative's Court: The Politicization of Law" (1991) 41 U.T.L.J. 147.

Third, the *Charter* does not mark an abrupt departure from this country's basic values. On the contrary, in many ways it is no more than a codification of those values, one designed to ensure that government is faithful to our most basic notions of justice. The courts have not sought to discard these values in order to replace them with others, foreign to our system. Instead, they have shown considerable concern to remain true to those values by repeatedly placing the *Charter* in a Canadian social, political and historical context.

These propositions lead to one fundamental conclusion. The *Charter* was designed to force governments to live up to certain fundamental responsibilities. It is in this respect that its entrenchment in our constitution does indeed mark the dawn of a new era. The courts, although on more prominent display than they used to be, were simply entrusted with a role they have long fulfilled: reminding government of the constraints to which its activities are subject. It is government and the legislative framework it uses in order to govern this country that has gone through the more profound transformation. That is as it should be.

The *Charter* was never intended to provide a cure for every problem that faces society. Indeed, given the Supreme Court of Canada's approach to the interpretation of the concept "principles of fundamental justice" in section 7 of the *Charter* or the equality rights in section 15 of the *Charter*, it is clear that the Supreme Court is of the view that there are limits to the scope of some of the most substantive sections of the *Charter*. In other words, the *Charter* was never intended to be a substitute for good government. It was instead designed to assist in ensuring that Canadians *are* provided with good government. And, to date, the *Charter* has shown that it does indeed have an essential role to play in improving the way in which we are governed. We can, I believe, all take tremendous pride in being part of this new era in Canadian history.

CHILD CARE AND THE *CHARTER*: PRIVILEGING THE PRIVILEGED

Claire F.L. Young*

In this article, the author cautions against the use of the Charter of Rights and Freedoms *as an instrument of social reconstruction, notably with regard to child care. She examines the potential impact of the* Symes *case upon the cause of the child care lobby, finding that a positive result for Symes could have had negative repercussions for this group. The author states that while Symes' ultimate goal appears to have been the commendable one of increasing state subsidization of child care, the practical result of her success would have been to further privilege the already advantaged, and to lead to the further oppression of disadvantaged groups of women. She argues that it is more important that the state take action toward increased support for child care programs that benefit all women than for privileged business women to have the ability to deduct child care as a business expense under the* Income Tax Act.

L'auteure nous exhorte à ne pas utiliser la Charte des droits et liberté *comme un instrument de réorganisation sociale, notamment en ce qui touche la garde des enfants. Elle examine l'incidence possible du cas* Symes *sur le groupe militant et estime qu'une décision en faveur de* Symes *aurait pu avoir des répercussions négatives pour ce groupe. Elle déclare que, bien que l'objectif ultime de* Symes *paraisse louable en ce qu'il visé à augmenter l'octroi de subventions aux enfants, ce succès aurait en fait contribué à augmenter les privilèges des nantis et l'oppression des groupes de femmes moins favorisées. D'après l'auteure, il est plus important que l'État augmente le soutien aux programmes qui profitent à tous, plutôt que de permettre aux femmes d'affaires privilégiées de déduire les frais de garde en tant que frais professionnels aux termes de la* Loi de l'impôt.

The focus of this paper[1] is the use of the *Canadian Charter of Rights and Freedoms* as a tool to further the aims of one particular social movement, that is, the child care lobby.[2] I shall use as a case study *Symes* v. *Canada*,[3] which

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1 An earlier version of this paper was presented at the Conference on Social Inequality and Social Justice, sponsored by the Western Association of Sociology and Anthropology, Vancouver, April 16, 1993. Thanks to Joel Bakan, Susan Boyd, Gwen Brodsky and Nitya Iyer for comments on that earlier draft and to Laurel Wellman for her research assistance and keen editorial skills.

2 The term "child care lobby" is used to describe all those groups that work towards the goal of affordable, accessible and quality child care. There are many such groups and the specifics of their demands vary, but in general they lobby for increased

was argued in the Supreme Court of Canada in February 1993. The appellant, a self-employed professional woman, claimed that the portion of her child care expenses not currently deductible in the computation of her income should have been deductible as a business expense under the *Income Tax Act*.[4] Symes argued, in part, that to deny her this deduction was to deny her equal benefit of the law and to discriminate against her on the basis of her sex in contravention of section 15 of the *Charter*.[5] Success for Elizabeth Symes here would have meant that she and other persons with business income would have their child care expenses subsidised by the state at rates varying with their income levels. On the face of it, this appears to be a laudable aim in that success would have led to increased state subsidisation of the costs of child care.

I intend, however, to use *Symes* to demonstrate the perils of relying on the *Charter* to further the aims of a social movement such as the child care lobby. My concerns about this strategy are twofold in nature. First, I question the ability of law (as in the case of the *Charter*) to effect any form of social transformation or social reconstruction. Much has been written on the limitations of the *Charter* in terms of its effectiveness as a tool for progressive social change, and while that theme underlies much of this paper, it is not the

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public funding for child care and improved standards within the child care industry. For a description of the position of the Canadian Day Care Advocacy Association, the largest such lobby group, see J. Beach, "A Comprehensive System of Child Care" (Paper presented at the National Child Care Conference & Lobby, 15-19 October 1992) [unpublished].

3 On appeal from the decision of the Federal Court of Appeal, *M.N.R.* v. *Symes* (1991), 91 D.T.C. 5387; [1991] 2 C.T.C. 1 [hereinafter *Symes*, cited to C.T.C.]. This paper was completed after argument but before the Supreme Court of Canada rendered its judgment. The decision of the Supreme Court is addressed briefly in the "Addendum" below.

4 R.S.C. 1952, c. 148, as am. by S.C. 1970-71-72, c.63.

5 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter *Charter*]. Section 15 reads:

> (1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and in particular, without discrimination based on race, nationality or ethnic origin, colour, religion, sex, age or mental or physical disability.

focus of my comments.[6] Rather, I shall look to the related issue of the harm that actions such as this one can do to the social movements of which they are part. Elizabeth Symes does not represent the child care lobby in any formal capacity, but win or lose, her litigation and its resolution have significant consequences for the child care lobby. Some of those consequences are negative.

It is important to note that this litigation is about the application of the *Charter* to a deduction in the computation of income under the *Income Tax Act*. Until recently, *Charter* challenges to the tax system have been limited mostly to the search and seizure powers of Revenue Canada. Increasingly, however, the section 15 equality provision of the *Charter* is being used by disadvantaged groups to challenge the discriminatory effects of the *Income Tax Act*. One of the first such cases was *Ontario Public Service Employees Union* v. *National Citizens Coalition*[7] in which government employees argued that their section 15 rights were infringed because they could not deduct donations to political lobby groups, such as the National Citizens Coalition, from employment income. Such donations are, however, deductible by taxpayers who earn business income, such as the self-employed. The court dismissed the employees' appeal, holding that they were not an enumerated or analogous group requiring *Charter* protection.[8] More recently, in *Schachtschneider* v. *Canada*[9] the Federal Court of Appeal held that the *Income Tax Act* did not discriminate against a married woman on the basis of

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6 See, for example, J. Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles" (1987) 25 Osgoode Hall L.J. 485; A.C. Hutchinson and A. Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988) 38 U.T.L.J. 278; R.A Hasson, "What's Your Favourite Right?: The Charter and Income Maintenance Legislation" (1989) 5 J.L. & Social Pol'y 1; J. Fudge, "The Effect of Entrenching a Bill of Rights upon Political Discourse: Feminist Demands and Sexual Violence in Canada" (1989) 17 Int'l J. Sociology of Law 445; J.C. Bakan, "Strange Expectations: A Review of Two Theories of Judicial Review" (1990) 35 McGill L.J. 439; and "Constitutional Interpretation and Social Change: You Can't Always Get What You Want (Nor What You Need)" (1991) 70 Can. Bar Rev. 307.

7 [1987] 2 C.T.C. 59; 87 D.T.C. 5270 (Ont. C.A.).

8 For an analysis of "enumerated or analogous grounds" see McIntyre J.'s decision in *Andrews* v. *Law Society of British Columbia* (1989), 56 D.L.R. (4th) (S.C.C.) 1 at 22.

9 (1993), 105 D.L.R. (4th) 162, [1993] 2 C.T.C. 178 (S.C.C.).

sex or religion by not allowing her to take a deduction in respect of a dependent child that unmarried taxpayers were entitled to claim. There are also several other section 15 *Charter* challenges to the *Income Tax Act* currently before the courts, including two brought by women arguing that the taxation of child support payments is discriminatory.[10] The significance of these *Charter* challenges to the *Income Tax Act* cannot be overstated when one considers the role of the *Charter* in the struggle for equality and progressive social change. Social movements, such as the child care lobby, are directly affected by the *Income Tax Act*. In the case of the child care lobby, the tax system is the primary means of delivery of federal government funding for child care. The deduction for child care expenses under section 63 of the *Income Tax Act* cost $265 million in 1989,[11] and it is estimated that the figure for 1993 will be well over $300 million. A smaller amount of child care funding is provided by the federal government under the *Canada Assistance Plan*[12] by which the federal government shares the cost with the provincial governments of subsidising child care for low income and special needs families.

Social movements are increasingly recognizing that the Canadian tax system is a most powerful economic and social tool. Issues such as what is taxed (the base), who is taxed, the appropriate tax mix (the allocation of the tax burden between income taxes, consumption taxes, capital taxes and other taxes), the degree of progressivity or regressivity (tax rates), and so on are fundamental matters that determine in large part the social and economic order within which we live. Now the *Charter* increasingly is being used to challenge that order. But when we evaluate the effectiveness of the *Charter* in this respect we must recognize that any such *Charter* challenge is made within the existing framework of a tax system that privileges wealth and responds to economic power. *Symes* is a good illustration of the problem this presents.

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[10] Sections 56(1) and 60 of the *Income Tax Act* require that the recipient of child support payments include the amount as income if the amount is deductible by the payor. Challenges to this provision include *Thibaudeau* v. *Canada*, [1992] 2 C.T.C. 2497, [1994] F.C.J. No. 577 (under appeal to the Supreme Court of Canada) and *Schaff* v. *Canada*, [1993] 2 C.T.C. 2695 (under appeal to the Federal Court).

[11] Department of Finance, *Government of Canada Personal Income Tax Expenditures* (Ottawa: Department of Finance, December 1992).

[12] *Canada Assistance Plan*, R.S.C. 1985, c.C-1.

Success in *Symes* would have, as I shall argue, privileged the already privileged within the tax system. In other words, a *Charter* victory for one litigant who challenges the tax system may reinforce the oppression of others subject to the same system because of the inherent biases of the system itself. We must be sensitive to this fact as we consider the implications of using the *Charter* to further the aims of social movements through challenges to the tax system.

In 1970, the Royal Commission on the Status of Women (the Bird Commission) said of the lack of accessible and affordable child care: "[w]e are faced with a situation that demands immediate action."[13] In 1986, the Task Force on Child Care (the Cooke Committee) said: "[t]he present state of affairs with regard to the care of our children must not be allowed to continue. In fact, we believe that the child care situation is in a state of crisis, and that serious consequences will result if steps are not taken immediately to rectify the situation."[14] Since that time, little has changed. The most significant event of the intervening seven years proved to be the announcement by the Conservative government of the creation of the National Strategy on Child Care in November 1987. One aim of that program was to increase the number of child care spaces in Canada by 200,000 over seven years and to direct significant funding towards a public day care system.[15] But in 1988, Bill C-144, which incorporated many of the changes that were recommended by the National Strategy, died on the order paper and, in 1992,

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[13] Royal Commission on the Status of Women in Canada, *Report* (Ottawa: Information Canada, 1970) at 263.

[14] Status of Women in Canada, *Report of the Task Force on Child Care* (Ottawa: Supply and Services Canada, 1986) at 279 (Chair: K. Cooke) [hereinafter *Cooke Report*]. This committee conducted the most comprehensive examination of child care to date. It undertook 25 research projects, invited 1200 groups to make submissions, received more than 200 briefs and made 53 recommendations. One of those recommendations was the establishment of a publicly funded child care system.

[15] The National Strategy on Child Care's recommendations included improved tax benefits and increased funding for capital and operating expenditures on a cost sharing basis with the provinces. For a full description of the program see Health and Welfare Canada, *National Strategy on Child Care* (Ottawa: Supply and Services, 1987).

the government announced that it was abandoning the program.[16] The situation today has been amply documented in the Canadian National Child Care Study, which shows that while increasing numbers of children receive some form of child care, the majority of those children are cared for by relatives or in unlicensed facilities.[17] Child care in Canada remains very much a private enterprise.

My comments on the child care lobby and the *Symes* case are premised on two recognised facts. First, lack of affordable, accessible child care is a significant impediment to women's equality in the workplace and in society generally. Secondly, child care is perceived as a women's issue. Much has been written about the role that lack of child care plays as an impediment to the entry or re-entry of women into the paid labour force.[18] Indeed, it has been calculated that women unable to participate in the paid labour force because they are unable to obtain child care form a significant percentage of the "hidden unemployed."[19] Despite this barrier, women with children are entering the paid labour force in greater numbers than ever. In 1970, twenty percent of women with children were in the paid labour force. By 1988, that figure had risen to 67 percent, including 58 percent of women with children

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16 There appears to be no chance of the National Strategy on Child Care being revived. Donald Blenkarn, chair of the Parliamentary Finance Committee, described the plan as "down the sewer. It is not a program that can be or should be." See K. Makin, "A Tory feminist faces a choice" *The Globe and Mail* (7 April 1993) A2.

17 66% of children aged 0 to 12 receive some form of child care from someone other than their parents. For children between 3 and 5 the figure is 83%. The nature of the child care varies. For children 0 to 3, unlicensed day care by a non-relative is the most frequently used form of child care. For a complete analysis of the statistics see Statistics Canada and Health and Welfare Canada, *National Child Care Study* by D.S. Lero *et al.* (Ottawa: Statistics Canada, 1992) at 77-85 [hereinafter *National Child Care Study*].

18 See, for example, *Cooke Report*, *supra* note 14; M. Eichler, *Families in Canada Today: Recent Changes and Their Policy Consequences*, 2d ed. (Toronto: Gage, 1988); M. Gunderson & L. Mszynski, *Women and Labour Market Poverty* (Ottawa: Canadian Advisory Council on the Status of Women, 1990); National Action Committee on the Status of Women, *Review of the Situation of Canadian Women* (Toronto: The Committee, 1991) and A. Duffy & N. Pupo, *Part-Time Paradox: Connecting Gender, Work and Family* (Toronto: McLelland & Stewart, 1992).

19 Social Planning Council of Metropolitan Toronto, "Hidden Unemployment Updated" (1986) 5 *Social Infopac* 5.

under three. In 1991, 64 percent of women with children under six worked outside the home.[20] However, lack of adequate child care also dictates for many women the nature of the work that they do. For some women, it means not working outside the home, and for others it means part-time work,[21] shift work or work at a location close to home, children or school.[22] Overall, the limited availability of affordable, accessible child care adds to the stress experienced by women with children who participate in the paid labour force. This is also an economic issue for women. Women earn less than men,[23] and lack of access to affordable child care contributes to this inequality in several ways. Obviously, the part-time work done by so many women is less remunerative than full time work, but the child care crisis also means that many women work in jobs that require less overtime hours or that allow them time off during school vacations. Further, women forego education or training opportunities that would lead to jobs with higher salaries. Finally, it should be stressed that this is not only a workplace equality issue. Womens' abilities to pursue other activities both in and outside the home are also affected by their child care responsibilities.

It seems clear that child care is perceived as a women's issue, but we must be careful about identifying it solely as such, as this only perpetuates the notion that women should be responsible for the care of children.[24] While

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20 Statistics Canada, *Perspectives on Labour and Income* (Ottawa: Statistics Canada, Summer 1994) at 37.

21 In 1989, women formed 72% of the part time labour force. See "Women in the Labour Force" in Statistics Canada, *Women in Canada: A Statistical Report* (Ottawa: Supply and Services, 1990) [hereinafter *Women in Canada*].

22 Of persons with the primary care of children, almost one quarter work one day a weekend, more than a quarter work at least one weekday evening and one in eight worked three or more evenings. See "Parental Work Patterns and Child Care Needs" Vol.4 in *National Child Care Study*, *supra* note 17 at 71-81.

23 The average wage for full year, full-time employment in 1991 was $38,567 for men and $26,842 for women, meaning that women earn 69.6% of what men earn. See Statistics Canada, *Earnings of Men and Women* (Ottawa: Statistics Canada, 1991) at 13.

24 For an interesting discussion of the impact of this perception on the Canadian and US policy debates about child care see K. Teghtsoonian, "Families, Ideologies and Child Care Policy Debates in Canada" (Paper presented at the Annual Meeting of the Canadian Political Science Association, Charlottetown, PEI, June 1992) [unpublished].

research shows that child care in heterosexual relationships is still performed primarily by women,[25] many feminists argue that the sharing of child care responsibilities by women and their male partners is one essential step in women's struggle for equality.[26] It appears that there is still a way to go in this regard. For example, the number of days women took off of work for family issues increased dramatically from 1.9 days in 1977 to 5.2 days in 1990. Men's time off for family responsibilities remained relatively static during the same time period, increasing slightly from .7 days in 1977 to .9 days in 1990.[27]

The fact that child care is performed primarily by women and is viewed as a "women's issue" has resulted in a devaluation,[28] and a certain invisibility, of women's child care work.[29] This in turn is, in my view, one reason that child care is so chronically underfunded. As I have discussed above, the only source of state funding for most families is the tax system and its deduction for child care expenses. For this reason, and because the tax system is the primary method of funding child care in Canada, the *Charter* challenge by Symes assumed critical importance in terms of its impact on federal funding of child care.

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25 Eichler, *supra* note 18; A. Hochschild & A. Machung, *The Second Shift: Working Parents and the Revolution at Home* (New York: Viking, 1989).

26 See, for example, N. Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* (Berkeley: University of California Press, 1978).

27 E. Akyeampong, "Absences from Work Revisited" in *Perspectives on Labour and Income* (Ottawa: Statistics Canada, 1992). See also Statistics Canada, *Where Does the Time Go?* by A.S. Harvey, K. Marshall & J.A. Frederick (Ottawa: Statistics Canada, 1991) for a detailed analysis of the time spent on primary child care activities by men and women.

28 In 1991, the average salary of women child care workers was $13,252, placing them last in Statistics Canada's list of the ten lowest paid professions. Statistics Canada, *The Daily* (Ottawa: Statistics Canada, 13 April 1992).

29 For a discussion of the invisibility and devaluation of child care work see E. Ferguson, "The Child-Care Crisis: Realities of Women's Caring" in C. Baines, P. Evans & S. Neysmith, eds., *Women's Caring: Feminist Perspectives on Social Welfare* (Toronto: McClelland & Stewart, 1991).

Section 63 of the *Income Tax Act* gives a very limited deduction for certain child care expenses.[30] In brief, for the 1993 taxation year, the amount of that deduction is $5000 for children aged zero to six, and $3000 for children aged seven to thirteen. Clearly these amounts do not reflect the actual cost of child care.[31] The appellant in *Symes*, a partner in a law firm, attempted to deduct as a business expense the salary she paid to the nanny who cared for her children. She argued that her child care expenses were incurred to gain or produce business income (her income from the law practice) and, as such, should be deductible. Symes' argument had two main components. First, she contended that her child care expenses were just like any other business expense and should fit within the technical provisions of the *Income Tax Act* that deal with business expenses.[32] She also argued that to deny her this deduction was to deny her equal benefit of the law in contravention of section 15 of the *Charter*. My focus in this paper is on this *Charter* argument and the problems it presents for the child care lobby.

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30 Section 63 permits a deduction in the computation of income for child care expenses paid in respect of an eligible child. Child care expenses include amounts paid for babysitting services, day nursery services and boarding school or camp fees, although there are weekly maximum amounts on the deductible amount for boarding school and camp fees. The child care expense must be incurred to enable the taxpayer or supporting person who resided with the child to perform the duties of employment, carry on a business, undertake certain occupational training or carry on grant-funded research. An eligible child is a dependent child (under 14) of the taxpayer or the taxpayer's spouse, and whose income does not exceed the basic personal amount. As of January 1, 1993 the amount of the child care expense deduction is $5000 for each child under 7 (or who has a prolonged mental or physical impairment) and $3000 for each child aged 7 to 13. The deductible amount is limited to the lesser of the amounts described and two-thirds of the taxpayer's earned income for the year. In the case of couples, the deduction must be claimed by the person who earns the lower income except where the lower-income person is a full-time student, in prison, incapable of caring for the children, or is living apart from the other person for at least 90 days by reason of the breakdown of their relationship.

31 The average cost of group day care in Vancouver for children aged 0 to 3 in 1989-90 was $593 a month, or approximately $7200 a year. See "Canadian Child Care in Context: Perspectives from the Provinces and Territories" Vol. I, *National Child Care Study*, *supra* note 17 at 94.

32 Sections 9 and 18(1)(a).

It is important to understand the particular point that is the basis of the *Symes* litigation in order to see the potential harm that may arise from it for the child care lobby. Symes argued that the disallowance of child care costs as a business expense has a disproportionate impact on women, who remain primarily responsible for child care. This, she contended, results in the denial of equal benefit of the law for women by reason of their sex. Her argument was successful before the Federal Court, where Cullen J. held that the issue had to be interpreted in light of the social and economic realities of the times. In so doing, he relied on the expert evidence of sociologist Dr. Patricia Armstrong that there had been a significant social change in the seventies and eighties brought about by the influx of women with children into the workplace. Cullen J. held that, in denying the deduction, Revenue Canada was discriminating against Symes on the basis of her sex because "the plaintiff is not treated like a serious business person with a serious expense incurred for a legitimate purpose."[33] On appeal to the Federal Court of Appeal, this decision was overturned. The case was heard by the Supreme Court of Canada, who rendered their decision in December 1993, affirming the decision of the Federal Court of Appeal.

What does this case mean for the child care lobby? That question in fact highlights one of the significant problems with using the *Charter* in cases of this nature. This case was brought by an individual, Elizabeth Symes, not the child care lobby. The *Charter* permits individuals to challenge the state with respect to its discriminatory laws or actions. Therefore, the case is about Symes, *her* child care expenses and *her* income tax liability. Despite the expert evidence given by Dr. Armstrong on the problems faced by women raising children while participating at the same time in the paid labour force, the decision will not be of general application to the issue of accessible, affordable, quality child care for women who wish to work outside the home. The legal argument made by Symes was a narrow one. It did not reflect the diversity found within the child care lobby nor the varying views within that lobby on strategies for improving child care. Rather, Symes' case focused on the discriminatory effect on her, as a self-employed business woman, of the denial of a deduction for an expense she claims is a business expense. In order to support her case, she compared herself to business men who may deduct

[33] *Symes* v. *M.N.R.*, [1989] 89 D.T.C. 5243 at 5252.

expenses incurred to produce business income. She did not argue the broader position that the denial to all women of a deduction for the portion of child care expenses not currently deductible under the *Income Tax Act* is discrimination on the basis of sex. If Symes had been successful, her success would have enabled only the self-employed to deduct these expenses.[34]

Restricting oneself to a narrow argument such as that put forward by Symes may have unintended consequences. This point is evidenced by the decision of the Federal Court of Appeal, which held that denying Symes the deduction was not discriminatory. Decary J. chose to place the appellant in an even narrower category than the one in which she had placed herself. When considering whether or not Symes had been discriminated against, the comparison group chosen by Decary J. was not business men but other women who did not have business income. After pointing out that Symes was not arguing that if she were successful, the *Income Tax Act* would then discriminate against women employees and in favour of self-employed women, he said: "I am not prepared to concede that professional women make up a disadvantaged group against whom a form of discrimination recognized by section 15 has been perpetrated."[35]

The argument made by Symes was based very much on a "similarly situated" test, which asks whether Symes is similarly situated to other business persons (men) who may deduct business expenses. In fact, she argued, the only difference between her and them is her gender and, therefore, to deny her the deduction is to discriminate against her on the basis of her sex. This argument was accepted by Cullen J. (in the Federal Court Trial Division) when he held that Symes *had* been discriminated against by reason of her sex and parental status.[36] This framing of the argument means that, if Symes had been successful before the Supreme Court, the scope and application of the

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[34] This point raises the question of whether this case should have been brought at all. Clearly, as I shall illustrate, there are negative consequences of this action, but there are also some potential benefits, including the resulting pressure on the government to respond to the child care "crisis." If nothing else, *Symes* has put the issue of child care front and centre with respect to media coverage of the issue.

[35] *Supra* note 3 at 13-14.

[36] This point is expanded on by A. Macklin in "Symes v. M.N.R.: Where Sex Meets Class" (1992) 5 C.J.W.L. 498 at 511.

decision would have been limited, applying only to those women who could meet the same test and show that they are just like Symes, who is just like a business man. Such a decision would create a gulf into which many other disadvantaged persons claiming tax relief for their child care expenses would fall. Indeed the irony is that the more disadvantaged a woman is, the less likely she is to succeed under the *Charter*. Unemployed women, women living below the poverty line and single mothers, for example, are not similarly situated either to Elizabeth Symes, or to business men.[37] The greater a woman's disadvantage, the less similarly situated and, therefore, the less likely to succeed she would be.[38]

Let us shift the focus to the *Charter* and the tax system in the context of the child care lobby. As I have mentioned, the major source of funding for child care in Canada is provided by the income tax system in the form of a deduction from income under section 63 of the *Income Tax Act*. That deduction has been classified as a tax expenditure.[39] The significance of classifying a deduction as a tax expenditure is that it is considered to be a departure from the normative tax system and, as such, is to be evaluated not only by reference to traditional tax criteria, but also by reference to budgetary

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37 For an excellent analysis of the inadequacies in anti-discrimination law, and especially its inability to address differences among members of a group who share a social characteristic, in this case the discriminatory burden of child care, see N. Iyer, "Categorical Denials: Equality Rights & the Shaping of Social Identity" (1993) 19 Queen's L.J. at 179. As Iyer puts it, "Obviously, Symes is very different from many women, notably along class lines. But, in law, Symes' win will have no class" (*ibid.* at 201).

38 It should be noted that in his decision, Cullen J. rejected the "similarly situated" test and adopted the test from *Andrews* v. *Law Society of British Columbia*, *supra* note 8, which is often referred to as the "enumerated or analogous grounds" test. This test looks to a distinction based on grounds relating to personal characteristics which has the effect of imposing burdens, obligations or disadvantages not imposed on others. Despite this, cases such as *Symes* lend themselves to the application of the similarly situated test and it appears that Symes' similarity to a business man underlay the decision of the Federal Court Trial Division. Since *Symes* was argued in the Supreme Court of Canada, the Federal Court of Appeal has decided *Schachtschneider* v. *Canada*, *supra* note 7. In denying the appeal, the Court relied to a great extent on *Andrews*, and Linden J. emphasized that the test of discrimination looks to whether groups have been socially, politically or historically disadvantaged.

39 See *supra* note 11.

criteria. In short, it is viewed as a spending measure. Therefore, it makes some sense to address the inadequate funding for child care by challenging the income tax provisions. But there is a significant flaw in such a strategy. Any challenge to the tool used to deliver the subsidy for child care is constrained by the limitations of that tool. To the extent that our tax system privileges wealth, any challenge to it with respect to funding of social programmes is constrained by that privilege.

The implications of *Symes* in terms of class privilege are disturbing. The *Income Tax Act* taxes income on the basis of the source of the income. Consequently, there are different rules for the computation of business income and employment income. One difference is that self-employed people may deduct expenses incurred to gain or produce business income, while the *Income Tax Act* specifically prohibits the deduction of expenses incurred to earn employment income.[40] Symes was claiming a deduction for child care expenses in the computation of her business income, a deduction which, even if she had been successful, would not become deductible by the vast majority of women. Women form less than 25 percent of the self-employed in Canada.[41] While it is difficult to argue that Symes should have framed her argument in a manner that would be inclusive of all women with child care expenses, which potentially would have made her case less likely to succeed, her use of the *Charter* here does translate into more privilege for the already privileged. Given the government's acknowledgement that funding for child care is limited, success for Symes and the consequential diversion of existing funds or new funding to those privileged by wealth and/or class would have been inappropriate. It would merely serve to reinforce the inequitable application of the tax system, especially for those who are economically and socially disadvantaged.

The Canadian income tax system subsidises activities by providing either a tax deduction or a tax credit. The difference is significant, because a deduction is worth more in terms of tax dollars saved to the taxpayer who pays tax at a high rate than it is to one who has less income and pays tax at

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[40] Section 8(2) prohibits the deduction of any expense incurred to earn employment income, other than one of the very limited expenses listed in s.8. Child care expenses are not so listed and therefore would not be deductible.

[41] *Women in Canada*, *supra* note 21.

a lower rate. In other words, the value of the deduction is tied to the rate at which a taxpayer is taxed. A tax credit, by contrast, is worth the same amount of money to all taxpayers with taxable income. At issue in *Symes* is a deduction for child care expenses, not a tax credit. Consequently, success for Symes would establish a hierarchy of women which is in inverse order to their ability to pay for child care. At the top would be business women, with the most benefit going to those with the highest incomes. Below them would be women with income other than business income, who would not be able to deduct child care expenses other than the limited amount permitted under section 63. The only difference between these two groups of women is the source of their income: in one case business income; in the other, employment or other income.

The following table illustrates this point. Assume that each taxpayer incurs child care expenses of $12,000 and that only $8,000 of that amount is deductible under section 63. Assume, further, that the Supreme Court of Canada found that the amount in excess of section 63 was a deductible business expense.

Tax-payer	Source and Amount of Taxable Income	Assumed Tax Rate	Deductible Amount	Tax Saving
A (self-employed)	$80,000 (business income)	50%	$12,000	$6,000
B (self-employed)	$30,000 (business income)	30%	$12,000	$3,600
C (employee)	$30,000 (employment income)	30%	$ 8,000	$2,400

While each taxpayer incurs the same amount in child care expenses, taxpayer B saves less in taxes than taxpayer A because her income is lower. Taxpayer C saves less than taxpayer B because her income is employment income and not business income. If Symes had been successful, the *Charter* would have been used to give an added advantage to an individual already advantaged under the *Income Tax Act*.

If the *Charter* applied and Symes was permitted to deduct child care expenses as a business expense, it has been suggested that men would also have been able to deduct child care expenses, because restriction of the deduction to women would also offend section 15 of the *Charter*. While I am not convinced that this argument would be successful — because men would have to show that they were a disadvantaged group in order to advance it — I am of the opinion that if Symes won on the technical argument not discussed in this article, men would have been able to deduct these expenses. Given that women earn on average less than 70 percent of what men earn,[42] it seems likely that, for couples in which both partners earn business income and incur child care expenses, men would take the deduction more often than would women because it would be worth more to the person with the greater income. Further, because men form more than 75 percent of the self-employed, it also is likely that the male partner would be the only one able to take advantage of this deduction.

Perhaps the most difficult issue raised by this case, when one evaluates it in terms of furthering the aims of the child care lobby, is that litigating for subsidization of child care through income tax deductions potentially contributes to the privatization of child care.[43] This is because, unlike direct subsidies paid in the form of operating or capital grants to non-profit child care facilities, tax subsidies are received by individuals and may be applied to any child care expenditure provided that it qualifies as a business expense. There are no limits on the forms of child care which qualify for the subsidy. This factor, combined with the lack of spaces for children in child care facilities, contributes to the privatization of child care.[44] Those who lobby for improved child care have always been careful to stress the need for a system that involves more participation by the state while reflecting a balance of public and private responsibility for child care. The Canadian Day Care

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42 Statistics Canada, *supra* note 23 at 13.

43 Child care is provided in many ways which include, among others, care at home by a parent or sibling, care at home by a caregiver who may be paid or unpaid, unlicensed day care centres, licensed day care centres which may be non-profit or for profit, nursery schools, kindergarten and so on.

44 In 1988, in British Columbia, there were 33,224 spaces in licensed day care facilities, but supplemental child care was used by 347,000 children aged 0 to 12. See *National Child Care Study*, *supra* note 17 at 92, 82.

Advocacy Association has lobbied strongly for increased funding for public non-profit child care facilities and an increased involvement by the government in the regulation of child care.[45] The Cooke Committee recommended that all new financing initiated by the federal government be directed only to services licensed and monitored by the provincial or municipal governments. It also recommended that new financing not take the form of tax relief.[46] These recommendations were not implemented and the result is considerable recourse to private arrangements such as employment of nannies and other domestic workers. Many of these workers are immigrant women who work for low wages in conditions in which they are subjected to racism and other forms of exploitation.[47] They are required by the *Immigration Act*[48] to live in the home of their employer, thereby increasing their vulnerability to abuse. The use of the *Charter* to obtain a tax benefit that will be used in the private sector only serves to reinforce the subordination and oppression of these women. From the perspective of the child care lobby this step also must be regressive because the recent focus of that lobby has been to increase the number of child care spaces and enhance the role of the state in child care, not to further privatize the industry.

There also is a strategic flaw in litigation such as the *Symes* case. As Brenda Cossman said of the case after Symes' success at the Trial Division of the Federal Court, the case "has divided the child care lobby, and indeed, significantly demobilized a powerful section of that lobby — upper income, self-employed professional parents — who stand to benefit from the business expense deduction."[49] The potential demobilization, if Symes had succeeded on appeal to the Supreme Court, has to be a concern to those working in the

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45 Canadian Day Care Advocacy Association, *Vision* (Ottawa: Canadian Day Care Advocacy Association, 1990).

46 See *Cooke Report*, *supra* note 14 at 375. It should be noted that the more funds that are directed to the subsidization of child care by way of a tax deduction, the less funding is available for other measures designed to alleviate the child care crisis. Furthermore, this may well lead to a deflation of the political will to provide funding by other means.

47 INTERCEDE, *Report and Recommendations on the Foreign Domestic Movement Program* (Toronto: Intercede, October 1990).

48 R.S.C. 1985, c.I-2.

49 Brenda Cossman, "Dancing in the Dark" (1990) 10 Windsor Y.B. Access Just. 223 at 235.

child care lobby. Since the demise of the National Strategy on Child Care it has become apparent that the government intends to take no immediate new initiatives with respect to child care. As Joe Clark said in 1992, when he was the Minister of Constitutional Affairs, "[w]hether or not Canada has a national child care programme is a matter of political will."[50] At present, that political will is absent, and the child care lobby needs all the support it can gather to get the issue back on the government's political agenda.

In conclusion, win or lose, the *Symes* case is problematic for the child care lobby. As I have argued, a victory for Symes would have privileged those already privileged by reason of their class. Given the limited resources allocated to child care, this victory would be at the expense of women who lack this privilege. To the extent that progressive reform should start with the most disadvantaged group, in this case foreign domestic workers, *Symes* is also problematic because, by contributing to the further privatization of the child care industry, it perpetuates the oppression of these women. Ironically, a loss for Symes may have had some incidental benefit for the child care lobby. It is possible that the government may feel pressure to step in where the courts have declined to act and increase funding for child care, although, if this funding is provided through the tax system, the problems I have described will remain unresolved.

[50] The Right Honourable Joe Clark, Address (Faculty of Law, University of British Columbia, 17 September 1992) [unpublished].

ADDENDUM

In December 1993, after this paper was substantially completed, the Supreme Court of Canada rendered its decision in *Symes*.[51] The court held that child care expenses were not deductible as a business expense under sections 9 and 18(1)(a) of the *Income Tax Act*. Iacobucci J., for the majority of the Court, held that child care expenses were specifically dealt with in section 63 of the *Act*, a section he found to be a self-contained and complete code, thereby precluding any further deduction for these amounts. He also held that the *Charter* issue was whether section 63 disproportionately limited the deduction with respect to child care expenses incurred by women, and concluded that it did not. In so doing, he acknowledged that, while Symes had overwhelmingly demonstrated how the issue of child care negatively affected women in terms of employment, "proof that women pay social costs is not sufficient proof that women pay child care expenses."[52] In dissent, L'Heureux-Dubé J. held that section 63 did not preclude the deduction of child care expenses and that they were a deductible business expense. She found that the relevant tax provisions were gendered in nature and that they should "be interpreted in a way that takes into account the realities of business women's expenses in relation to child care."[53]

The implications of this case in terms of class privilege were discussed earlier in this article. The fact that Symes only raised the issue of the deductibility of these expenses by the self-employed was dealt with, albeit superficially, by the Court. For the majority, Iacobucci J. commented that Symes' "arguments were presented in a curious isolation,"[54] and he found this approach to be inappropriate with respect to the *Charter* analysis, but he did not pursue the matter further. L'Heureux-Dubé J. acknowledged that Symes raised the narrow question of child care for the self-employed, but did not find this troublesome. She said: "[t]o grant her a deduction to which she is clearly entitled under the Act in no way diminishes the larger issue of child

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51 *Symes* v. *Canada*, [1994] 1 C.T.C. 40.

52 *Ibid.* at 73.

53 *Ibid.* at 100.

54 *Ibid.* at 77.

care as it applies to all parents, particularly women, a matter to be left for another day."[55]

What effect has this decision had in terms of the child care lobby? It is, at this stage, too early to tell. The decision was, in fact, greeted with approval by some women's groups,[56] although others in the child care lobby expressed disappointment. It is unclear what happens next. Furthermore, a new Liberal government was elected in the fall of 1993 and although that government has committed itself to a "realistic and fiscally responsible program to increase the number of child care spaces in Canada,"[57] details of how this will be accomplished have not yet been announced.

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55 *Ibid.* at 104.

56 NAC described the decision as "a victory for social equality, not a blow to women." See "Women's Group Backs Court Ruling" *The Globe and Mail* (18 December 1993) A5.

57 Liberal Party of Canada, Campaign Platform: "Creating Opportunity: The Liberal Plan for Canada" (15 September 1993). The government also announced that no child care program would be put in place until the economy grew by 3% in a given year. See S. Delacourt, "Throne Speech sets modest goals" *The Globe and Mail* (19 January 1994) A2.

THE *CHARTER* AND SPOUSAL BENEFITS: THE CASE OF THE SAME-SEX SPOUSE

J.P. McEvoy*

The author discusses the issue of equality rights under section 15 of the Charter of Rights and Freedoms *in terms of a particular 'discrete and insular minority': the gay and lesbian community. While the rights of this minority group have been acknowledged in a legal sense, the author points out that practical recognition, such as alteration in legislative practice, lags behind. The case of* Egan and Nesbit *v.* Canada *is used to explore the circular reasoning that Canadian courts continue to engage in as a means of upholding legislation which violates the equality rights provisions of the* Charter. *The case concerns the controversial extension of benefits, under the* Old Age Security Act, *to same-sex couples. Rather than fulfilling the promise of the* Charter*'s equality guarantees, the lower court decisions exhibit a marked reluctance to characterize as discriminatory governmental practices which prejudicially affect persons solely by reason of their sexual orientation.*

L'auteur examine la question des droits à l'égalité garantis par l'art. 15 de la Charte des droits et libertés *par rapport à une «minorité discrète et isolée» : la communauté des gais et des lesbiennes. Bien que les droits de cette minorité soient officiellement reconnus, l'auteur souligne que leur reconnaissance concrète, qui se manifesterait par une modification des dispositions législatives, est très en retard. Le cas de* Egan et Nesbit v. R. *sert à démontrer le raisonnement circulaire que les tribunaux continuent à appliquer pour confirmer des lois qui contreviennent aux dispositions de la* Charte. *Cette affaire concerne l'extension controversée des avantages sociaux à certains couples de même sexe, en application de* la Loi *sur la sécurité de la vieillesse. Plutôt que de respecter les promesses de droits à l'égalité, les cours inférieures hésitent manifestement à caractériser de discriminatoires les pratiques gouvernementales préjudiciables fondées uniquement sur l'orientation sexuelle des personnes intéressées.*

For many 'discrete and insular' minorities in Canada, *legal* equality has been achieved.[1] They have no need of marches in the streets or other

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* I wish to acknowledge the helpful comments of my colleagues Karl Dore and Edward Veitch who reviewed an earlier version of this paper.

1 The nine now-traditional minority grounds expressly included in the equality rights guarantee of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter *Charter*], per s.15(1) are race, national or ethnic origin, colour, religion, sex, age, and mental or physical disability. These categories are extendable to include 'analogous' minorities. Federal and provincial human rights legislation proscribe

manifestations of discontent to achieve legal recognition of their fundamental right to be respected within Canadian society. For these minorities, the campaign remains one of practical application — to change attitudes and practices rather than for legal recognition. For other minorities within Canadian society the campaign continues for *legal* recognition and protection. If the 1950s and 60s were the pivotal years of consciousness for racial minorities, the 1980s and 90s are the pivotal years for gays and lesbians and the proscribed ground of 'sexual orientation.'

One small step, though rebuffed, in the campaign for equality rights for gays and lesbians is *Egan and Nesbit* v. *Canada*.[2] In *Egan*, a majority of the Federal Court of Appeal held that the *Charter* right to equal benefit of the law was not infringed by the expressly heterosexual definition of 'spouse' — as "a person of the opposite sex" — to determine qualification for an income benefit under the federal *Old Age Security Act*.[3] The purpose of this comment is to analyze the reasoning of the Federal Court of Appeal, in this case, in the context of the equality rights jurisprudence of the Supreme Court.

I. The Legal Context

An attempt to include sexual orientation in the enumerated grounds of section 15 of the *Canadian Charter of Rights and Freedoms* was defeated during the 1981 hearings of the Special Joint Committee on the Constitution

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discrimination against minorities identified on a variety of bases.

The present proscribed grounds of discrimination under the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 3(1) are race, national or ethnic origin, colour, religion, age, sex including pregnancy or childbirth, marital status, family status, mental or physical disability, and pardoned offence. Bill C-108, *An Act to amend the Canadian Human Rights Act and other Acts in consequence thereof*, 3d Sess., 34th Parl., 1992 was introduced and received first reading in the House of Commons on 10 December 1992 but had not progressed further as of the 14 May 1993 adjournment. The purpose of this Bill is, in part, to implement the repeated recommendation of the Canadian Human Rights Commission to add sexual orientation to the list of proscribed grounds of discrimination. It is expected that the Bill will be reintroduced in the 35th Parliament and enacted in 1994.

2 (1993), 153 N.R. 161 (Fed. C.A.), [1993] 3 F.C. 401 [hereinafter *Egan*]. Leave to appeal was granted 14 October 1993: see [1993] Supreme Court of Canada Bulletin of Proceedings at 1807.

3 R.S.C. 1985, c.O-9.

of Canada by the unequivocal vote of two in favour, twenty-two against.[4] Notwithstanding this rejection, a 1985 Parliamentary Committee studying equality rights issues "concluded that 'sexual orientation' should be read into the general open-ended language of section 15 of the *Charter* as a constitutionally prohibited ground of discrimination."[5] And the courts, aided by concessions on the point by counsel for the Attorney General,[6] have done so. Yet, notwithstanding general acceptance of sexual orientation as a *Charter* protected ground, there has been little shift in the legal position of gays and lesbians.

The most dramatic, and at the same time obvious, use of the analogous ground status of sexual orientation has been to bolster arguments for inclusion of sexual orientation as a proscribed ground in federal and provincial anti-discrimination legislation.[7] At the federal level, court action has been

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4 Canada, *Minutes and Proceedings of Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada*, 1st Sess., 32d Parl. (29 January 1981) at 48:34.

5 Canada, House of Commons, *Equality For All: Report of the Parliamentary Committee on Equality Rights* (Ottawa: Queen's Printer, October 1985) at 29. The federal government's published response to this Committee's Report included the opinion of the Federal Department of Justice "that the courts will find that sexual orientation is encompassed by the guarantees in s.15 of the *Charter*." See Canada, *Toward Equality: The Response to the Report of the Parliamentary Committee on Equality Rights* (Ottawa: Supply and Services, 1986) at 13.

6 In *Veysey* v. *Correctional Services of Canada*, [1990] 1 F.C. 321 (F.C.T.D.) at 329, Dubé J. held that "sexual orientation is not a prohibited ground listed under s.15 but, in my view, it is an analogous ground ..." On appeal to the Federal Court of Appeal, [(1990), 109 N.R. 300 at 304], counsel for the Attorney General of Canada conceded that "sexual orientation is a ground covered by s.15 of the *Charter*." Concessions were also made by counsel in *Haig and Birch* v. *Canada* (1992), 57 O.A.C. 272 at 276; *Brown* v. *British Columbia (Minister of Health)* (1990), 66 D.L.R. (4th) 444 at 458 [hereinafter *Brown*]; and *Knodel* v. *British Columbia (Medical Services Commission)* (1991), 58 B.C.L.R. (2d) 356 (B.C.S.C.) [hereinafter *Knodel*].

7 The first jurisdiction in Canada to include sexual orientation as a proscribed ground of discrimination was Québec in 1977 — eight years before the coming into force of the equality rights section of the *Charter*. Presently, four other provinces — Manitoba, New Brunswick, Nova Scotia and Ontario — and one territory, Yukon, have amended anti-discrimination legislation to include 'sexual orientation' as a proscribed ground in relation to matters involving employment, accommodation, and public services. See *Charter of Human Rights and Freedoms*, S.Q. 1975, c. 6, s. 10

successful in having 'sexual orientation' read in as a proscribed ground under the *Canadian Human Rights Act*. In *Haig and Birch* v. *Canada*,[8] the Ontario Court of Appeal held that the omission of sexual orientation from the list of proscribed grounds, upon which the Canadian Human Rights Commission could provide some measure of protection or vindication from discrimination through its complaint procedures, itself constituted discrimination. Krever, J.A., for the Court, stated:[9]

> One need not look beyond the evidence before us to find disadvantage that exists apart from and independent of the legal distinction created by the omission of sexual orientation as a prohibited ground of discrimination in section 3(1) of the *Canadian Human Rights Act*. The social context which must be considered includes the pain and humiliation undergone by homosexuals by reason of prejudice towards them. It also includes the enlightened evolution of human rights social and legislative policy in Canada, since the end of the Second World War, both provincially and federally. The failure to provide an avenue for redress for prejudicial treatment of homosexual members of society, and the possible inference from the omission that such treatment is acceptable, create the effect of discrimination offending section 15(1) of the *Charter*.

The heterosexual exclusivity of the institution of marriage was the subject of *Layland* v. *Ontario (Minister of Consumer and Commercial Relations)*.[10] In that case, two male persons denied a marriage licence by the Ottawa City Clerk's office sought judicial review of the decision on the basis that the

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as am. by S.Q. 1977, c. 6, s.1, now R.S.Q. 1977, c. C-12, s. 10; *The Human Rights Code*, S.M. 1987-88, c. 45, s. 9(2); *Human Rights Act*, R.S.N.B. 1973, c. H-11 as am. by S.N.B. 1992, c. 30; *Human Rights Act*, R.S.N.S. 1989, c. 214, s. 12 as am. by S.N.S. 1991, c. 12, s. 5(1)(n); *Human Rights Code*, S.O. 1986, c. 64, now R.S.O. 1990, c. H-19, ss. 1-3,5,6; and *Human Rights Act*, S.Y. 1987, c.3, s.6(g), repealing the *Fair Practices Act*, R.S.Y. 1986, c. 11.

Recent claims of discrimination re: employment benefits have been successful in Ontario (*Leshner* v. *Ontario (No. 2)* (1992), 16 C.H.R.R. D/184 and *Clinton and Ontario Blue Cross et al.* (14 July 1993) Ont. Human Rights Comm'n) but unsuccessful in Manitoba (*Vogel* v. *Manitoba (No. 2)* (1991), 16 C.H.R.R. D/233 (Man. Bd. of Adjudication); confirmed on appeal (1992), 16 C.H.R.R. D/242 (Man. Q.B.)).

8 *Supra* note 6.

9 *Ibid.* at 279.

10 (1993), 104 D.L.R. (4th) 214 (Divisional Court).

traditional definition of marriage[11] denied access to the institution of marriage on the basis of sexual orientation and violated their equality rights under section 15 of the *Charter*. The Ontario Divisional Court, in a two to one decision, reaffirmed the fundamental position of the institution of marriage within society as a unit for the rearing of children. The Court recognized the analogous grounds status of sexual orientation within section 15 of the *Charter* but determined that the definitional qualification of 'one man/one woman' is not discriminatory when considered in the historical, social and biological context of the role and function of marriage in society. Yet, as the Court noted, child-rearing is not the sole reason for marriage. The institution also provides a mechanism for the automatic creation of legally recognized mutual rights in relation, *inter alia*, to matrimonial property, social benefits, and succession.[12] Having separated the institution of marriage from its religious foundations and reconstituted it as a civil institution, it seems rather self-evident that the Canadian state denies same-sex partners the equal benefit of the law by failing to either expand the civil concept of marriage or by failing to grant automatic legal incidents to state-sanctioned same-sex partnerships.[13]

II. *Egan and Nesbit*

Egan and Nesbit, who were born in 1921 and 1927, respectively, are an openly gay couple who have resided together since 1948 in what, in ordinary

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[11] The voluntary union for life of one man and one woman to the exclusion of all others, per *Hyde* v. *Hyde and Woodmansee* (1866), L.R. 1 P.&D. 130 at 133.

[12] *E.g.* the *Fatal Accidents Act*, R.S.P.E.I. 1988, c. F-5, s.1(f) defines "dependent" to include, *inter alia*, "any other person who for a period of at least three years immediately prior to the death of the deceased was dependent upon the deceased for maintenance and support." This definition implicitly includes same-sex dependent relationships. In most Canadian provinces, fatal accidents legislation narrowly defines beneficiaries or dependents to exclude same-sex relationships.

[13] See *Baehr* v. *Lewin*, 852 P.2d 44 (1993), in which a majority of the Supreme Court of Hawaii held that the statutory heterosexual definition of marriage was subject to strict scrutiny analysis on equal protection challenge. For an earlier academic view of the need for reform of the concept of marriage, see E. Veitch, "The Essence of Marriage: A Comment on the Homosexual Challenge" (1976) 5 Anglo-American L.R. 41.

parlance, might be termed a 'spousal' relationship.[14] In 1986, Egan attained 65 years of age and qualified for both the Old Age Security and Guaranteed Income Supplement Benefits under the *Old Age Security Act*. A further benefit, a monthly spouse's allowance, which requires annual application, is payable under the *Act* if the spouse of the person 65 years of age has attained 60 years of age, is not separated from the person receiving benefits under the *Act*, and has resided in Canada for at least 10 years.[15] In 1987, Egan's application on behalf of Nesbit for a spouse's allowance was rejected on the basis that the definition of 'spouse' in the *Act* "does not include homosexual couples." A 1989 application by Nesbit, on his own behalf, was rejected for the same reason.[16]

At trial, Martin J. dismissed the application for a declaration that the definition of 'spouse' in the *Act* discriminated against Egan and Nesbit contrary to section 15 of the *Charter* and for an order directing retroactive payment of the spouse's allowance to Nesbit during the relevant period.[17]

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[14] In the words of the trial judge, Martin J.:

> In this case there was a long-term and intimate relationship between the two plaintiffs. They shared joint bank accounts, credit cards and property ownership. By their wills they appointed each other as their respective executors and beneficiaries. They have always travelled and holidayed together and, at one point, publicly exchanged rings. To their families and friends they refer to themselves as partners. [*Egan and Nesbit* v. *Canada*, [1992] 1 F.C. 687 at 696.]

Note, however, that the dictionary meaning of the word 'spouse' demonstrates its origins in the concept of marriage.

[15] *Old Age Security Act, supra* note 3, s. 19.

[16] The reasons for decision of the trial judge, Martin J., reproduce the polite letters received by Egan in 1987 and Nesbit in 1989 from the appropriate official at the Department of National Health and Welfare. See *supra* note 14 at 694-95.

[17] Prior to dealing with the merits of the application, Martin J. rejected a standing challenge to the plaintiffs. This standing challenge was argued on the basis of the undisputed fact that, due to a medical condition, Nesbit had been unable to work during the three year period 1987-90 and had received payments under a provincial social security program (*Guaranteed Available Income for Need Act*, R.S.B.C. 1979, c. 158) which resulted in a net total income benefit to Egan and Nesbit of approximately $6000 compared to what would have been received had they been categorized as 'spouses.' Martin J. held that this argued global lack of adverse effects was irrelevant to the determination of whether the federal *Act* itself infringed or violated the equality rights of the plaintiffs. See *ibid.* at 697-98.

Martin J. held that the definition in question did not draw a distinction, and therefore did not discriminate, on the basis of sexual orientation. Simply stated, Egan and Nesbit were held to be in the same general non-spousal category as brothers, sisters and any other combination of cohabiters who similarly do not "publicly represent themselves as husband and wife," per the definition of 'spouse' in the *Act*.[18]

The appeal to the Federal Court of Appeal was dismissed in a two to one decision with all three members of the panel issuing separate reasons for decision. Robertson J.A. dismissed the appeal for reasons which, in substance, mirrored the reasons for decision of Martin J. at trial. His Lordship agreed with and accepted as correct the concession by counsel for the Attorney General that sexual orientation is an analogous ground of discrimination under section 15(1) of the *Charter* and considered the fundamental issue to be whether the distinction inherent in the *Act*'s definition of 'spouse' is based on sexual orientation and discriminatory.[19] Following a brief review of the proper approach to section 15(1), Robertson J.A. undertook a thoughtful and articulate analysis of prior cases concerned with sexual orientation and the *Charter*. Two categories of case were identified — those concerned with denial of a benefit *because* of sexual orientation and those in which one of the qualification criteria for a benefit was 'spousal' status.

In relation to the denial *because* of sexual orientation category of cases, Robertson J.A. grounded himself squarely in the anti-discrimination legislation model. Both *Haig and Birch* v. *Canada* and *Brown* v. *British Columbia (Min. of Health)* were viewed as examples of the perceived proper role of section

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[18] In the words of Martin J.:

> When compared to the unit or group which benefits by the challenged law the plaintiffs fall into the general group of non-spouses and do not benefit because of their non-spousal status rather than because of their sexual orientation ...
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> The homosexual couple is but one of a larger class of same sex non-spousal couples who live together. In my view Parliament has not included them in the spouse's allowance program simply because they are not a spousal couple which Parliament has chosen to limit to couples of the opposite sex who live together publicly representing themselves as husband and wife. (*Ibid.* at 704-05).

[19] *Supra* note 2 at 167.

15 equality rights in mandating the irrelevancy of a personal characteristic, such as sexual orientation, to entitlement to employment or a medical benefit. In this regard, Robertson J.A. expressed doubt about the correctness of *Brown* and stated that the non-inclusion of the drug AZT in a program that provided coverage for other costly prescription drug users "is precisely the type of case where a 'distinction' *can* exacerbate conditions of prejudice for members of a disadvantaged minority by restricting access to a basic and needed benefit."[20]

In the spousal qualification category of cases, which included *Egan* itself, Robertson J.A. considered that "the true complaint [is] not the denial of a benefit, but rather denial of benefit on the same terms available to opposite-sex couples."[21] Two key cases were *Karen Andrews* v. *Ontario (Min. of Health)*,[22] in which a claim of discrimination was rejected because the health premiums paid by opposite- and same-sex couples were equal, and the virtually identical case of *Knodel* v. *British Columbia*[23] in which a difference of $84 between health care premiums paid by opposite- and same-sex couples was held to deny equal benefit of the law by imposing an economic burden on same-sex couples and by negatively affecting the same-sex couples' dignity by reinforcing 'homophobia.' Robertson J.A. characterized the denial of equal benefit of the law in *Knodel* as a 'technical' denial of equal benefit of the law, in effect, because medical coverage was in fact available to the same-sex couple though at a slightly higher cost than to an opposite-sex couple.[24]

Robertson J.A. characterized the true nature of both the *Knodel* and *Egan* litigation as an indirect challenge to the concept of marriage rather than as a claim for a specific benefit not otherwise available. He found this challenge flawed because it depended on application of the discredited 'similarly situated' test, in other words, the analogous ground of sexual orientation was

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20 *Ibid.* at 171 [emphasis in original].

21 *Ibid.*

22 (1988), 49 D.L.R. (4th) 584 (Ont. H.C.) [hereinafter *Karen Andrews*].

23 *Supra* note 6.

24 "By comparison, both *Re Karen Andrews* and *Knodel* involved a legislative scheme in which a benefit — health coverage — was available to all. In *Re Karen Andrews* the cost was the same regardless of spousal status. In *Knodel* the cost differential could not reasonably be regarded as impeding access to the health care system." (*Supra* note 2 at 172.)

argued as a basis of similarity and dissimilarity with opposite-sex and other non-spousal relationships (e.g. brother-sister), respectively. How, asked Robertson J.A., can what is in law an 'irrelevant personal characteristic' be the comparative point of similarity/dissimilarity to establish discrimination within the meaning of section 15?[25] Robertson J.A. acknowledged that "it has been argued" that comparison is central to equality[26] but clearly considered himself analytically constrained by the Supreme Court's decision in *Andrews* v. *Law Society of British Columbia*[27] to reject such an approach. Having rejected 'irrelevant personal' characteristics as the means to establish discrimination, Robertson J.A. proceeded further in his analysis in the event that his understanding of *Andrews* was in error. He accepted that, in some circumstances, entitlement for a benefit on the basis of spousal status could constitute a denial of equality rights on the basis of sexual orientation[28] but

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[25] His Lordship stated:

> The decision of the Supreme Court to reject the similarly situated test had had only a limited effect on eliminating formal comparisons between perceived groups ... counsel seem prepared to argue cases, and courts decide them, on the presupposition that same-sex couples are either 'like' or 'unlike' opposite-sex ones, as the case may be. In so doing, they effectively sidestep the similarly situated test.
>
> It is naive to pretend that the 'sameness' issue disappeared with the Supreme Court's rejection of the similarly situated test. Nor should it have been expected that the issue would disappear completely. So long as discrimination is defined in terms of a distinction based on 'personal characteristics,' there will always be a temptation to make a comparison between those who do and do not possess that difference or characteristic.
>
> ... it must be formally recognized that the appellants' case is built on the 'similarity' between same-sex and opposite-sex couples. The Supreme Court's decision in *Andrews* destroys the very premise on which their claim of discrimination rests. [See *ibid.* at 174-75.]

[26] See *ibid.* at 174, referring to W. Black and L. Smith, "The Equality Rights" in G. Beaudoin and E. Ratushny, eds., *Canadian Charter of Rights and Freedoms*, 2d ed. (Toronto: Carswell, 1989) 557 at 563.

[27] [1989] 1 S.C.R. 143; 56 D.L.R. (4th) 1 [hereinafter *Andrews*, cited to D.L.R.].

[28] His Lordship offered the following example to illustrate his reasoning:

> Assume that a drug effective in the treatment of AIDS is discovered but that it can only be produced in small quantities such that there is an immediate shortage. Assume also that the drug is extremely expensive and, thus, the state is required to intervene. It does so by establishing a

considered that two alternative arguments undermined the claim of discrimination — the existence of other excluded groups and the lack of an adverse impact.

Robertson J.A. had two difficulties with the existence of otherwise qualified excluded groups — that is to say, cohabiting non-spousal relationships such as brother-brother, sister-sister, brother-sister and friend-friend. First, he considered that recognizing entitlement on the basis of sexual orientation would create 'an inequality' in favour of one of the excluded groups, leaving the remaining excluded groups in search of analogous grounds recognition.

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drug program in which all married persons, as well as common law spouses, and their children are entitled to receive the drug at no cost. All others must pay the full cost. (See *supra* note 2 at 178).

Spousal status as a criterion of entitlement in this illustration, which is similar to the fact pattern in *Brown*, would, per Robertson J.A., violate equality rights if the adverse impact test is satisfied. The critical element for Robertson J.A. is that an individual actually claims the drug program benefit itself. This is important because in his earlier analysis, Robertson J.A. had characterized *Knodel* and *Karen Andrews* as claims not for specific benefits under the health programs in issue (because the programs were of universal health care) but for recognition of the validity of same-sex relationships and *Brown* as a claim for the specific benefit. It may be inferred from his analysis that Robertson J.A. considered only *Brown* to present a proper case of denial of equality rights. By claiming an individual benefit, that person's relationship to another is irrelevant and argument on the basis of the similarly situated test coupled with an irrelevant personal characteristic is inapplicable.

In the illustration above, entitlement is defined in terms of relationships — married and common law spouses and their children — whereas under the *Old Age Security Act*, Parliament has defined entitlement to the spouse's allowance in terms of relationships — married and common law spouses — and has further defined the acceptable relationships. It is implicit from his discussion of his illustration that intuitively Robertson J.A. did not consider such spousal criterion for entitlement to be *bona fide* yet considered that in some contexts, in which a person's personal relationship with another is defined to be relevant, such criterion will be *bona fide* and justify 'pre-empting' an equality rights challenge. It is further implicit that Robertson J.A. considered the spousal allowance benefit to fall into the latter category. Yet, does his illustration alter fundamentally if we amend it by substituting a direct financial benefit, *i.e.* the spouse's allowance, for which scarce public resources must be dedicated? Why should Parliament's determination of criterion of entitlement pre-empt an equality rights challenge in one instance but not in another? Is not the spouse's allowance an individual benefit and one for which Nesbit made an individual application?

Second, given the existence of other excluded groups, he considered that compelling reasons must be given to justify recognition of one excluded group but not another. He did not find it necessary to determine whether an alleged ground of discrimination must be common to all of the excluded groups, but pointed to the exclusion of other non-spousal relationships as negating discrimination on the basis of sexual orientation:[29]

> Legislation denying benefits to members of another group may detract from a finding of discrimination contrary to subsection 15(1) of the Charter. It may reveal that one is not dealing with a benefit freely accorded all others in society and, hence, the impact of the legislation might not necessarily have the effect of reinforcing disadvantage or reinforcing disadvantage to the degree necessary to invite judicial intervention.

In holding that the plaintiffs had failed to establish an adverse impact due to exclusion of same-sex couples from the spouse's allowance program, Robertson J.A. rejected what he termed the "abstract" test in favour of a "concrete" test for distinguishing discrimination from mere distinction. The abstract test, exemplified by the decision in *Knodel*, was stated to presume discrimination once a distinction is based on a proscribed ground with the effect of the distinction being to reinforce prejudice against the identified group without the necessity, for example, of denial of benefit measured in financial or material terms. Robertson J.A. acknowledged that denial of the spouse's allowance to same-sex couples reinforces existing prejudice but considered such a test contrary to *Andrews*. In his view, an abstract test fails to consider the purpose and content of the impugned legislation and is constructed on the very test for determining the existence of a discrete and insular minority rather than discrimination itself. For Robertson J.A., it is the concrete test which requires legislative disadvantage or a more burdensome impact independent of membership in the identified group which is consistent with the *Andrews* approach. Careful to distinguish his contextual analysis from section 1 justification analysis, Robertson J.A. determined that the purpose of the spouse's allowance program is to aid a narrowly defined financially interdependent group, particularly women, who have dedicated many of their own potential income-earning years to child-rearing. He stated that such financial interdependency cannot "in any reasonable way be deemed relevant to same-sex couples" and, most tellingly, expressed the stereotype-based

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[29] *Ibid.* at 179.

suspicion that same-sex couples do not constitute an economically disadvantaged group in society.[30] Having previously acknowledged that existing prejudices may be reinforced by the exclusion of same-sex couples, Robertson J.A. mentioned the reinforcing prejudice argument in the context of his concrete test analysis, but did not specifically address it. He concluded by again characterizing the litigation before him as an indirect challenge to the concept of marriage.

In separate reasons concurring in the result, Mahoney J.A. accepted the correctness of the concession that sexual orientation is an analogous ground of discrimination protected by section 15 of the *Charter* and that the plaintiffs had been denied a benefit available to unmarried opposite sex spousal couples. The critical issue was whether, in the context of the *Act*, the definition of 'spouse' constituted discrimination. Mahoney J.A. noted that financial need, determined on the income of both pensioner and spouse, is the basis for both the guaranteed income supplement under Part II of the *Act* and for the spousal allowance under Part III and concluded that this method of determination "recognizes the obligation of a conjugal spouse to support his or her partner financially."[31] The effect of the definition was to exclude non-conjugal couples and same-sex couples from qualification for the allowance. Mahoney J.A., as had Robertson J.A., concluded that the challenge by the plaintiffs to the definition of spouse was grounded in an application of the similarly situated test to distinguish same-sex couples from other excluded couples:[32]

> The distinction is necessarily made on the basis of an irrelevant personal difference, sexual orientation; there is no other identifiable difference. One then accepts that, because they have maintained their relationship for at least a year and publicly represented themselves as spouses, they are not legitimately to be distinguished from common law spouses of the opposite sex for pension purposes. That seems to me to invert the teachings of *Andrews*.

Having in this manner rejected the very basis for the alleged discrimination, Mahoney J.A. agreed with what he found to be the non-circular reasoning of the trial judge that the plaintiffs do not qualify for the spousal allowance

30 *Ibid.* at 181-82.
31 *Ibid.* at 184.
32 *Ibid.* at 185.

because "of their non-spousal status rather than because of their sexual orientation."[33]

In dissent, Linden J.A. chastised the majority for "largely adopting" what he regarded as the circular reasoning that the denial of the spousal benefit was on the basis of non-spousal status as defined in the *Act*, rather than because of sexual orientation. For Linden J.A., the issue was simply "whether the exclusion of gay and lesbian partners from the definition of spouse, and therefore from eligibility for spouse's allowance, contravenes subsection 15(1) of the *Charter*."[34] The specific inclusion of the exclusionary phrase "of the opposite sex" in the definition amply demonstrated for Linden J.A. a distinction constituting denial of the equal benefit of the law, because same-sex couples "are specifically excluded from eligibility for spouse's allowance benefits independent of the exclusion of other groups or individuals."[35]

Turning to the issue of whether the exclusion of same-sex couples constitutes discrimination, Linden J.A., without mentioning and notwithstanding the concession of counsel on this point, entered into a somewhat lengthy analysis which led him to the conclusion that sexual orientation is an analogous ground of discrimination for the purposes of section 15(1) of the *Charter*.[36] Quoting the *Andrews* definition of "discrimination,"[37] Linden J.A. drew particular attention to the accepted principle that distinctions relating to personal characteristics may constitute discrimination whether intentional or unintentional (facially neutral). Recent

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33 *Ibid.*, quoting Martin J. in *supra* note 14 at 704.

34 *Ibid.* at 188.

35 *Ibid.* at 191.

36 It is interesting to note the primacy given to United States decisions by Linden J.A. who used the infamous United States Supreme Court decision in *Dred Scott* v. *Sandford* (1856), 19 How. 393 to illustrate disadvantaged groups in society during his "brief look back into legal history" (*Egan*, *supra* note 2 at 194), and *Meinhold* v. *U.S. (Dep't of Defense)*, [1993] W.L. 15899 (C.D.Cal.) as an example of the exclusion of gays and lesbians from "public life in the past, including participation in the Armed Forces" (*Egan*, *supra* note 2 at 195).

37 *Andrews*, *supra* note 27 at 18 per McIntyre J., quoted *infra* note 50 and accompanying text.

decisions of the Supreme Court holding that pregnancy[38] and sexual harassment[39] are forms of discrimination on the basis of sex were invoked by Linden J.A. as authorities for the conclusion that the definitional distinction in issue was based on the proscribed analogous ground of sexual orientation:[40]

> Strictly speaking, it is true that this is not a distinction based directly on sexual orientation, since being in a same sex relationship is not necessarily the defining characteristic of being gay or lesbian ... Nevertheless, the distinction in this case is based on a characteristic or matter related to sexual orientation, since it is lesbians and gay men who may enter into same sex relationships. The words 'of the opposite sex' used in the definition of spouse are specifically aimed at excluding lesbian and gay partners from eligibility for spouse's allowance benefits.

Linden J.A. identified three reasons why, in his opinion, the existence of other excluded non-spousal relationships is irrelevant to a finding of discrimination: (i) direct discrimination was in issue because the definition of spouse expressly singled out sexual orientation by the phrase "of the opposite sex;" (ii) lesbians and gays are an accepted disadvantaged group (discrete and insular minority) while other non-spousal relationships are not; and (iii) no valid non-discriminatory reason had been shown why same-sex relationships had been excluded.[41] Affirming the comparative nature of equality analysis and the repudiation of the similarly situated test, Linden J.A. applied a contextual approach in which gays and lesbians were accepted as an independently disadvantaged group further disadvantaged by stereotyping and prejudice by their exclusion under the definition of spouse:[42]

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38 *Brooks* v. *Canada Safeway Inc.*, [1989] 1 S.C.R. 1219 at 1244, Dickson C.J.C. (distinctions based on pregnancy are "at least, strongly, 'sex related'").

39 See *Janzen* v. *Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252 at 1288, Dickson C.J.C.: The fallacy is the belief that sex discrimination only exists where gender is the sole ingredient in the discriminatory action and where, therefore, all members of the gender are mistreated identically ... discrimination does not require uniform treatment of all members of a particular group. It is sufficient that ascribing to an individual a group characteristic is one factor in the treatment of that individual.

40 *Egan*, *supra* note 2 at 197.

41 *Ibid.* at 197-98.

42 *Ibid.* at 201.

> The exclusion of gay and lesbian partners from eligibility for spouses allowance under the *Old Age Security Act* relies on a stereotyped view of lesbian and gay relationships. The Act, consequently, treats gay and lesbian relationships as less worthy than heterosexual ones. It fails to recognize that long-term affection and mutual support may characterize these relationships, much like heterosexual relationships. The definition of spouse in section 2 of the Act is premised on a negative, stereotyped view of lesbian and gay relationships, which is implicitly contrasted to an idealized view of the heterosexual family.

Having found a violation of the section 15 right to equal benefit of the law, Linden J.A. also found that the statutory definition was not saved by section 1 analysis.[43] Linden J.A. held that the appropriate remedy was to both read in and read down the statutory definition of spouse to include same-sex relationships.[44] Having characterized the claim as one for a general remedy under section 52 of the *Constitution Act, 1982* rather than under section 24(1) of the *Charter*, Linden J.A. did not address the specific claim for payment of the benefit retroactive to the date of age eligibility.[45]

III. Equality Rights: *Andrews* and its Progeny

Equality is a comparative concept. Comparison is the core of equality; without it, a standard for equality cannot exist. The very word suggests the mathematical symbol for equation which, in and of itself, requires the comparison of two distinct quantities. *Andrews* v. *Law Society of British Columbia* did not change that. Rather, the comparative nature of equality

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43 Counsel had conceded the pressing and substantial nature of the spouse's allowance program as sufficient to warrant overriding a constitutionally protected right and that the means taken were rationally connected to the objective. However, counsel for the plaintiffs argued, and Linden J.A. held, that the minimal impairment and overall proportionality steps were not satisfied because inclusion of benefits for same-sex relationships would impair neither the effectiveness of the program nor achievement of its objectives. In this determination, budgetary considerations were held to be irrelevant.

44 Linden J.A. would have rewritten the definition as follows:

> 'spouse,' in relation to any person, includes a person who is living with that person, having lived with that person for at least one year, if the two persons have publicly represented themselves as husband and wife or as in an analogous relationship.' (*Supra* note 2 at 211.)

45 See *R.* v. *Schachter*, [1992] 2 S.C.R. 679.

rights under the *Charter* was confirmed. What was repudiated was the mechanistic formula of the similarly situated test.

Andrews arose as a challenge to the citizenship requirement for admission to the practice of law in British Columbia. Co-respondents Andrews and Kinersly were permanent residents of Canada who satisfied all of the qualifications for admission except citizenship. They challenged the citizenship requirement as a violation of their right to equality per section 15 of the *Charter*. Though dissenting on the justification analysis per section 1 of the *Charter*, and therefore, in the result, the reasons of McIntyre J. represent the approved analytical approach to section 15 and section 1 of the *Charter*.

The key to the analogous grounds approach promulgated by McIntyre J. lies not in the rejection of the similarly situated test but rather in the affirmation of the comparative nature of equality[46] and that equality must be tested, not just within the confines of the legislation in issue, but in the social and political context in which the legislative distinction operates.[47] Rejection of the similarly situated test was merely rejection of the minimalist standard of formal equality, so easily demonstrable as inappropriate in our time and in our society.[48] The section 15 concept of equality is broader than the American intentional discrimination approach to equal protection[49] and is

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[46] As stated by McIntyre J.:

> The concept of equality has long been a feature of Western thought ... It is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises ...
> Consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application. [*Supra* note 27 at 10, 13.]

[47] As stated by McIntyre J.:

> ... by comparison with the condition of others in the social and political setting in which the question arises. [See *ibid.* at 10.]

[48] The reasons given by McIntyre J. for rejecting the similarly situated test were that it excludes consideration of the nature of the law and that its literal application could be used to justify the Nuremberg Laws of Adolf Hitler and the discredited 'separate but equal' doctrine of former United States jurisprudence. (*Ibid.* at 11-12.)

[49] See *Washington* v. *Davis*, 96 S.Ct. 2040 (1976) (employment opportunity and equal protection and due process clauses) and *McCleskey* v. *Kemp*, 107 S.Ct. 1756 (1987) (death sentence and equal protection). For recent general overviews of American

firmly rooted in the concept of equality developed in relation to federal and provincial anti-discrimination legislation. This broadened concept means that facially neutral distinctions can be held to violate the section 15(1) equality guarantee because of adverse impact and systemic discriminatory effects. Motivation is not a requisite element in equality analysis. In recognition of the obvious reality that laws must draw distinctions between persons to whom they apply or not apply, McIntyre J. focused on the key qualifier to section 15 equality rights — the phrase 'without discrimination.' In words now often repeated, McIntyre J. defined discrimination as follows:[50]

> ... discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

This definition has three elements: (i) a distinction; (ii) that the distinction be based on grounds relating to individual or group personal characteristics; and (iii) a comparative disadvantage. In most cases, as in *Egan* itself, elements (i) and (iii) will be satisfied easily by the party alleging discrimination; comparative disadvantage is, of course, essential to establishing a violation of one of the four equality rights. Element (ii) provides the pivotal point upon which the section 15(1) argument will succeed or fail.

Consideration of the personal characteristics element is informed by the purpose of the equality rights guarantee. As identified by McIntyre J., the purpose is "to ensure equality in the formulation and application of law" and "the promotion of a society in which all are recognized at law as human beings equally deserving of concern, respect, and consideration."[51] The "without discrimination" qualifier serves to identify those distinctions which,

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equal protection analysis, see M. Klarman, "An Interpretative History of Modern Equal Protection" (1991) 90 Michigan L.R. 213 and D.E. Lively, "Equal Protection and Moral Circumstance: Accounting for Constitutional Basics" (1991) 59 Fordham L.R. 485. For a thought provoking different analysis, see P. Westen, "The Empty Idea of Equality" (1982) 95 Harv. L.R. 537.

50 *Supra* note 27 at 18. In the following discussion, I recognize that the definition arguably contains only two elements — a distinction based on personal characteristics and a burden/lack of benefit.

51 *Ibid.* at 15.

per McIntyre J., involve "prejudice or disadvantage."[52] Distinctions involving prejudice or disadvantage are found in the enumerated grounds in section 15(1) — the "most common and probably the most socially destructive and historically practised basis of discrimination"[53] — and in the open-ended category of analogous grounds. It is instructive that in addition to using the "discrete and insular minority" phrase[54] for the purpose of identifying analogous grounds of discrimination, McIntyre J. quoted the following from Hugessen J. in *Smith, Kline & French Laboratories Ltd.*:[55]

> The inquiry, in effect, concentrates upon the personal characteristics of those who claim to have been unequally treated. Questions of stereotyping, of historical disadvantagement, in a word, of prejudice, are the focus ...

In the matter before him, McIntyre J. accepted that the citizen/non-citizen distinction in the qualification for the practise of law in British Columbia had the effect of imposing a burden in the form of a three year delay for non-citizens during which they qualified for citizenship.[56] Discrimination was found on the basis that the sole ground for the distinction was the personal characteristic of citizenship rather than a consideration of the educational and professional qualifications of the applicants. The methodology actually employed by McIntyre J. is significant. Having linked the burden of delay with the ground of citizenship, section 15(1) was satisfied in the sense that

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52 *Ibid.* at 23.

53 *Ibid.* at 18.

54 From the United States Supreme Court decision in *United States* v. *Carolene Products Co.*, 304 U.S. 144 at 152-53, n.4 (1938).

55 *Smith, Kline & French Labratories* v. *A.-G. Can.*, [1987] 2 F.C. 359 at 369, quoted by McIntyre J. *supra* note 27 at 22.

56 This burden was held by McIntyre J. (*ibid.* at 24) to constitute a denial of "equality before and under the law or the equal protection of the law." This interpretation of these equality rights was confirmed by Wilson J. in *R.* v. *Turpin*, [1989] 1 S.C.R. 1296 at 1329. Wilson J. interpreted equality before the law as:

> [D]esigned to advance the value that all persons be subject to the equal demands and burdens of the law and not suffer any greater disability in the substance and application of the law than others. This value has historically been associated with the requirements of the rule of law that all persons be subject to the law impartially applied and administered.

discrimination was proven and an equality right infringed.[57] All justifications for the distinction, including consideration of the purpose of the legislation in question, was deferred to the section 1 stage of analysis. It bears repeating that, though writing in dissent on the section 1 analysis, McIntyre J., in effect, wrote for the Court in establishing the analytical approach to section 15(1) and section 1. Wilson J. (writing for herself, Dickson C.J.C. and L'Heureux-Dubé J.) expressed "complete agreement" and La Forest J. "substantial agreement" with the approach presented by McIntyre J.[58] Subsequent

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[57] As noted above, McIntyre J. wrote in terms of the rights to equality before the law and under the law and the equal protection of the law (*supra* note 27 at 24). It must also be recognized that McIntyre J., in *Andrews*, rejected an approach suggested in P. Hogg, *Constitutional Law of Canada*, 2d. ed. (Toronto: Carswell, 1985) at 800 that "[w]hen a law draws a distinction between individuals, on any ground, that distinction is sufficient to constitute a breach of s.15, and to move the constitutional issue to s.1." In the third edition of this book [*Constitutional Law of Canada*, 3d. ed. (Toronto: Carswell, 1992) at 1167], the learned author writes that:

> ... the complainant does not have to establish that the law draws an unreasonable, irrational, unfair, unjustified or invidious distinction. It is enough to show that the disadvantageous treatment is caused by a law that employs one of the distinctions listed in s.15 or an analogous distinction.

[58] Whereas McIntyre J. had almost perfunctorily concluded that citizenship constitutes an analogous ground of discrimination, no doubt aided in that determination by the concession of counsel (see *supra* note 27 at 39, La Forest J.), Wilson and La Forest JJ. did provide justification for that conclusion by brief reference to the political powerlessness of non-citizens. More generally, Wilson J. reinforced the broader context approach for the recognition of analogous grounds:

> ... this is a determination which is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society. While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others. (*Ibid.* at 32-33.)

Having already expressed her 'complete agreement' with McIntyre J.'s analysis of s.15(1) and s.1, Wilson J., in effect, added her own emphasis to the second point of McIntyre J's three point definition of discrimination and recognized 'stereotyping,' 'historical disadvantage' and 'prejudice' as indicia of an analogous category. In his separate reasons, La Forest J., having expressed 'substantial agreement' regarding the meaning of s.15(1), raised the progressive possibility of a future consideration of s.15(1) apart from discrimination through the application of law and repeated his

decisions by the Supreme Court have reinforced rather than modified the basic *Andrews* approach.[59]

Two post-*Andrews* decisions — *R.* v. *Turpin*[60] and *R.* v. *Hess and Nguyen*[61] — provide additional guidance or clarification of the nature of the distinction which constitutes discrimination. In *Turpin*, the Court considered whether the section 15(1) right to equality before the law was infringed by Criminal Code provisions which require persons charged with murder[62] to be tried by judge and jury except in the province of Alberta, where such an accused may elect to be tried by judge alone. A unanimous Court of six justices, per Wilson J., held that the right of the Ontario accused to equality before the law was denied because the law treated them more harshly than such accused in Alberta who have the benefit of the election, but that such accused persons were not victims of discrimination in the *Andrews* sense. In particular, Wilson J. held that such accused persons cannot be characterized as a "discrete and insular minority" and that accused persons in Alberta and elsewhere in Canada do not have associated with them "indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political and social prejudice." In its analysis and result, *Turpin* was an unremarkable application of *Andrews*.[63] However, particular phrasing in the

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conservative deference-to-the-legislature approach regarding policy decisions. He also justified citizenship as an analogous ground by reference to its immutable character and by reference to the at times sorry treatment of aliens in Canadian history.

59 The Court has indicated a willingness to broaden the potential scope of analogous grounds based on personal characteristics used to identify discrete and insular minorities. The potential of military status in some circumstances was recognized in *R.* v. *Généreux*, [1992] 1 S.C.R. 259 at 310-11, Lamer C.J.C., and province of residence was similarly recognized in *R.* v. *Turpin*, [1989] 1 S.C.R. 1296 at 1333, Wilson J. and in *R.* v. *S.(S.)*, [1990] 2 S.C.R. 254 at 289, Dickson C.J.C.

60 [1989] 1 S.C.R. 1296.

61 [1990] 2 S.C.R. 906.

62 And other offences within the exclusive jurisdiction of a superior court of criminal jurisdiction: per s. 427 of the *Criminal Code*, R.S.C. 1970, c. C-34 as am. by R.S.C. 1985, c. C-46, s. 469.

63 See also *Rudolph Wolff & Co.* v. *Canada*, [1990] 1 S.C.R. 695, in which it was held that individuals claiming relief against the Crown, and therefore within the exclusive jurisdiction of the Federal Court for the adjudication of their claims, do not constitute a disadvantaged group within Canadian society.

reasons of Wilson J. led Crown counsel to argue a narrower approach to discrimination in *Hess and Nguyen.*

Hess and Nguyen concerned a challenge to the validity of the Criminal Code offence of sexual intercourse between a male person and a female, not his wife and under the age of fourteen years. Both male accused were charged with this offence and argued that their equality rights were violated by the legislative fact that only males could be charged with the offence and only females could be complainants. Critical to their position was the absence of an offence of sexual intercourse between a female person and a male, not her spouse and under the age of fourteen years. In a most remarkable decision, a majority of the Court, per Wilson J. held that section 15(1) of the *Charter* was not violated because the "offence ... as a matter of biological fact, can only be committed by one of the sexes."[64]

In her dissenting opinion, McLachlin J. dealt with the argument raised by Crown counsel on the basis of *Turpin.* In *Turpin*, Wilson J. had stated:[65]

> A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage apart from and independent of the particular legal distinction being challenged,

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64 *Supra* note 61 at 929. The decision is remarkable because Wilson J. recognized that s.15(1) of the *Charter* would be violated if the offence could be committed by either sex but is made an offence if committed by only one sex. She held that the offence of having sexual intercourse can only be committed by males. This is a male-active view of sexual intercourse and ignores the neutral definition in s.3(6) of the *Criminal Code*, which simply states that sexual intercourse is complete upon penetration. In other words, the Supreme Court has held that only males can have 'sexual intercourse' but has not stated what females have during vaginal sexual relations. It should be noted that the majority did find the offence violated s.7 of the *Charter* and was not saved by s.1 analysis.

Another view of the purpose of the criminal offence provision was that it was to protect children from sexual corruption by adults. If so, the result is unequal treatment of male and female adults which should be justified by s.1 analysis. See D. Lepofsky, "The Canadian Judicial Approach to Equality Rights: Freedom Ride or Roller Coaster?" (1992) 55 L. & Contemp. Probs. 167 at 181.

65 *Supra* note 60 at 1332, quoted by McLachlin J. in *Hess and Nguyen*, *supra* note 61 at 942.

and followed this with discussion of the 'discrete and insular minority' tool and the absence of 'stereotyping, historical disadvantage, etc.,' quoted above. On this basis, Crown counsel argued that discrimination is not found in a distinction resulting in a burden or benefit but rather requires independent disadvantage peculiar to the alleged 'discrete and insular minority.' As males cannot qualify as a 'discrete and insular minority,' counsel argued that this narrower concept of discrimination could not be satisfied. McLachlin J. reaffirmed *Andrews* and rejected this argument as a misreading of *Turpin*. She interpreted the latter case as merely indicating that independent disadvantage is only an element likely to be found in most cases of discrimination. McLachlin J. clearly reasserted the basic premise that discrimination is found where there is a linkage between a distinction imposing a burden or benefit and an enumerated or analogous ground of discrimination. The majority, per Wilson J., did not specifically address the argument of Crown counsel. Referring to both *Andrews* and *Turpin*, Wilson J. stated, in effect, that a distinction linked to an enumerated ground of discrimination does not automatically lead to a finding of a violation of section 15(1) of the *Charter* absent the denial of one or more of the four equality rights.[66] As noted, for Wilson J., sex was a legitimate non-discriminatory distinction because of biological factors. With respect, this purported justification was better left to section 1 analysis.[67]

Any doubts about the *Andrews* test, in particular the relationship between 'distinction' and 'discrimination,' have been laid to rest by the decision of the Supreme Court in *R.* v. *Swain*.[68] In that case, the Court considered whether section 15(1) equality rights were violated by a newly reformulated common

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66 *Supra* note 61 at 928.

67 The same comment can be made about *R.* v. *S.(S.)*, *supra* note 59, in which the absence of alternative measures program for young offenders in Ontario, which programs are available in all other provinces under federal law, was held not to constitute discrimination on the basis of personal characteristics because of a valid federal objective and the historical context. This justificatory analysis was considered in the context of determining 'discrimination' rather than in a s.1 analysis. It is clear that in some instances the Court considers the absence of discrimination in the pejorative sense of that word to be decisive within s.15(1) analysis.

68 [1991] 1 S.C.R. 933.

law rule permitting the Crown to raise the issue of insanity of an accused. Lamer C.J.C. restated the *Andrews* test as follows:[69]

> 1. The court must first determine whether the claimant has shown that one of the four basic equality rights has been denied ... This inquiry will focus largely on whether the law has drawn a distinction (intentionally or otherwise) between the claimant and others, based on personal characteristics.
>
> 2. Next, the court must determine whether the denial can be said to result in 'discrimination.' This second inquiry will focus largely on whether the differential treatment has the effect of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to opportunities, benefits and advantages available to others.
>
> 3. Furthermore, in determining whether the claimant's section 15(1) rights have been infringed, the court must consider whether the personal characteristic in question falls within the grounds enumerated in the section or falls within an analogous ground, so as to ensure that the claim fits within the overall purpose of section 15 — namely, to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society.

Note that in this restatement, Lamer C.J.C. presents a neutral view of discrimination in the sense of differential treatment imposing a burden or denying a benefit in his second step and links the personal characteristic element to the alleged violation of one of the four equality rights in his first step. This is a slight variance from McIntyre J.'s definition of discrimination in *Andrews* which includes consideration of the personal characteristic element but is, no doubt, within permissible levels of curial consistency due to the repeated use of the word 'largely' in relation to the focus of inquiry at each successive stage of analysis. The third step is merely a determination that the identified personal characteristic is either one of the enumerated grounds per section 15(1) or an analogous ground.

IV. Analysis

In many sectors of Canadian society, the issue of same-sex relationships and spousal qualification for health, dental and other benefits has been quietly dealt with as a matter of collective bargaining. There are many variations on

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[69] *Ibid.* at 992 [single paragraph separated and elements numbered for emphasis].

this theme — some simple, some complex.[70] But legislation is a public process and requires a political will to act, a will which is not always evident, particularly in relation to a question which for many involves not only minority human rights concerns but also issues of morality, religion and social welfare.

The definition of 'spouse' in the *Old Age Security Act* is as follows:[71]

> 'spouse,' in relation to any person, includes a person of the opposite sex who is living with that person, having lived with that person for at least one year, if the two persons have publicly represented themselves as husband and wife.

It is self-evident from this definition that either a male or female person may qualify as a 'spouse' and that the essential qualifications are cohabitation and public reputation (two of the basic elements of a 'common law marriage') and, most significantly, that the persons be of the opposite sex. As noted by the trial judge, "had Nesbit been a woman cohabiting with Egan on substantially the same terms as he in fact cohabited with Egan he would have been eligible for the spouse's allowance."[72]

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[70] In New Brunswick, the Blue Cross health insurance plan for provincial government employees was amended in 1993 by redefining the term as follows:

> 'Spouse' means an individual
> (a) to whom the insured employee is legally married or
> (b) with whom the insured employee, though not legally married, has cohabited continuously, in a conjugal relationship, for at least one year immediately prior (to becoming eligible to be insured and also immediately prior to being eligible for a claim) and who has been publicly represented as the insured employee's spouse.
>
> Spouse shall include partners of the same sex. Only one individual will qualify as a spouse. If the insured employee has more than one spouse using the above bases, the spouse will be the individual to whom the employee is legally married.

Examples of clauses with similar intent in various CUPE contracts are reproduced in CUPE Research and Equal Opportunities Departments, *Employment Benefits for Lesbian and Gay Workers and Their Families* (February, 1990).

[71] R.S.C. 1985, c. O-9, s. 2. An argument focusing on the word "includes" in the definition of 'spouse' was rejected by both Robertson and Linden JJ.A. because of the clearly opposite-sex wording of the latter part of the definition. See *supra* note 2 at 166, 186.

[72] *Supra* note 14 at 695.

It is difficult to avoid the impression that the trial and majority appeal decisions are at odds with a broad purposive approach to equality rights. Having accepted sexual orientation as an analogous ground of discrimination for the purposes of section 15(1) of the *Charter* and having recognized that same-sex couples, not being 'of the opposite sex,' cannot satisfy the definition of spouse and, thereby, qualify for the spouse's allowance benefit, the trial and majority appeal courts' rationale that denial is on the basis of nondiscriminatory non-spousal status rather than sexual orientation seems somewhat misplaced.

In establishing the spouse's allowance under the *Old Age Security Act*, as with any benefit program, Parliament had to define the group intended to receive the benefit. This target group should be identified not only in the actual words used by Parliament in the Act itself, but also in the stated purpose or object of the benefit. A comparison of both the actual definition and the target group identified by the purpose or object of the benefit will assist in determining whether Parliament has been under-inclusive in its definition.

Both the trial and appeal courts discerned the purpose of the spouse's allowance benefit by reference to the words used in 1975 by the then Minister of National Health and Welfare before the Standing Committee on Health, Welfare and Social Affairs:[73]

> Its objective is clear and singular in purpose. It is to ensure that when a couple is in a situation where one of the spouses has been forced to retire, and that couple has to live on

[73] Hon. M. Lalonde, *Minutes and Proceedings of Evidence of the Standing Committee on Health, Welfare and Social Affairs* (12 June 1975) at 25:7, as quoted in *supra* note 14 at 692. Both trial and appeal courts quoted the following from Hon. Flora MacDonald, Secretary of State for External Affairs, when speaking to a 1979 amendment to the *Act*:

> Statistics have shown that in 90 per cent of marriages the younger spouse is female and that females live longer than males. These women, who in their younger years remained in the home looking after children, with no access to continuing income or pension plans, are the same women who in their later years too often become the victims of a society which has not yet come to terms with equality in the workplace. (See *House of Commons Debates* (22 October 1979) at 476.)

> the pension of a single person, that there should be a special provision, when the breadwinner has been forced to retire at or after 65, to make sure that particular couple will be able to rely upon an income which would be equivalent to both members of the couple being retired or 60 years of age or over. That is the purpose of this Bill, no more than that, no less than that.

The stated purpose, therefore, was a purely social one of providing a limited financial benefit during the period between the older spouse taking retirement benefits and the younger spouse becoming eligible for old age security and guaranteed income benefits. This benefit is tied to the income levels of both individuals forming the couple and constitutes a step towards a form of minimum guaranteed income. It is a financial subvention in support of the income levels of two persons. When testifying before the Standing Committee, the Minister reported the projection that 65,000-90,000 spouses would benefit under the new spouse's allowance program at an annual cost of approximately $100 million, and that the total number of excluded persons (singles, widows etc.) between 60-65 years of age was approximately 180,000.[74] In the vast majority of instances, the older spouse was and is male and the younger spouse was and is female, but it does not necessarily follow that the partial rationale identified by Martin J. at trial and repeated by Robertson J.A. on appeal — that it was intended to provide compensation to mothers for their child-rearing years[75] — was a controlling element in the Parliamentary intention. Indeed, it is denied by the Parliamentary record. During that same 1975 appearance before the Standing Committee on Health, Welfare and Social Affairs, the Minister of National Health and Welfare was pressed by Committee members concerning perceived discrimination against single persons, particularly widows whose husbands had died after commencement of the spouse's allowance but before the widow attained 65 years of age and qualified for old age security in her own right.[76] The Minister, in reply,

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74 *Ibid.* at 25:9-10.

75 *Supra* note 14 at 692, Martin J. at trial, and *supra* note 2 at 181, Robertson J.A. on appeal.

76 In response to a question, the Minister reported that approximately 375 such widows were disqualified each month from entitlement for the spouse's allowance. See *supra* note 73 at 25:17.

repeatedly identified the purpose of the Bill in the following words, and on other occasions in words similar thereto:[77]

> The object of this bill, once more, is to come to the rescue of people where two have to live on the pension of one. Period. That is the purpose of this bill, no more.

By careful use of the neutral word 'spouse,' the Minister, while testifying before the Committee, stressed the non-gender specific nature of the spouse's allowance program and thereby denied any specific intention to benefit female spouses.[78] Even if such a narrow original intention could be supported, demographic realities have altered the standard picture of the Canadian family and, in particular, income-earning roles in a spousal relationship. In 1967, almost 60 percent of Canadian families had a single income earned by the male spouse; by 1991, that figure had dropped to 19 percent and two-income families had grown to 61.2 percent of all husband-wife families.[79]

Recognizing, as did the trial and appeal courts, that there are various combinations of persons cohabiting and surviving economically on one person's income, it is obvious that Parliament has been under-inclusive in its definition of the beneficiary of the spouse's allowance program. Opposite-sex cohabiting couples, whether married or not, are but one segment of the target group of two persons living on the pension of one. This target group includes same-sex cohabiting couples in a 'spousal equivalent relationship' and the myriad of non-spousal cohabiting couples. Was and is this under-inclusiveness in relation to same-sex couples discrimination within the meaning of section 15 analysis? What is the legal significance of other excluded groups?

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77 *Ibid.* at 26:7. For the same statement, differently phrased, see *ibid.* at 25:9. During third reading debate on the Bill, the Minister stated " ... the purpose of the bill is to ensure that in the future, at least for individuals over 60, no couple will have to provide for their needs solely on one pension." See *House of Commons Debates* (18 June 1975) at 6893.

78 *Ibid.* at 26:19. The Minister, in response to a question concerning the eligibility of a couple of whom the female was older than the male stated: "I have never mentioned the wife's pension; I have always talked about the spouse's pension."

79 Statistics Canada, Catalogue No. 13-215, *Characteristics of Dual-Earner Families, 1991* (Ottawa: Statistics Canada, 1993) at 20-21.

Almost certainly the exclusion of same-sex couples from the spouse's allowance benefit was intentional discrimination. First, it is an express exclusion by insertion of the phrase "of the opposite sex." Second, this exclusion may be taken to have reflected public attitudes at the time of the enactment of the amendment establishing the benefit. No express mention of same-sex couples is recorded in the minutes of either the Standing Committee on Health, Welfare and Social Affairs or the House of Commons debates when considering the legislation in question. However, ample evidence of negative public attitudes at the time may be found expressed in relation to another more fundamental enactment, the federal *Human Rights Act*. In 1982, during consideration by the Standing Committee on Justice and Legal Affairs of proposed amendments to the *Human Rights Act*, the then Minister of Justice, asked about the absence of any proposal for inclusion of political belief and sexual orientation as proscribed grounds of discrimination, responded:[80]

> I think there is also the concern as to whether there is sufficient social consensus in this area for these grounds to be broadly accepted.

It is a fairly safe inference that the lack of public and political acceptance of inclusion of sexual orientation as a proscribed ground of discrimination would have applied equally to an actual payment of a financial benefit to same-sex couples. It must not be forgotten that a government Bill to amend the *Human Rights Act* to include sexual orientation was tabled only in 1992. However, this 'evidence' of intentional discrimination is inferential at best and does not pre-empt the necessity of further analysis of the application of the section 15(1) concept of discrimination. Let us proceed, therefore, to apply both the original *Andrews* approach to section 15(1) analysis and its *Swain* reformulation.

Analysis of section 15(1) equality rights and the spouse's allowance benefit is simplified by the concession of counsel and acceptance by the courts of sexual orientation as an analogous ground of discrimination. As discussed

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[80] Hon. Mark MacGuigan, then Minister of Justice and Attorney General for Canada, *Minutes and Proceedings of Evidence of the Standing Committee on Justice and Legal Affairs* (20 December 1982) at 114:19-20. (Referred to by Stone J.A. in *Mossop* v. *Canada*, [1991] 1 F.C. 18 at 41).

above, McIntyre J. in *Andrews* identified the three-element concept of discrimination as the key qualifier. Applied to the definition of 'spouse' in the *Old Age Security Act*, the first element, that there be a distinction, is easily satisfied. The statutory definition specifically distinguishes between opposite-sex and same-sex couples by inclusion of the qualifying phrase "of the opposite sex."

The second element requires that the distinction be based on grounds relating to individual or group characteristics, in this instance, the conceded analogous ground of sexual orientation. In *Egan and Nesbit*, neither the trial nor the majority appeal justices expressed the opinion that the gender-specific statutory definition of 'spouse' was unrelated to the analogous ground of sexual orientation. The relationship between the definition and the analogous ground was, for all practical purposes, presumed and is, in law, easily supportable. It is undisputed, as discussed by Linden J.A. in dissent, that a 'spousal-type' relationship is not necessarily a characteristic of either homosexual or heterosexual orientations. There are otherwise qualified persons of both orientations who are single or unattached and, therefore, not involved in a spousal-type cohabitation relationship for at least one year as required by the statutory definition of 'spouse.' It should also be undisputed that persons involved in a spousal-type cohabitation relationship are, by the sex of the person with whom they are in that relationship, manifesting or expressing their sexual orientation. As discussed by Linden J.A., the Supreme Court of Canada has validated this principled approach to the scope of 'sexual orientation' by its decisions expanding the scope of 'sex' as a ground of discrimination for the purposes of anti-discrimination laws.[81] The principles

[81] In *Brooks* v. *Canada Safeway Ltd.*, *supra* note 38, a health insurance plan which facially discriminated on the basis of pregnancy was held by the Court to be discrimination on the basis of sex or was, "at least, strongly, 'sex-related'" discrimination (*ibid.* at 1244) "because of the basic biological fact that only women have the capacity to become pregnant" (*ibid.* at 1242). In the companion case of *Janzen* v. *Platy Enterprises Ltd.*, *supra* note 39, which concerned the on-the-job harassment of two female restaurant workers, the Court held that sexual harassment is a form of sex discrimination because "only a women could be subject to sexual harassment by a heterosexual male" (*ibid.* at 1289). In both cases the Court rejected the argument that "discrimination requires identical treatment of all members of the affected group" (*ibid.* at 1289). Accordingly, it was not a defence in *Brooks* that not all women become pregnant nor that not all female employees in *Janzen* were

reflected in these cases are equally applicable to sexual orientation and spousal benefits. As noted, choice of 'spousal' partner is inextricably linked to sexual orientation, and the fact that not all persons of a same-sex orientation are affected by the discrimination, because of their noninvolvement in a relationship, is not controlling as a defence. Accordingly, one may conclude that the second element is satisfied and that the distinction is based on grounds relating to personal characteristics of the individual or group.[82]

The third element requiring comparative disadvantage is easily satisfied. The spouse's allowance benefit is available to opposite-sex couples but is denied to same-sex couples who otherwise qualify, in the sense of having two persons living on the pension income of one person at a sufficiently low income level to trigger payment of the benefit.

Having satisfied the three elements of the *Andrews* definition of discrimination, discrimination for the purposes of section 15(1) of the *Charter* is found. When then linked with a denial of the guarantee of equal benefit of the law, the requirements of section 15(1) are completely satisfied.

The reformulated three-step test in *Swain* is also satisfied. First, one of the four equality rights has been denied because, as discussed above, a distinction has been drawn based on personal characteristics, *i.e.* sexual orientation. Second, the denial results in discrimination because the differential treatment has the effect of withholding a benefit, *i.e.* the spouse's allowance, available to others. Third, the personal characteristic is an accepted analogous ground of discrimination.

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harassed. The fundamental sex-based nature of the discrimination remained in relation to the persons actually affected.

82 This position is strengthened by the Supreme Court's decision in *Canada* v. *Mossop*, [1993] 1 S.C.R. 554. In that case, a complaint under the *Canadian Human Rights Act* of discrimination on the basis of family status was dismissed because of the deliberate decision by Parliament not to include sexual orientation as a proscribed ground of discrimination. It was held by Lamer C.J.C. that family status and sexual orientation are so closely connected that to accept the claim of discrimination would be to introduce a ground of discrimination not sanctioned by Parliament. The *Charter* was not argued in this case notwithstanding the invitation by the Court to do so.

What factors led trial and majority appeal justices to conclude that discrimination had not been proven and that the guarantee of equal benefit of the law had not been denied?

First, all the justices, including Linden J.A. in dissent, construed the true nature of the plaintiffs' claim not as a simple claim for the actual benefit denied but rather as an indirect challenge to the traditional concept of marriage. Robertson J.A., it will be recalled, categorized prior case law as involving either a direct claim for a benefit (*Haig and Birch*, *Brown*) or as a claim for recognition of the equivalency of same- and opposite-sex relationships such that the particular benefits in issue would be available on the same terms for both types of relationships (*Knodel*, *Karen Andrews*). Robertson J.A., having clearly and expressly placed the spouse's benefit claim of Egan and Nesbit in the latter category, ignored the actual denial to Nesbit of a financial benefit available to others as constituting the requisite disadvantage. But Nesbit, it will be recalled, claimed for himself the denied spouse's allowance and, in fact, back-payment of the benefit to the date first otherwise qualified. For his part, Linden J.A., in dissent, similarly characterized the claim as a generalized one falling under the section 52 supremacy clause rather than one requiring an individual remedy under section 24(1) of the *Charter*. The remedy found appropriate by Linden J.A. was to modify the statutory definition of 'spouse' consistent with inclusion of same-sex couples; he ignored the specific claim for back-payment of the benefit.

Second, in applying the concrete test for discrimination, Robertson J.A. accepted a contextually narrow female-spouse-centred purpose for the spouse's allowance benefit which permitted him to exclude same-sex couples from the target group. As discussed above, the stated purpose of the spouse's allowance benefit was to ensure that two persons did not have to live on the pension income of one person. This is a much broader purpose than compensating female spouses for their child-rearing years and, having been stated neutrally by the Minister at the time, would encompass same-sex couples living on the pension income of one person. It should also be noted that not all qualified female spouses would necessarily have had children and, therefore, have foregone income earning years in favour of child-rearing.

Third, in applying the concrete test for discrimination, Robertson J.A. considered not only that the disadvantage must be operative in the impugned

legislation and be independent of membership in the disadvantaged group generally but also that there be a direct relationship between the type of disadvantage operative in the impugned legislation and the disadvantaged group generally. The benefit at issue, the spouse's allowance, is an economic benefit. As a group, however, homosexuals were not believed by Robertson J.A., in the absence of any evidence to the contrary, to be an economically disadvantaged group. The absence of a direct relationship between the disadvantage in issue and the disadvantage suffered by the group generally led Robertson J.A. to conclude that there is no requisite disadvantage. This conclusion is, of course, reinforced by the characterization of the true nature of the litigation as challenging the traditional concept of marriage rather than a claim for the denied economic benefit. With respect, this approach seems grounded in the pejorative sense of discrimination rather than in the distinction coupled with a proscribed ground approach; it is better placed as part of the section 1 justification analysis. It must not be forgotten that there is an income test for receipt of the spouse's allowance benefit and that same-sex couples are excluded even if they qualify under the means test. Excluding all members of an identifiable group from an income benefit because the group generally is considered to enjoy higher incomes, notwithstanding the financial conditions of individual members in that group (here defined as a couple), seems a good example of the very type of stereotype-based rules which are the object of the section 15(1) equality rights guarantee.

Fourth, the trial and majority appeal justices applied an intuitive concept of discrimination involving a pejorative sense of that word. This approach carries with it high judicial authority by virtue of the Supreme Court's majority decision in *Hess and Nguyen* but, as argued above, is inconsistent with the *Andrews* approach of a distinction linked to a proscribed ground of discrimination. It will be recalled that in *Hess and Nguyen*, Wilson J. found no discrimination in a criminal offence which could only be committed by male persons. In other words, she applied a relevance test — though, admittedly, one involving exclusivity. The justices who rejected the claim by Egan and Nesbit also applied a relevance test. By narrowly defining the purpose of the spouse's allowance to favour females in light of their child-rearing years, these justices found motherhood and female gender as the relevant criteria, a category of intended beneficiary felt to exclude same-sex couples. However, as noted above, not all qualified female spouses would necessarily have dedicated their potential income earning years to child-

rearing, accordingly, the stated relevancy arguably is not as exclusive as in *Hess and Nguyen*. In any event, as argued above, considerations of relevancy are akin to justification and are better placed in section 1 analysis.

Fifth, the trial and majority appeal judges placed undue significance on the existence of other excluded groups. What distinguishes the same-sex 'spousal equivalent' couple from other excluded non-spousal combinations is the recognition of the analogous ground of sexual orientation for equality rights purposes. However, in the view of Martin J. at trial and Robertson and Mahoney JJ.A. on appeal, this is a two-edged sword which redounded upon and defeated any claim of discrimination. For these learned justices, rejection of the similarly situated test by the Supreme Court in *Andrews* meant that plaintiffs Egan and Nesbit could not establish entitlement to the spouse's allowance by demonstrating similarity to the included beneficiary group and dissimilarity to the excluded group on the basis of the analogous ground of sexual orientation, an irrelevant personal characteristic, as the point of comparison. With the greatest respect, and as discussed above, *Andrews* did not reject comparison as a central element of equality; *Andrews* rejected the similarly situated test as the *standard* for equality. In the same manner that we presently recognize 'discrete and insular minorities' as an analytical tool, the similarly situated test is also an analytical tool, though now recognized as faulty. Its rejection was not intended by the Supreme Court in *Andrews* as a rejection of the essentially comparative nature of equality.[83] Equality shorn of comparison is meaningless.

At the section 15(1) stage of analysis, it is not necessary to examine comparisons between included and excluded groups and this, perhaps, is what Robertson and Mahoney JJ.A. meant in rejecting the similarly situated arguments of the plaintiffs. By inserting the phrases "of the opposite sex" and "husband and wife" in the definition of spouse, Parliament triggered one of the analogous grounds of discrimination — sexual orientation — and drew a distinction on that basis. This, on the analysis of *Andrews* discussed above, when linked to denial of a benefit, is sufficient to satisfy the analytical

[83] It bears repeating that McIntyre J. in *Andrews,* described equality as a "comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises." (See *supra* note 27 at 10.)

requirements of section 15(1) of the Charter. The analysis then should move on to section 1 justification analysis.

Robertson J.A.'s two difficulties with the existence of the excluded groups — (i) the inequality which would result if one of the excluded groups was recognized on the basis of sexual orientation leaving the others to argue new analogous grounds and (ii) the view that compelling reasons be given to justify recognition of one excluded group but not another — would, if generally accepted, have profound negative consequences for the protection of equality rights under the *Charter*. These difficulties fail to accord to sexual orientation its full status as a constitutionally recognized analogous ground of discrimination. That there are other excluded groups, not coming within the protective ambit of any enumerated or recognized analogous ground of discrimination, surely cannot mean that Parliament may discriminate on the basis of a protected, albeit analogous, ground. This is easily tested. Of the nine enumerated grounds of discrimination in section 15(1) of the *Charter* only age is in any way triggered by the qualification criteria for the spouse's allowance benefit and that, presumably, would be justified per section 1 analysis. If one amended the qualification criteria to expressly exclude persons on the basis of the enumerated grounds of sex (*e.g.* all male persons) or persons with mental or physical disabilities, would one seriously consider that the existence of other non-protected groups (brother-brother, sister-sister, etc.) shields the Parliamentary decision from a finding of discrimination contrary to section 15(1) of the *Charter*? Why should exclusion on the basis of an analogous ground be treated differently? It should not. To recognize the shielding effect of excluded non-enumerated, non-analogous grounds groups is to provide a means for validating proscribed discrimination within section 15(1) analysis; it would have the effect of shielding that discrimination from section 1 justification analysis. Such an approach is inconsistent with the very purpose of *Charter* equality rights guarantees.

Sixth, the trial and majority appeal judges deferred to a social construct model of equality rights in which deference should be accorded to a choice by Parliament involving the progressive development or extension of social benefits. This is the section 1 deferential approach espoused by a number of

justices, particularly La Forest J. in *McKinney* v. *University of Guelph*.[84] This may well be an element in the ruling by a Supreme Court majority, should they dismiss a further appeal to that Court. However, progressive development must have some time limits for full extension of constitutionally protected rights. Nineteen years have passed since the amendment of the *Social Security Act* to provide the spouse's allowance benefit. It is difficult to accept that nineteen years is not long enough for Parliament to take the next step towards progressive development of the law.

Assuming, then, that section 15(1) analysis results in a finding of discrimination, justification analysis under section 1 of the *Charter* must be considered. Only Linden J.A., in dissent, found it necessary to undertake section 1 analysis and employ the now familiar *Oakes* test.[85] Acknowledging that plaintiffs' counsel had conceded the first step in that test — that the legislative objective is pressing and substantial and sufficient to warrant overriding a constitutionally protected right — Linden J.A. focused on the proportionality step of the test. Counsel had agreed upon the rational connection between the spouse's allowance benefit and the program object, so that the focal points were the application of the minimum impairment and overall proportionality elements of the test. Linden J.A. held that minimal impairment had not been satisfied as alternative means were readily available consistent with both respect for the guaranteed equality rights and the program objectives. Quite simply, setting aside budgetary concerns as irrelevant, Parliament could have included same-sex couples and in no way have undermined the effectiveness of the spouse's allowance benefit program. In particular, Linden J.A., as had Martin J. at trial, rejected as "unconvincing" the argument that the financial needs of same-sex couples were adequately treated under provincial social assistance programs.[86] Though unnecessary to the analysis, given his conclusion in relation to the minimal impairment element, Linden J.A. also held that the overall proportionality element of the *Oakes* test was not satisfied in that providing a financial benefit to heterosexual couples in need did not outweigh the provision of the same benefit to same-sex couples in financial need.

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84 [1990] 3 S.C.R. 229.

85 *R.* v. *Oakes*, [1986] 1 S.C.R. 103.

86 *Supra* note 2 at 205-07.

One final point needs to be made. Robertson J.A. specifically rejected what he labelled as the "abstract" test of discrimination, *i.e.* that the legislative provision in issue reinforces existing prejudice against the disadvantaged group. It is difficult to imagine a legislative benefit program or indeed any distinction drawn by a statute on the basis of a proscribed ground of discrimination which would not have the effect of reinforcing existing prejudice by the very fact of non-inclusion of the particular group so identified. In *Knodel*, *Brown*, *Egan and Nesbit*, and in *Andrews* itself, exclusion of the subject group imposed a financial burden by denying or delaying a benefit or the exercise of employment. In *Karen Andrews*, however, the same health care benefits were available to both opposite- and same-sex couples on the same financial terms. In this situation, the effect of exclusion is only to reinforce prejudice or non-acceptance in society at large. In a society which constitutionally guarantees equality rights, laws should not reinforce prejudice against any segment of society. These are not the attributes of a free and democratic, tolerant society.[87]

V. Conclusion

Three of the four judges who considered the question held that the expressly heterosexual definition of 'spouse' in the *Old Age Security Act* did not deny same-sex couples the right to equal benefit of the law and that the definition, when analyzed in context, is not discriminatory. Yet the approach of these judges, which groups same-sex relationships within the general non-spousal category, conveniently denies the fundamental nature of a same-sex relationship such as that of Egan and Nesbit. It is not a brother-brother relationship. It is a relationship akin to a traditional opposite-sex marriage relationship except for the sex and sexual orientation of the parties. As noted by Robertson J.A., approximately fifty federal laws define rights and obligations on the basis of restrictive definitions and concepts of spousal status. There are similar laws in each of the provinces and territories of Canada. The controversial issues raised in *Egan and Nesbit* have general significance for Canada and Canadians. Now on appeal to the Supreme Court, a final determination should be released in late 1994 or early 1995. No matter

[87] See K. Mahoney, "The Constitutional Law of Equality in Canada" (1992) 44 Maine L.R. 229 at 249: "If the measure under attack continues or worsens that disadvantage, it violates the equality guarantee. No comparator is required."

which way it decides the actual matter in dispute, the decision of the Supreme Court will have a significant impact on Canadian law and society. As subjects of a test case, *Egan and Nesbit* were particularly well chosen.

CONSTITUTIONAL CONTACT WITH THE DISPARITIES IN THE WORLD: POVERTY AS A PROHIBITED GROUND OF DISCRIMINATION UNDER THE CANADIAN *CHARTER* AND HUMAN RIGHTS LAW

Martha Jackman*

While poverty is not a ground of discrimination expressly enumerated under section 15 of the Charter, *it is a condition shared by several of the groups specified in that section. The author argues that the* Charter*'s promise of substantive equality will remain meaningless for large numbers of the disadvantaged in Canada unless poverty is recognized as a prohibited ground of discrimination analogous to those expressly enumerated. In support of her argument, the author documents the magnitude of poverty in Canada and the intolerant attitudes which prevail regarding the poor, attitudes which translate into discriminatory practices. The systemic disadvantaging of the poor also has an impact on their ability to organize politically, all of which qualifies the poor as a "discrete and insular minority" deserving of* Charter *protection. The author concludes that poverty should be viewed in the same manner as the specified grounds in section 15 — as an equality and human rights issue.*

Bien que la pauvreté ne figure pas expressément parmi les motifs de distinction illicites énoncés dans l'art. 15 de la Charte, *c'est une condition partagée par plusieurs des groupes visés par l'article. L'auteur soutient que la promesse d'égalité formelle contenue dans la* Charte *restera vide de sens pour un grand nombre de personnes désavantagées au Canada, à moins que la pauvreté ne soit reconnue comme un motif de distinction illicite au même titre que les autres. À l'appui de son argument, l'auteur décrit l'ampleur du problème au Canada, ainsi que l'intolérance et les pratiques discriminatoires qu'il suscite. La situation de désavantage systémique que subissent les pauvres a également une incidence sur leur capacité de s'organiser politiquement. Tous ces facteurs devraient certainement placer la classe défavorisée parmi les «minorités discrètes et isolées» visées par la protection de la* Charte. *L'auteur conclut que la pauvreté devrait faire partie des motifs énumérés dans l'art. 15 — comme relevant des droits à l'égalité et des droits de la personne.*

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> ... no more of this eventual stuff ... We need to have contact with the disparities in the world.[1]

I. Introduction

Few would dispute that poverty has always operated as one of the most significant and systemic barriers to full participation in Canadian society. As the Economic Council of Canada wrote more than 25 years ago: "[t]o feel poverty is, among other things, to feel oneself an unwilling outsider — a virtual nonparticipant in the society in which one lives."[2] For the numerous Canadians who experience it, poverty generally means substandard housing, inadequate diet, reduced health, poor education and employment prospects, social stigma, and political marginalization. A recent description of the living conditions of low-income sole support mothers in Montreal gives some indication of what poverty implies for many:[3]

> Difficulté de se nourrir en fin de mois et même dès la moitié du mois, impossibilité de s'habiller et d'habiller les enfants convenablement suivant les saisons, incapacité de chauffer son logement adéquatement et absence de loisirs ... Ces femmes vivent une difficulté certaine de pourvoir aux biens essentiels tels, la nourriture, les vêtements, le logement et les loisirs, ce qui démontre sans aucun doute une forme d'exclusion à laquelle elles sont soumises.

Not surprisingly, poverty is also a condition shared by several of the groups expressly enumerated under section 15 of the *Canadian Charter of Rights and Freedoms*.[4] Women, the elderly, persons with disabilities, persons of colour, and aboriginal people are all disproportionately represented among Canada's poor.[5] Nevertheless, poverty itself does not figure as a distinct category of

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1 This remark was made by a homeless Toronto man, interviewed in R. Morris & C. Heffren, *Street People Speak* (Oakville: Mosaic Press, 1988) at 52.

2 Economic Council of Canada, *Fifth Annual Review: The Challenge of Growth and Change* (Ottawa: Queen's Printer, 1968) at 104.

3 L. Fortin, "La pauvreté des femmes vue par des intervenantes et des enseignantes de Montréal" (Spring/Summer 1992) 16:2,3 Perception 22 at 22-23; see also S. Baxter, *No Way to Live — Poor Women Speak Out* (Vancouver: New Star Books, 1988).

4 Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982 (U.K.)*, 1982, c. 11 [hereinafter the *Charter*].

5 See the discussion *infra* notes 10-32.

disadvantage under section 15 of the *Charter*, and the systemic disadvantaging which poverty brings about has no explicit recognition in Canadian anti-discrimination law. As a result, the *Charter* cannot automatically be invoked to challenge poverty-based discrimination. It is, in part, for this reason that poverty and the poor have also been largely ignored in broader debates around the *Charter* and the scope of its equality guarantees.

The following discussion will argue that given the severe impact of poverty on social conditions, opportunities and status in Canadian society, the *Charter*'s guarantee of substantive equality will remain meaningless for a vast number of Canadians unless poverty itself is recognized as a prohibited ground of discrimination under section 15. To support this claim, the paper will first examine the incidence, social impact, and political significance of poverty in Canada. It will then consider the definition of equality put forward by the Supreme Court of Canada in *Andrews* v. *Law Society of British Columbia*[6] and *R.* v. *Turpin.*[7] The paper will argue that the poor meet the test established by the Supreme Court for determining whether a non-enumerated group is entitled to section 15 protection, so that state action which discriminates on the basis of poverty is subject to challenge. The paper will next examine the few cases in which poverty-related claims have been dealt with by the courts. Finally, the paper will point to federal and provincial human rights law as an example of an area where *Charter* review could provide an important means of redress for Canadians who are poor.

It is clear that recognition of a legal right to equality for the poor under the *Charter* and Canadian human rights law will not automatically remedy the many and systemic problems created by existing inequalities in wealth and access to economic opportunities in Canadian society. As numerous critics of the *Charter* have pointed out, the high cost of litigation, lack of access to the courts, judicial attitudes towards the poor, and the many other procedural and remedial hurdles which *Charter* litigation presents, weigh against the *Charter* making any real difference in this regard.[8]

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6 [1989] 1 S.C.R. 143 [hereinafter *Andrews*].

7 [1989] 1 S.C.R. 1296 [hereinafter *Turpin*].

8 See, for example, J. Frémont, "Les tribunaux et la *Charte*: le pouvoir d'ordonner la dépense de fonds publics en matières sociales et économiques" (1991) 36 McGill L.J. 1323; J. Bakan, "Constitutional Interpretation and Social Change: You Can't Always

While the realities of *Charter* litigation must be borne in mind, it remains that recognition of the poor as a protected group under section 15 will remove a major impediment to poverty-based challenges under the *Charter*. Such recognition is a necessary first step towards delivering on the *Charter*'s promise of equal protection and equal benefit of the law for a distressingly large number of Canadians. Without it, the *Charter* will remain, even on its own terms, seriously out of touch with a major source of disparity in Canadian society.

II. The Incidence of Poverty in Canada

For statistical purposes, poverty in Canada is most commonly defined and measured in terms of Statistics Canada's "low income cut-offs."[9] These cut-offs represent the gross level of income at which an individual or family is considered to be spending a disproportionate amount of income on food, shelter and clothing. Based on surveys showing that the average Canadian family spends 36.2 percent of its gross income on these items, Statistics Canada defines low income Canadians as those who spend in excess of 54.7 percent of their income obtaining these basic necessities. The low income cut-offs vary by size of family unit and community of residence, and are updated annually.[10]

Get What you Want (Nor What You Need)" (1991) 70 Can. Bar Rev. 307; A.C. Hutchinson & A. Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988) 38 U.T.L.J. 278. For a comment on the recent Supreme Court of Canada decision in the *Finlay* case, which comes to a similar conclusion about the usefulness of litigation as an anti-poverty strategy, see M. Young, "Starving in the Shadow of Law: A Comment on *Finlay* v. *Canada (Minister of Finance)* (Winter 1994) 5:2 Constitutional Forum 31.

9 Statistics Canada, *Income Distributions by Size in Canada, 1992* (Ottawa: Statistics Canada, 1993) at 22-28 [hereinafter *Income Distributions, 1992*]. For a more comprehensive review of the Statistics Canada measurements, as well as alternative definitions and measurements of poverty, see D.P. Ross & R. Shillington, *The Canadian Fact Book on Poverty - 1989* (Ottawa: Canadian Council on Social Development, 1989) at 5-20; A. Spector, "Measuring Low Incomes in Canada" (Summer 1992) 25 Canadian Social Trends 8. Canadian poverty trends between 1980 and 1990 are reviewed in National Council of Welfare, *Poverty Profile, 1980-1990* (Ottawa: Ministry of Supply and Services Canada, 1992).

10 *Income Distributions, 1992*, *ibid.* at 42-43.

In 1992, Statistics Canada's low income cut-offs for unattached individuals ranged from $11,186 for those living in rural areas, to $16,186 for unattached individuals living in cities with a population over 500,000. The range was from $21,050 for a family of four living in a rural area, to $30,460 for a family of four living in a large city.[11] On the basis of its low income cut-offs for 1992, Statistics Canada estimated that 16.8 percent of Canadians lived in poverty,[12] including 39.7 percent of unattached individuals, and 13.4 percent of persons in families.[13] Thirty-five percent of unattached men and 53.1 percent of unattached women over the age of 65 fell below the poverty line,[14] as did 18.9 percent of children under 18[15] — 43 percent of them in mother-led single-parent families.[16]

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[11] *Ibid.* at 43.

[12] *Ibid.* at 23.

[13] *Ibid.* This estimate can be seen as a conservative one, to the extent that Statistics Canada does not include natives living on reserves or inmates of institutions in its measurements, two groups which experience above average levels of poverty. In a recent book which received wide media attention, however, economist Christopher Sarlo argued that poverty levels in Canada were being exaggerated since they were being measured in relative rather than in absolute terms. Using 1988 statistics, Sarlo placed the "absolute" poverty line at $13,140/annual income for a family of four (versus Statistics Canada's $22,371), and the national poverty rate at 2.5% (versus Statistics Canada's 10.1%); see C.A. Sarlo, *Poverty in Canada* (Vancouver: The Fraser Institute, 1992). Critics have pointed out that Sarlo's calculations of basic needs and expenses (for example, a $17.50/week food budget for a single elderly woman; *ibid.* at 66) are highly unrealistic, and that changing the measure of poverty in Canada will not change the problem; see for example G. York, "Lower poverty line urged" *The Globe and Mail* (9 June 1993) A1, A5; J. Murphy, "Analyzing the Poverty of Christopher Sarlo" (June 1993) 17:2 Perception 19.

[14] *Income Distributions, 1992*, *ibid.* at 29.

[15] *Ibid.* at 23.

[16] National Council of Welfare, *Poverty Profile 1992* (Ottawa: Ministry of Supply and Services Canada, 1994) at 62. For an extended discussion of child poverty see Standing Senate Committee on Social Affairs, Science and Technology, *Children in Poverty: Toward a Better Future* (Ottawa: Ministry of Supply and Services Canada, January 1991) [hereinafter Senate, *Children in Poverty*]; see also C. Freiler & B. Kitchen, "Family Portrait" (Spring 1990) 14:2 Perception 46; J. Oderkirk, "Parents and Children Living With Low Incomes" (Winter 1992) 27 Canadian Social Trends 11; J. Swift, "Poverty in Canada: A Picture of Hard Times" (March 1993) Canadian Forum 8-15; Campaign 2000, *Child Poverty in Canada: Report Card 1993* (Ottawa: Canadian Council on Social Development, 1993).

In 1992, the average annual income of unattached poor men under the age of 65 was $7,887, as compared to $26,680 for all unattached men under 65. The average annual income of unattached poor women under the age of 65 was $7,606, as compared to $22,931 for all unattached women in the same age group. The average income of poor couples with children under 18 years of age was $17,062, as compared to $60,246 for all couples with children in that age group. The figure for poor couples without children was $11,980, as compared to $55,638 for all childless couples.[17] In 1992, 21 percent of poor family heads and 16 percent of poor unattached individuals under the age of 65 worked full-time, and 35 percent of family heads and 50 percent of individuals worked part-time.[18] Sources of income for poor families and unattached individuals under the age of 65 were, in order of importance, earnings from employment, social assistance benefits, and unemployment insurance payments.[19] Average governmental assistance amounts received annually by the poor in 1992 ranged from $10,134 for sole support mothers to $7,662 for couples with children, $3,962 for unattached men, and $4,017 for unattached women.[20]

The above statistics point to several factors which greatly increase the risk of poverty for individuals and families. Among these factors is reliance on social assistance which, in 1992, provided a maximum annual income of $3,240 to $8,395 (according to province of residence) for an unattached individual, and between $11,932 and $22,379 for a family of four.[21] These income levels clearly place the recipients well below the poverty line in all provinces.[22] For unattached individuals, for instance, maximum provincial

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17 National Council of Welfare, *Poverty Profile 1992*, *ibid.* at 49.

18 *Ibid.* at 58.

19 *Ibid.* at 54. Poor seniors receive most of their income from federal old age security pension, guaranteed income supplements, and Canada and Québec Pension Plan payments. Average annual O.A.S. and G.I.S. payments received by couples over the age of 65 in 1992 were $11,197, by unattached men $7,753, and by unattached women $8,077. Average annual Québec and C.P.P. amounts were $4,600 for couples, $3,606 for men, and $3,102 for women; *ibid.* at 51-53.

20 *Ibid.* at 51.

21 See National Council of Welfare, *Welfare Incomes 1992* (Ottawa: Ministry of Supply and Services Canada, Spring 1993) at 16-18.

22 See generally National Council of Welfare, *Welfare in Canada: The Tangled Safety Net* (Ottawa: Minister of Supply and Services Canada, November 1987) 57-85.

social assistance rates provide annual incomes ranging from 24 to 62 percent of the poverty line, and for families of four, from 45 to 72 percent of the poverty line.[23] Involuntary reliance on part-time[24] or minimum wage employment;[25] being a member of a mother led single-parent family,[26] being an elderly woman,[27] a person with a disability,[28] a member of a

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23 National Council of Welfare, *Welfare Incomes 1992*, *supra* note 21 at 26-27.

24 In 1990, 22 percent of part-time workers wanted, but were unable to find, full-time employment; M. McCulloch, "The Facts on Employment, 1990" (Spring 1991) 15:2 Perception 17 at 18. See generally Economic Council of Canada, *The New Face of Poverty: Income Security Needs of Canadians* (Ottawa: Minister of Supply and Services Canada, 1992) at 30 [hereinafter *The New Face of Poverty*]; M. Gunderson, L. Muszynski & J. Keck, *Women and Labour Market Poverty* (Ottawa: Canadian Advisory Council on the Status of Women, 1990); G. Ternowetsky & G. Riches, "Economic Polarization and Restructuring of Labour Markets in Canada: The Way of the Future" in G. Riches & G. Ternowetsky, eds., *Unemployment and Welfare* (Toronto: Garamond Press, 1990) 19.

25 In 1992, a person working full-time in minimum wage employment would earn an annual income ranging between $8,320, at the federal minimum wage, and $12,601, in the province of Ontario. These levels of income place the recipients and their dependents well below the poverty line (55% of the poverty line for the federal minimum wage and 83% of the poverty line for Ontario); see: Senate, National Council of Welfare, *Incentives and Disincentives to Work* (Ottawa: Ministry of Supply and Services, 1993) at 69-70; see also M. Hess, "Sinful Wages" (Summer 1991) 15:3 Perception 29.

26 The highest rate of family poverty is experienced by families led by a female single parent, 57.2% of which were poor in 1992. In addition to their heightened risk of being poor, female single-parent families also experience the greatest depths of poverty, with average incomes $8,274 below the poverty line in 1992; Statistics Canada, *Income Distributions, 1992*, *supra* note 9 at 29, 31; National Council of Welfare, *Women and Poverty Revisited* (Ottawa: Minister of Supply and Services Canada, Summer 1990) at 57-88; J. Oderkirk & C. Lochhead, "Lone Parenthood: Gender Differences" (Winter 1992) 27 Canadian Social Trends 16.

27 National Council of Welfare, *Women and Poverty Revisited*, *ibid.* at 94-105; E. Ng, "Children and Elderly People Sharing Public Income Resources" (Summer 1992) 25 Canadian Social Trends 12; National Council of Welfare, *Sixty-five and Older* (Ottawa: Ministry of Supply and Services Canada, 1984).

28 1986 census figures show that 68% of Canadians with disabilities had an income of less than $10,000 a year, and only 5% had an income over $30,000; S. Torjman, "Income Insecurity: the Disability Income System in Canada" (Autumn 1989) 13:4 Perception 36; D.P. Ross & R. Shillington, *An Economic Profile of Persons With Disabilities in Canada* (Ottawa: Department of the Secretary of State Canada, 1990) 17-21; K. Nessner, "Profile of Canadians With Disabilities" (Autumn 1990) 18

visible minority,[29] a recent immigrant,[30] or an aboriginal person,[31] also greatly increase one's likelihood of being poor.

III. The Social Significance of Poverty

The incidence of poverty can be measured statistically. However, its social significance must be understood primarily in terms of the lived experience of people who are poor. Poverty has an impact on all aspects of life: at the levels of food, housing, health, education, social status, and political efficacy, among others. As the National Council on Welfare defines it "[p]overty is a deprivation ... an insufficiency of income and opportunity to provide for the necessities of life — not just food and shelter but the very real needs that go beyond those."[32] The circumstances of children living in poverty are illustrative:[33]

Canadian Social Trends 2; V. Galt, "Disabled Strive to Crack Job Market" *The Globe and Mail* (18 January 1993) A1, A4. For disabled persons unable to obtain employment, 1992 provincial social assistance benefits provided incomes ranging from 49 to 71% of the poverty line; National Council of Welfare, *Welfare Incomes 1992*, *supra* note 21 at 26-27.

29 See National Council of Welfare, *Women and Poverty Revisited*, *supra* note 26 at 118-20; J. Kapica, "Visible Minorities Lead in Education but Trail in Income," *The Globe and Mail* (13 December 1991) A9; B. Singh Bolaria & P.S. Li, *Racial Oppression in Canada* (Toronto: Garamond Press, 1988).

30 See *Income Distributions, 1992*, *supra* note 9 at 168; J. Badets, "Canada's Immigrant Population" (Autumn 1989) 14 Canadian Social Trends 3.

31 See for example Indian and Northern Affairs Canada, *Basic Departmental Data, 1991* (Ottawa: Ministry of Supply and Services Canada, December 1991); Standing Committee on Health and Welfare, Social Affairs, Seniors and the Status of Women, *Minutes of Proceedings and Evidence of the Sub-Committee on Poverty*, 2d Sess., 34th Parl., at 9:5-15; 11:4-24 (February 1991) [hereinafter *Evidence of the Sub-Committee on Poverty*]; Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People*, vol. 1 (Winnipeg: Queen's Printer, 1991) 9 (Commissioners: A.C. Hamilton & C.M. Sinclair); R.M. Bienvenue, "Colonial Status: The Case of Canadian Indians" in R.M. Bienvenue & J.E. Goldstein, eds., *Ethnicity and Ethnic Relations in Canada*, 2d ed. (Toronto: Butterworths, 1985) 199.

32 Cited in N. Funk-Unrau, *The Poor Among Us: Study and Action Guide on Poverty in Canada* (Winnipeg: Conference of Mennonites in Canada, 1988) 1.

33 D.S. Hubka, "Reporting on child poverty: the efforts of Campaign 2000" (Autumn 1992) 16:4 Perception 17 at 19.

> Canadian children in poverty live seriously disadvantaged lives. More often than not, they live in poor housing and are members of families with a high likelihood of unemployment and often limited access to child care (due to the high expense). Poor children can expect to live shorter lives, suffer more illness, require an increasing amount of emergency food assistance, and be more likely to drop out of school.

The difficulty of obtaining adequate food on poverty-line incomes is a major problem[34] facing individuals and families who are poor:[35]

> The poor always pay more to get less ... Goods in low-income areas tend to have higher prices due to low sales volume and slow turnover. Lacking access to consumer protection information, transportation, and the extra dollars needed to take advantage of specials, the poor spend twice as much of their income on food as high-income families do.

The emergence and growth of food banks in Canada bear particular witness to this problem.[36] The Canadian Association of Food Banks estimates that almost half a million Canadians turn to food banks and emergency meal programs each month,[37] large numbers of whom are children.[38] In a comprehensive study of Canadian food banks published in 1986, Graham Riches found that food bank users include those living on social assistance, on unemployment insurance, on fixed incomes, on no incomes, and on income from low wage employment.[39] Many travel long distances to reach food

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34 See, for example, British Columbia Nutrition Council, *The Poor Can't Afford to Eat in B.C.* (Vancouver: B.C. Nutrition Council, 1991); testimony from the Nova Scotia Nutrition Council, *Evidence of the Sub-Committee on Poverty, supra* note 32 at 10:78-79 (6 February 1992); K. Hobbs et al. *The Waste of a Nation: Poor People Speak Out About Charity* (Vancouver: End Legislated Poverty, 1992); see also R.E. Robertson, "The Right to Food — Canada's Broken Covenant" (1989-1990) 6 C.H.R.Y. B. 185.

35 Funk-Unrau, *The Poor Among Us, supra* note 32 at 3.

36 G. Riches, *Food Banks and the Welfare Crisis* (Ottawa: Canadian Council on Social Development, 1986); M. Webber, *Food for Thought* (Toronto: Coach House Press, 1992); submissions by the Canadian Association of Food Banks, *Evidence of the Sub-Committee on Poverty, supra* note 31 at 11:24-51 (27 February 1991); *Twice Vulnerable: A Preliminary Profile on Access to Emergency Food Assistance for Metro's Multicultural Communities* (Toronto: Foodshare, January 1989).

37 M.A. McLaughlin, "The Facts on Food and Shelter, 1990" (Spring 1991) 15:2 Perception 21.

38 Estimates suggest that up to half of Canadian food bank users are children; see Riches, *Food Banks and the Welfare Crisis, supra* note 36 at 43.

39 *Ibid.* at 43-46.

banks, and are turned away empty-handed because the demand for food exceeds the available supply.[40] Thirty percent of food bank applicants have no food in the house, and 70 percent haven't enough to last until the next day.[41]

The difficulty of obtaining adequate and affordable housing is another serious problem facing people who are poor.[42] Studies prepared for the Ontario Social Assistance Review Committee show that some two-thirds of households receiving social assistance in Ontario are devoting more than 40 percent of their monthly income to cover the cost of shelter.[43] In higher cost housing markets, the Committee found that many individuals and families were paying at least twice what they could really afford, with the result that: "[t]hey must often go without other essential items and cut back even on the basics of food and clothing in order to cover the high cost of housing."[44] As one witness appearing before the Committee explained: "For most of us on assistance, affordable housing is a dream, and for some of us the logistics of securing any place to live is a nightmare of landlord discrimination, first and last month's rent, with selection limited to overpriced dumps."[45] This situation is not particular to Ontario. The shortage of subsidized low-income housing is acute across Canada,[46] with the result that social assistance

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40 *Ibid.* at 42.

41 *Ibid.* at 51-54.

42 See for example Senate, *Children in Poverty*, *supra* note 16 at 39-42; McLaughlin, *supra* note 37; J. McClain & C. Doyle, *Women and Housing: Changing Needs and the Failure of Policy* (Ottawa: Canadian Council on Social Development/James Lorimer, 1984).

43 Social Assistance Review Committee, *Transitions* (Toronto: Queen's Printer for Ontario, 1988) at 59-60. Statistics Canada figures show that, in 1990, 28% of Canadian renters paid 30% or more of their income on housing, and 10% paid over half; M. Blakeney, "Canadians in Subsidized Housing" (Winter 1992) 27 Canadian Social Trends 20.

44 *Transitions*, *ibid.* at 60.

45 *Ibid.* at 468.

46 Canadian Mortgage and Housing Corporation statistics show that only 5% of Canadian households receive any kind of rental housing subsidy. In 1990, 29% of heads of subsidized households were between 55 and 75 years of age and 23% were over 75 years of age; 15% of subsidized households were headed by single parent mothers. Over a third of subsidized household heads had less than 8 years of schooling; 64% were not in the labour force; and 56% relied on government transfers

recipients, low wage earners, and others living below the poverty line in other parts of the country face similar problems of having to devote excessive amounts of their limited incomes to secure adequate housing.[47]

At the extreme, substantial numbers of poor individuals and families find themselves homeless. A 1987 Report prepared for the Canadian Council on Social Development put a conservative estimate of the number of persons who were homeless in Canada in 1986 at 130,000 to 250,000.[48] A snapshot survey in January 1987 of those applying to homeless shelters across Canada found that over half were unemployed, and the same number dependent on social assistance.[49] One formerly homeless woman described the severe problems caused by lack of secure housing in the following terms:[50]

> You do have to have a stable place ... You have to have some kind of housing where you can say, look, I can call this home ... because if you get bumped around all the time you're not going to have nothing, no job, no clothes, no security, no nothing. You have to have some place to live in order to get these things.

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as their principal source of income; see generally Blakeney, *supra* note 43 at 20-24.

47 M.A. McLaughlin, *Homelessness in Canada: The Report of the National Enquiry* (Ottawa: Canadian Council on Social Development, 1987); T. Bird, "Shelter Costs" (Spring 1990) 16 Canadian Social Trends 6 at 10. As a recent report of the Standing Committee on Aboriginal Affairs documents, aboriginals living on and off reserves face even greater problems of unsafe, overcrowded and unaffordable housing; Canada, House of Commons, Standing Committee on Aboriginal Affairs, *A Time for Action: Aboriginal and Northern Housing* (Ottawa: Standing Committee on Aboriginal Affairs, 1992) (Chair: L. Schneider); see also J. Bell, "The Crowded Arctic" (July/August 1990) 1 Arctic Circle 22.

48 McLaughlin, *ibid.* at 5; see also Minister's Advisory Committee on the International Year of Shelter for the Homeless, *Final Report: More Than Just a Roof: Action to End Homelessness in Ontario* (Toronto: Ontario Ministry of Housing, 1988) (Chair: J. Patterson).

49 McLaughlin, *ibid.*

50 L.D. Harman, *When a Hostel Becomes a Home — Experiences of Women* (Toronto: Garamond Press, 1989) at 84; see also S. Baxter, *Under the Viaduct: Homeless in Beautiful B.C.* (Vancouver: New Star Books, 1991); Morris & Heffren, *supra* note 1; E. Bouchard, *Les femmes itinérantes: une réalité méconnue* (Québec: Conseil du Statut de la Femme, février 1988).

Poverty also has a direct bearing on individual health.[51] In a brief presented to the Royal Commission on the Economic Union and Development Prospects for Canada, the Canadian Mental Health Association described the relationship between poverty and ill-health as follows:[52]

> Our association's study clearly demonstrates the deleterious effects on health of unemployment and poverty ... Clearly both unemployment and poverty result in a decreased ability to purchase goods and services necessary for the upkeep of physical health (for example, adequate housing, food, clothing, dental care and so on). Both place Canadians in a state of chronic stress — stress in turn, contributes to the onset of a number of diseases (for example, heart disease) and to behaviours that increase the likelihood of becoming ill (for example, substance abuse).

As a recent federal report confirmed:[53]

> [R]esearch in Canada and elsewhere shows clearly that there is a direct relationship between health status and income. The higher the income, the longer and healthier the life, despite the fact that medical treatment is available and used throughout the country, and even when smoking, nutrition and other factors are taken into account. In the aggregate, low socioeconomic status, not lack of health care, is the greatest correlate of poor health.

The link between poverty and poor health in children is especially well documented.[54] The mortality rate for children under 20 years of age in Canada is 56 percent higher for poor children than for children from higher income families, and the infant mortality rate is twice as high.[55] Children who are poor also have twice the rate of mental and physical disability,

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51 See, for example, Department of Public Health, *The Unequal Society: A Challenge to Public Health* (Toronto: City of Toronto, November 1985); *Evidence of the Sub-Committee on Poverty*, *supra* note 31 at 12; 13:5-22 (March 1991); K. Hardill, "Poverty and the Social Context of Health" (1992) 12:4 Canadian Women's Studies 86.

52 Canadian Mental Health Association, "Economic Policy and Well-Being" in D. Drache & D. Cameron, eds, *The Other Macdonald Report* (Toronto: James Lorimer & Company, 1985) 80 at 81.

53 Royal Commission on New Reproductive Technologies, *Proceed With Care: Final Report of the Royal Commission on New Reproductive Technologies*, vol. 1 (Ottawa: Minister of Government Services Canada, 1993) 74.

54 *Children in Poverty*, *supra* note 16 at 62.

55 *Ibid.* at 62-63.

attributable in part to their greater risk of low birth weight as a consequence of inadequate maternal diet and other poverty-related factors.[56]

Poverty has also been shown to have a negative impact on educational achievement, while at the same time education, or the lack thereof, has a significant influence on the risk of being poor.[57] According to 1990 statistics, 50 percent of unattached individuals living in poverty and the heads of 49 percent of families who are poor did not finish high school, while only 6 percent of poor families had a family head with a university degree.[58] As the Economic Council of Canada recently concluded: "Canadians with lower levels of basic education are substantially more prone to be poorer in their adult years than those who go to school longer."[59] In addition to the fact that those with less education have a higher risk of being poor, the Economic Council found that the educational achievement of children from poor families is substantially below average.[60] According to the 1991 Senate report on child poverty in Canada, high school drop out rates are also twice as high for children who are poor as for children from non-poor families.[61] The Senate Committee concluded that ill-health, lack of money for the necessities for school attendance, and difficulties in maintaining self-esteem when comparing

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56 *Ibid.*; see also *Evidence of the Sub-Committee on Poverty*, *supra* note 31 at 2:4-9 (21 February 1990).

57 *The New Face of Poverty*, *supra* note 24 at 21.

58 *Poverty Profile, 1980-1990*, *supra* note 16 at 36-37.

59 *The New Face of Poverty*, *supra* note 24 at 21; see also R. Langlois, *S'appauvrir dans un pays riche* (Montréal: Éditions Saint-Martin, 1990) at 25-26.

60 *The New Face of Poverty*, *ibid.* Not only are they less well educated, children of the poor are also more likely to be illiterate than other children. Like education itself, literacy has a direct bearing on income and employability, with those who are illiterate having an income level 44% lower than those who are literate, and much lower chances of being employed; C. Swan, "Why Millions of Canadians Can't Read This Article" (Summer 1990) 14:3 Perception 8 at 9-10; National Anti-Poverty Organization, *Literacy and Poverty — A View From the Inside* (Ottawa: National Anti-Poverty Organization, 1993); Canadian Press, "Poor Children Face Great Risk of Being Illiterate, Report Says" *The Globe and Mail* (27 January 1993) A8.

61 D.P. Ross & R. Shillington, "Child Poverty and Poor Educational Attainment: The Economic Costs and Implications for Society" in Appendix I, Senate, *Children in Poverty*, *supra* note 16, 51 at 62.

themselves to economically better-off fellow students were among the causes.[62] Economist David Ross puts the problem as follows:[63]

> It is not hard to understand why low income and dropping out are associated. Public education is not free, even though basic tuition may be. The expenses associated with sending children to school are difficult to meet in poor families. The costs may not be particularly onerous at the elementary school level, but they climb once a child reaches high school; for example, the added expense of school materials, clothes and extra-curricular athletic and social activities can strain poverty incomes. Furthermore, there is a temptation to seek employment to contribute to the family income when the compulsory age of schooling has been reached.

High drop-out rates and other socio-economic barriers preventing those who are poor from obtaining post-secondary education, trade, technical or professional training translate into marginal employment prospects — a guarantee of continuing poverty.[64] And, for low income women, the difficulties of securing post-secondary schooling or other forms of training leading to adequately paid employment are exacerbated by the lack of affordable and accessible child care.[65]

In addition to the actual material restrictions which it imposes on the lives of people who are poor, poverty has historically been, and continues to

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62 *Ibid.* at 62-63.

63 D. Ross, "Action Needed on Education for Indians" (Fall/Winter 1992) 15:4, 16:1 Perception 27 at 28. As Ross documents, these poverty-related problems are exacerbated for native Canadians. Drop out rates among registered Indians has been estimated at close to 70% and over 75% of Indians between the ages of 15 and 34 living on reserves have not finished high school; *ibid.*

64 See generally National Anti-Poverty Organization, *Employability and Employment Training* (Ottawa: National Anti-Poverty Organization, 1989); National Anti-Poverty Organization, *supra* note 60; Senate, *Children in Poverty*, *supra* note 16 at 68-69; Economic Council of Canada, *Sixth Annual Review* (Ottawa: Queen's Printer, 1969) at 113-115.

65 See generally Status of Women Canada, *Report of the Task Force on Child Care* (Ottawa: Supply and Services Canada, 1986) (Chair: K. Cooke); National Council of Welfare, *Child Care: A Better Alternative* (Ottawa: Minister of Supply and Services Canada, 1988); S. Torjman, *The Reality Gap: Closing the Gap Between Women's Needs and Available Programs and Services* (Ottawa: Canadian Advisory Council on the Status of Women, April 1988) at 13-15; Gunderson, Muszynski & Keck, *supra* note 24 at 28-29.

operate as, a socially debilitating source of stigma. Not only are the poor disadvantaged in their lack of access to food, housing, education, and other "goods, services and conditions of life which ... have come to be accepted as basic to a decent, minimum standard of living,"[66] they are held responsible for their own poverty and for their failure to extricate themselves from it. As John Kenneth Galbraith put it in *The Affluent Society*:[67]

> People are poverty-stricken when their income, even if adequate for survival, falls markedly behind that of the community. Then they cannot have what the larger community regards as the minimum necessary for decency; and they cannot wholly escape, therefore, the judgement of the larger community that they are indecent.

Early attitudes in Canada, like elsewhere, reflected the idea that poverty was the result not of structural economic factors but of individual personality traits and moral defects.[68] A 1912 Report of the Associated Charities of Winnipeg reflected the prevailing attitude towards poverty at the time:[69]

> If material assistance was all that was needed, if the families seeking it could in all cases be relied upon to use it in such a way that they would quickly become self-supporting the work of this department would be easy. Unfortunately, the large majority of applications for relief are caused by thriftlessness, mismanagement, unemployment due to incompetence, intemperance, immorality, desertion of the family and domestic quarrels. In such cases the mere giving of relief tends rather to induce pauperism than to reduce poverty.

The view that the poor are largely responsible for their own poverty still persists in many ways today.[70] As one social assistance recipient put it: "[the] message is: if you need financial help for necessities, you have failed. And

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66 Economic Council of Canada, *supra* note 2 at 104-105.

67 J.K. Galbraith, *The Affluent Society* (Boston: Houghton Mifflin, 1958) at 323-24.

68 D. Guest, *The Emergence of Social Security in Canada*, 2d ed. (Vancouver: University of British Columbia Press, 1985) at 15-16; J.J. Rice, "Politics of Income Security: Historical Developments and Limits to Future Change" in B. Doern, Research Coordinator, *The Politics of Economic Policy* (Toronto: University of Toronto Press, 1985) 221 at 223-224.

69 Cited in Guest, *ibid.* at 37-38.

70 See for example A.W. Djao, *Inequality and Social Policy: The Sociology of Welfare* (Toronto: Wiley & Sons Canada, 1983) at 167-80; in the American context see F. Block *et al.*, eds., *The Mean Season — The Attack on the Welfare State* (New York: Pantheon Books, 1987).

since you've flunked the big test, you can't be trusted and you don't really matter."[71]

Not surprisingly, these attitudes also pervade the Canadian legal system.[72] Lise Corbeil, a former director of the National Anti-Poverty Organization, describes the inherent bias and unresponsiveness of the legal system from the perspective of the poor:[73]

> Law schools do not train lawyers to serve the poor. Their curriculum is usually confined to one course in poverty law ... the remainder of the curriculum deals with law and the rich. Upon graduation, law students go to work in law offices which are physically and psychologically inaccessible to the poor ... Some lawyers will become judges and be charged with the responsibility of ruling on cases which involve the lives of the poor, without ever having lived in their circumstances or studied the implications of judicial decisions on [their] lives.

A recent Québec Superior Court judgment, *Gosselin* v. *Québec (Procureur Général)*[74] relating to the constitutional validity of a provincial "workfare" program gives considerable credit to these concerns. In his decision, Justice Reeves attributed poverty not to social or economic factors external to the individual but to factors of an "intrinsic" nature:[75]

> Selon certains, le remède [à la pauvreté] consisterait simplement à donner plus d'argent aux pauvres. Cette réponse se fonde sur la prémisse douteuse que l'état de pauvreté résulte de causes économiques fortuites et qu'en rétablissant l'équilibre économique du pauvre, celui-ci retrouvera son autonomie et cessera d'être exposé aux maladies associées à la pauvreté.

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71 B. French, "A Grinding Response to Poverty" *The Globe and Mail* (15 May 1992) A16.

72 See for example S. Turkington, "A Proposal to Amend the Ontario Human Rights Code: Recognizing Povertyism" (1993) 9 J.L. & Social Pol'y 134; A. Bartholomew & S. Boyd, "Toward a Political Economy of Law" in W. Clement & G. Williams, eds., *The New Canadian Political Economy* (Kingston/Montreal/London: McGill-Queen's University Press, 1989) 212; D. Schneiderman & C.F. Graydon, "An Appeal to Justice: Publicly Funded Appeals and *R.* v. *Robinson*; *R.* v. *Dolejs*" (1990) 28 Alta L. Rev. 873.

73 L. Corbeil, *The Impact of Poverty on Fairness in Judicial Proceedings* (Ottawa: National Anti-Poverty Organization, February, 1992) [unpublished]; see also National Anti-Poverty Organization, *supra* note 60 at 52-53.

74 [1992] R.J.Q. 1647 [hereinafter *Gosselin*].

75 *Ibid.* at 1676.

> La thèse est vraie pour les cas de pauvreté résultant de causes extrinsèques. Les études démontrent que la majorité des pauvres le sont pour des raisons intrinsèques. Il s'agit de personnes sous-scolarisées ou psychologiquement vulnérables, ou chez qui l'éthique du travail n'est guère favorisée.

In other words, Justice Reeves dismissed the idea that poverty is the product of structural economic factors, or that poverty and its ills can be remedied by providing better economic support. In his view, for a majority of the poor, poverty is the product of individual personality traits or shortcomings, such as lack of education, psychological vulnerability, or a poor work ethic. For such persons, Justice Reeves concludes, economic assistance alone will not ensure the achievement of the psychological, educational and moral autonomy which they lack, and without which they will never become fully independent members of society.[76]

Judicial prejudices around poverty are also evident in *Alcoholism Foundation of Manitoba* v. *Winnipeg*,[77] a 1990 Manitoba Court of Appeal decision involving a Winnipeg by-law imposing geographic restrictions on the location of group housing in the city. In his judgment for the Court, Justice Monin expressed considerable sympathy for municipal efforts to establish and enforce zoning regulations designed to protect middle class homeowners from the risk that the enjoyment or value of their properties would be diminished because of the proximity of low-income or multi-family housing. As Justice Monin expressed it:[78]

> Ratepayers building $150,000 or $200,000 single-family homes are entitled to expect that only similar homes will be built in their vicinity, and that the integrity of that particular zoned area of the community will not be interfered with or reduced by allowing homes having one-third the value to be built next to them or near them, or occupied by more than

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[76] As Justice Reeves expressed it, *ibid*, certain individuals will overcome poverty through individual strength of character: "l'être humain qui a développé les qualités de force, courage, persévérance et discipline surmonte et maîtrise généralement les obstacles éducatifs, psychiques et même physiques qui pourraient l'entraîner dans la pauvreté matérielle;" however "[p]our [la majorité des pauvres] ... l'assistance pécuniaire doit s'accompagner de programmes de rescolarisation, de suivi et d'appui permettant d'atteindre l'autonomie non seulement matérielle mais psychique, éducative et morale nécessaires à l'autonomie totale et permanente."

[77] (1990) 69 D.L.R. (4th) 697.

[78] *Ibid.* at 709.

> one family. That was and should still be an entirely legitimate concern of the city councillors.

Justice Monin's view that elected municipal officials are fully justified in promoting zoning and housing policies which discriminate against low income residents, in order to protect the property interests of middle and upper middle-class homeowners, is indicative of the bias against the poor which exists within the legal system.

Also telling is a back page commentary published in the national magazine *Canadian Lawyer*, in which lawyer Karen Selick addressed the issue of child poverty in Canada in the following terms:[79]

> When I read about the growing numbers of hungry three-year-olds, I can't help wondering what their parents were thinking of three years and nine months before. That's not a long time to plan ahead. If they knew they were poor when they were conceiving the baby, what made them expect to be not-poor after the baby was born? If they didn't care enough that they'd be raising their child in poverty, why should they expect the rest of us to come to the rescue?

After identifying foreseeable family breakdown, failure to use birth control, and costly smoking habits[80] as additional causes of individual and family poverty, Selick concluded: "... the truth is that many poor people earn their poverty."[81] As one low income single mother wrote in response to Selick's

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[79] K. Selick, "If the Poor Don't Care, Why Should We?" (September 1990) 14:6 Canadian Lawyer 60.

[80] Smoking habits were also cited by Justice Reeves in *Gosselin*, *supra* note 74 at 1676-1677, as an example of the improvidence of the poor:

> Les très défavorisés s'adonnent deux fois plus que les autres à l'usage du tabac. Or, parmi les maladies des "pauvres" se trouve une forte incidence de maladies respiratoires. Pourtant, la cigarette coûte cher et absorbe une portion relativement élevée du budget du "pauvre." Pourquoi le pauvre affecte-t-il une part importante de son maigre budget au tabac (et à l'alcool)? Il s'agit évidemment de drogues bénignes qui soulagent sa détresse psychologique. La conclusion s'impose: l'assistance pécuniaire doit s'accompagner d'éducation et d'encouragement à délaisser les habitudes coûteuses et nocives."

It is difficult to imagine that judicial statements of this nature would be tolerated in relation to any other group in Canadian society.

[81] Selick, *supra* note 79.

article, stereotypes about the poor and simplistic explanations of why people are poor — they keep having children, they smoke, they own dogs, they are lazy — are commonplace: "... poor people have to be three times as virtuous as the rest of society to be deemed acceptable as human beings. The standards are the highest for those with the least resources."[82]

For people who are poor, negative stereotypes and social stigma are a constant fact of life: in the popular media,[83] in their dealings with landlords, with financial institutions, with school officials, with stores and sales staff, with neighbours and strangers, with social welfare agencies, with other government officials, and with the legal system.[84] To quote from one brief to the 1970 Senate Committee on Poverty:[85]

> ... this involuntary exclusion [of the poor from the mainstream of society] arises, not from the characteristics of the poor themselves, but from the fact that in our society there is a pervasive discrimination against low income people — discrimination which, consciously or unconsciously, permeates the policies of most of our major institutions.

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82 French, *supra* note 71.

83 As Lindalee Tracey writes in her recent book *On the Edge: A Journey Into the Heart of Canada* (Vancouver/Toronto: Douglas & McIntyre, 1993) at 5:

> Poverty is defined by what it subtracts from human potential, and poor people by what they lack. There's slim recognition of their contribution and social achievements — as taxpayers, workers, good neighbours, story tellers, cultural guardians, consumers, parents and volunteers. It's their misery, pitifulness, victimization that titillate the public, confirming, perhaps, old assumptions about the defectiveness of the poor. This last year, editorials and headlines brought many of us to tears over the million Canadian children living in poverty. But surely if children are hungry, their parents are even hungrier. Where were the stories about them? Their absence insinuated parental neglect — as if they don't know how to cook or care for their children.

84 See generally J. Swanson, "Discrimination Against Low Income People: What's it Like?" (December 1992) 21 Action Line at 9; Baxter, *supra* note 3 and the testimony of the witnesses from End Legislated Poverty, *Evidence of the Sub-Committee on Poverty*, *supra* note 31 at 9:65-77 (5 February 1991); P. Fleming, "Poor-nography Rages On" (May 1993) V:6 Flawline 1; Funk-Unrau, *supra* note 32; Tracey, ibid., L. Carver, "The Man With the Yellow Eyes" (May 1993) 26 This Magazine 33.

85 Brief presented by the Vanier Institute of the Family to the Special Senate Committee on Poverty, cited in *Poverty in Canada: Report of the Special Senate Committee on Poverty* (Ottawa: Information Canada, 1971) at 38.

As the Economic Council of Canada explains, negative attitudes towards the poor are not only pervasive, but institutionalized:[86]

> [I]nstitutional rigidities and attitudes — in the education system, in industry, in labour unions, in governments ... have become embedded in policies and practices that tend to make the economy function in a way that is pervasively discriminatory against the poor.

Thus the difficulty for the poor of extricating themselves from their poverty results not from individual shortcomings or from random economic factors and circumstances, but rather from systemic barriers within Canadian society — barriers which not only reflect but are maintained through widespread prejudice and discrimination.

IV. The Political Significance of Poverty

It is hardly surprising, in view of the above, that poverty has a severe detrimental impact on the political efficacy of those who are poor. As Frank Michelman contends:[87]

> Without basic education — without the literacy, fluency and elementary understanding of politics and markets that are hard to obtain without it — what hope is there of effective participation in the last-resort political system? ... But if so, then what about life itself, health and vigour, presentable attire, or shelter not only from the elements but from the physical and psychological onslaughts of social debilitation? Are not these interests the universal, rock-bottom prerequisites of effective participation in democratic representation...?

The problem is a circular one: the political process is largely inaccessible to the poor, people who are poor have lower rates of political participation, and electoral politics are generally unresponsive to their needs and demands. In a 1990 brief submitted to the Royal Commission on Electoral Reform and Party Financing, the National Anti-Poverty Organization (N.A.P.O.) describes the many barriers which restrict the access and participation of the poor in the Canadian political process. In particular, N.A.P.O. points to a wide range of financial and class barriers which limit the ability of poor persons to run for

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86 Economic Council of Canada, *supra* note 64 at 112.

87 F.I.Michelman, "Welfare Rights in a Constitutional Democracy," (1979) Wash. U.L.Q. 659 at 677.

election, including lack of funds for electoral deposits and campaign expenses, the likelihood of not having a job that allows for time off for campaigning, and the inability to forego wages during a campaign. As a result, N.A.P.O. concludes:[88]

> [O]ur Members of Parliament are overwhelmingly representative of the privileged white, male non-disabled middle to upper class segment of our society. On the other hand ... lower income Canadians are barely visible in the elected and non-elected chambers of Parliament. Partly as a result, many lower income Canadians have relatively little faith in the ability or desire of our elected officials to represent their interests.

In addition to the near-impossibility of running for elected office, N.A.P.O. identifies other barriers to political participation by the poor, such as the exclusion of the homeless from enumeration under elections legislation,[89] exclusionary enumeration rules facing those living in temporary shelters,[90] and the lower likelihood of enumeration of the poor because of the reluctance of enumerators to enter low-income neighbourhoods and housing projects, among other factors.[91] Emphasis on print information, such as voting lists and about where and how to vote, create additional obstacles for those with limited literacy skills, as reflected in their below-average voting rates,[92] and the lower than average voter turn-out rates for poor people in general.[93]

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88 National Anti-Poverty Organization, *Poor People and the Federal Electoral System: Barriers to Participation* (Ottawa: National Anti-Poverty Organization, May 1990) at 3; on the unrepresentative and élite composition and attitudes of MPs, particularly in relation to redistributive welfare policies, see C.E.S. Franks, *The Parliament of Canada* (Toronto: University of Toronto Press, 1987) at 68-71.

89 National Anti-Poverty Organization, *ibid.* at 7-9.

90 *Ibid.* at 6-7.

91 *Ibid.* at 9-11; see also Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy — What Canadians Told Us*, volume 4, (Ottawa: Ministry of Supply and Services Canada, 1991) at 29-32.

92 While 15 percent of the literate population in a 1987 Southam survey reported that they rarely or never voted in federal elections, this figure jumped to 23 percent for those with only basic literacy skills; National Anti-Poverty Organization, *ibid.* at 15.

93 While 86 percent of those with annual incomes over $40,000 voted in the 1984 election, the voter turn-out rate was 75% for those earning under $10,000, and 70% for the unemployed; J.H. Pammett, "Voting Turnout in Canada," in H. Bakvis, ed., *Voter Turnout in Canada*, Volume 15 of the Research Studies for the Royal Commission on Electoral Reform and Party Financing (Toronto: Dundurn Press, 1991) 33 at 56-7; see also End Legislated Poverty, *Brief to the Royal Commission*

The view that the Canadian political process is inaccessible and unresponsive to the poor is well supported.[94] It is conceded that Canadian public policy-making, at both the federal and provincial levels, is a closed, elite-dominated process.[95] This is a product of both parliamentary government and federalism. Modern parliamentary government concentrates power in the executive branch of government, to which cohesive, well-organized producer interests have been the most successful in gaining access.[96] As one observer contends, policy making in Canada, "has remained largely in the hands of a circumscribed socio-economic policy community composed of senior government officials, leading politicians (mainly ministers), and the leaders of the major economic interests groups."[97]

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on Electoral Reform (Vancouver: End Legislated Poverty, March 1990).

94 See generally M. Jackman, "The Protection of Welfare Rights Under the Charter" (1988) 20 Ottawa L. Rev. 257 at 279-283; R.J. VanLoon & M.S. Whittington, *The Canadian Political System — Environment, Structure and Process* (Toronto: McGraw-Hill Ryerson, 1987) at 154; W. Mishler, *Political Participation in Canada: Prospects for Democratic Citizenship* (Toronto: MacMillan, 1979) at 88-95; A. Kornberg, W. Mishler & H.D. Clarke, *Representative Democracy in the Canadian Provinces* (Scarborough: Prentice-Hall Canada, 1982) at 82-4, 104-5; W.L. White, R.H. Wagenberg & R.C. Nelson, *Introduction to Canadian Politics and Government*, 4th ed. (Toronto: Holt, Rinehard and Winston of Canada, 1985) at 93.

95 See for example K.G. Banting, *The Welfare State and Canadian Federalism*, 2d ed. (Kingston: McGill-Queen's University Press, 1987) at 109; S. Brooks, *Canadian Democracy: An Introduction* (Toronto: McClelland and Stewart, 1993) at 229-30; A.P. Pross, "Pressure Groups: Adaptive Instruments of Political Communication" in A.P. Pross, ed., *Pressure Group Behaviour in Canadian Politics* (Toronto: McGraw-Hill Ryerson, 1975) 1 at 18; R. Presthus, *Elite Accommodation in Canadian Politics* (Toronto: Macmillan, 1973); and see generally L. Panitch, ed., *The Canadian State: Political Economy and Political Power* (Toronto: University of Toronto Press, 1977).

96 D.V. Smiley, *Canada in Question: Federalism in the Eighties*, 3d ed. (Toronto: McGraw-Hill Ryerson, 1980) at 91-92; G.B. Doern & R.W. Phidd, *Canadian Public Policy: Ideas, Structure, Process* (Toronto: Methuen, 1983) at 30-31, 80; F. Thompson & W.T. Stanbury, "The Political Economy of Interest Groups in the Legislative Process in Canada," in R. Schultz, O.M. Kruhlak & J.C. Terry, *The Canadian Political Process*, 3d ed. (Toronto: Holt, Rinehart and Winston, 1979) 224 at 234-38.

97 H.G. Thorburn, *Interest Groups in the Canadian Political System* (Toronto: University of Toronto Press, 1985) at 121; in relation to social welfare policy making in particular, see Rice, *supra* note 68 at 241. The disproportionate ability of economically powerful interest groups to influence legislation and public policy is

Federalism, the other major Canadian political institution, generates an ongoing requirement of inter-governmental bargaining, which also occurs at the executive level.[98] Historically, federalism has also focused attention on inter-regional concerns, rather than on class-based issues. As Donald Smiley explains:[99]

> Federalism is ... an important influence in perpetuating inequalities among Canadians ... [o]ne of the results of the continuing conflicts between Ottawa and the provinces is to displace other conflicts among Canadians, particularly those between the relatively advantaged and those who are less so. So long as the major cleavages are between governments, inequalities *within* the provinces are buttressed.

In contrast to the Canadian business community, the poor, although numerically significant as a group, are both inadequately organized and lacking in resources, which greatly limits the likelihood and effectiveness of collective political action.[100] As one commentator describes it:[101]

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illustrated by the recent federal government decision to extend the capital gains exemption on family trusts, at a possible cost of $1 billion in lost tax revenue, after extensive lobbying by the Canadian Association of Family Enterprises. The Association, "which counts some of the wealthiest families in Canada among its members," supplied the federal Finance Department with information from a survey of 120 member families, showing an average tax bill of $9.9 million per family trust if the exemption were not extended; see Canadian Press, "Tax Break May Have Cost $1-Billion" *The Globe and Mail* (31 May 1994) A5.

98 See Smiley, *supra* note 96 at 91-118; L. Panitch, "The Role and Nature of the Canadian State," in Panitch, ed., *The Canadian State*, *supra* note 95 at 11.

99 D.V. Smiley, "An Outsider's Observations of Federal-Provincial Relations Among Consenting Adults" in R. Simeon, ed., *Confrontation and Collaboration — Intergovernmental Relations in Canada Today* (Toronto: Institute of Public Administration, 1979) 105 at 108; see also R. Simeon, "Regionalism and Canadian Political Institutions" in J.P. Meekison, ed., *Canadian Federalism: Myth or Reality*, 3d ed. (Toronto: Methuen, 1977) 292 at 302; G. Stevenson, "Federalism and the Political Economy of the Canadian State" in Panitch, ed., *The Canadian State*, *supra* note 95 at 71; Task Force on Canadian Unity, *A Future Together* (Ottawa: Minister of Supply and Services Canada, 1979) at 109; D.P.J. Hum, *Federalism and the Poor: A Review of the Canada Assistance Plan* (Toronto: Ontario Economic Council, 1983) at 6-10.

100 For a discussion of the major determinants of interest group success, see Van Loon & Whittington, *supra* note 94 at 425-27; W. Mishler, "Political Participation and Democracy" in M.S. Whittington & G. Williams, eds., *Canadian Politics in the 1980s* (Toronto: Methuen, 1981) 126 at 138-9.

> Every study ever done on this subject has shown that the poor do not campaign, petition officials, or engage in cooperative activity as much as other groups. Alienation and defeatism, often rational, discourage collective action. Many poor people lack the experience and the resources to organize. They have been most responsive to activity that promises an immediate material benefit. While frequently successful, such protest is not self-sustaining, especially because organizations cannot restrict rewards to those willing to join the protest. Moreover protest activity is difficult to channel into larger political objectives.

The lack of effective interest group activity by the poor further reduces their ability to compete for the attention of legislators and other policy makers.[102] The cumulative effect of these factors is, as N.A.P.O. suggests, that the interests of the poor have largely been ignored in the Canadian political process.[103] As one anti-poverty group commented to the Royal Commission on Electoral Reform — noting the federal government's failure to include this major deficiency in the Canadian electoral system as a matter for Commission inquiry:[104]

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101 C. Leman, *The Collapse of Welfare Reform: Political Institutions, Policy, and the Poor in Canada and the United States* (Cambridge, Mass.: The MIT Press, 1980) at 50-51.

102 The difficulty of attracting the interest of politicians on issues of concern to the poor is illustrated by the outcome of a public meeting and news conference organized by one Vancouver anti-poverty organization to discuss the results of a major research project undertaken by the group:

> Of elected politicians invited, only Margaret Lord, an NDP MLA, appeared and spoke to the audience after the panel ... Those invited included the entire Vancouver City Council, all four Lower Mainland federal Conservative Cabinet Ministers, selected MPs from the Liberal and NDP parties, a representative from the provincial Social Credit Party, provincial Liberal Party MLAs as advised by the party office, plus the Leader of the Opposition, and of course, the Premier and provincial cabinet Ministers and other NDP MLAs.

See Hobbs *et al.*, *supra* note 34 at 25.

103 National Anti-Poverty Organization, *supra* note 88 at 3.

104 End Legislated Poverty, *Brief to the Royal Commission on Electoral Reform*, *supra* note 93; see also the comments of Brian Curley, member of ALERT P.E.I., in Charter Committee on Poverty Issues, *The Charter of Rights and the Fight Against Poverty: Are We Winning — Proceedings of the 1993 Conference and General Meeting* (Ottawa: Charter Committee on Poverty Issues, 1993) at 15; M. Hartling, "Commentary," in H.V. Kroeker, ed., *Sovereign People or Sovereign Governments* (Montreal: Institute for Research on Public Policy, 1981) at 91-94.

> You probably don't see this problem as within your mandate to deal with, but one of the main reasons that people with low incomes don't vote, is that they don't have any experience that voting helps them out or is relevant to their lives ... When I was trying to register a person standing in a food bank line up to vote, he asked me: "Why should I reinforce a system that's oppressing me?" I tried to convince him to register but he refused because all of his experiences with politicians were either negative or irrelevant.

It is clear from the above discussion that poverty is a source of serious material, social and political disadvantage in Canadian society. The next section of the paper will address the issue of whether such disadvantage falls within the remedial reach of the *Charter*'s equality rights guarantee.

V. Poverty and the Right to Equality Under Section 15 of the *Charter*

The right to equality is set out under section 15 of the *Charter* in the following terms:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 15 identifies a number of groups which are automatically entitled to bring forward equality claims and, at the same time, leaves open the possibility that other analogous groups will be able to invoke the section as a barrier to discrimination against them. In its decision in *Andrews* v. *Law Society of British Columbia*,[105] the Supreme Court of Canada considered both the meaning of discrimination and the criteria for determining whether a group, while not expressly enumerated under section 15, is nevertheless protected. In his judgment in the case, Justice McIntyre described the object of section 15 as "the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."[106] Justice McIntyre then defined discrimination within the meaning of section 15 as:[107]

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[105] *Supra* note 6 [hereinafter *Andrews*].
[106] *Ibid.* at 171.
[107] *Ibid.* at 174.

> ... a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

Justice McIntyre went on to suggest that distinctions based on characteristics attributed to an individual solely on the basis of his or her association with a group, will almost always be discriminatory, while those related to an individual's personal merits and capacities will rarely be so.[108]

In her concurring judgment in the *Andrews* case, Justice Wilson endorsed Justice McIntyre's general interpretation and application of section 15, and expanded on his allusion to "discrete and insular minorities" as the ones section 15 was intended to protect.[109] The concept of "discrete and insular minorities" was put forward first by the United States Supreme Court in its 1938 decision in *United States* v. *Carolene Products*,[110] involving the equal protection clause under the U.S. Constitution.[111] As Justice Stone expressed it in his famous footnote in the case, the Fourteenth Amendment renders suspect legislation which is tainted by "prejudice against discrete and insular minorities" — prejudice which is likely to "curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[112] The concept of discrete and insular minorities was expanded upon by John Hart Ely in his 1980 book *Democracy and Distrust*.[113] As Ely described it, this

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[108] *Ibid.* at 174-5. On the basis of this reasoning, Justice McIntyre found that the citizenship requirements set out in the British Columbia *Barristers and Solicitors Act* violated s.15, since they bar non-citizens as a group from employment solely on the basis of their citizenship status, without regard to their individual educational, professional or other personal qualifications and merits; *ibid.* at 183.

[109] *Ibid.*

[110] 304 U.S. 144 (1938).

[111] The Fourteenth Amendment provides that: "... No state shall ... deny to any person within its jurisdiction the equal protection of the laws;" see G. Gunther, *Constitutional Law*, 11th ed. (Mineola: Foundation Press, 1985) A10.

[112] *United States* v. *Carolene Products*, *supra* note 110 at 152-53, n. 4; For a discussion of this aspect of American equal protection law see L.H. Tribe, *American Constitutional Law*, 2d ed. (Mineola: The Foundation Press, 1988) at 1436 ff.

[113] J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980).

approach to equal protection review takes as its starting point that certain groups in society are particularly vulnerable to legislative and other forms of government sanctioned discrimination, because of invidious stereotypes, historic and continuing prejudice, and exclusion from the political process itself.[114] On that basis, the key to understanding whether a court should intervene to invalidate a law or government policy on equal protection grounds is the extent to which the group which is burdened by that policy has had an equal opportunity to participate in the political process through which it was elaborated. An important parallel concern is the degree to which a given law or policy reflects, reinforces, or facilitates systemic bias against that ill or unrepresented group in the political process.[115] In a classic application of this theory in the welfare context, Frank Michelman explains the relationship between these two concerns:[116]

> Maldistribution of formal political power obviously removes or weakens a basic institutional safeguard against systematic maldistribution of status and the resources that support it. Conversely, and perhaps more importantly, inequalities of resources and statuses, especially insofar as visibly correlated with salient group identification, almost certainly constitute a fundamental condition and cause of systematic bias in the functioning of majoritarian political institutions.

Applying the "discrete and insular minority" based approach to the case of non-citizens at issue in *Andrews*, Justice Wilson pointed out that they are a group "lacking in political powers and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated."[117] Citing Ely, she characterized non-citizens as among "those groups in society to whose needs and wishes elected officials have no apparent interest in attending;"[118] and in the words of John Stuart Mill, as an obvious

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[114] *Ibid.* at 145-70. For an application of Ely's approach in the Canadian context, see P. Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell/Methuen, 1987) at 127-32.

[115] Ely, *ibid.* at 101-04.

[116] Michelman, *supra* note 87 at 675. For a review of equal protection case law in the poverty area see also F.I. Michelman, "The Supreme Court, 1968 Term — Foreword: On Protecting the Poor Through the Fourteenth Amendment" (1969) 83 Harv. L. Rev. 7; Tribe, *supra* note 112 at 1625-72.

[117] *Andrews*, *supra* note 6 at 152.

[118] *Ibid.*; citing Ely, *supra* note 113 at 151.

example of a group whose interests are "in the absence of its natural defenders ... always in danger of being overlooked ..."[119]

This approach to section 15 review, which focuses on the actual circumstances of the group at issue within the broader socio-political context, is necessarily a highly contextualized one. Thus, Justice Wilson emphasized in *Andrews*, in deciding whether a particular group is indeed analogous to those enjoying explicit protection under section 15, it is not simply the law or legislative action subject to challenge which must be examined, but "the place of the group in the entire social, political and legal fabric of our society."[120] Justice Wilson reiterated this point in her judgment for the Court in *R.* v. *Turpin*.[121] There, she found that persons living outside the province of Alberta, who could not elect to be tried by judge alone, were not a disadvantaged group within the meaning of section 15, even though persons living in Alberta were eligible for such trials. A search for "indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political and social prejudice" would, she argued, be fruitless in such a case.[122] Nor, she argued, would such a finding of discrimination "advance the purposes of section 15 in remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society."[123]

The Supreme Court's characterization of the objectives of section 15, as well as the Court's approach to the task of identifying whether a group is in an analogous position to those expressly enumerated, are of obvious relevance for the poor. Poverty is one of the greatest hallmarks of disadvantage in our society. As such it is a trait which, as suggested at the outset of the paper, is shared by many of the groups expressly enumerated under section 15. However, notwithstanding the frequent intersection of poverty and other forms of disadvantage explicitly recognized under section 15, including poverty and gender, poverty and disability, and poverty and race, among others, the poor also comprise a discrete and identifiable group that is subject to its own

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119 *Ibid*; citing J.S. Mill, *On Liberty and Considerations on Representative Government* (Oxford: B. Blackwell, 1946).

120 *Ibid.*

121 *Supra* note 7 [hereinafter *Turpin*].

122 *Ibid.* at 1333.

123 *Ibid.*

particular and distinct forms of discrimination and disadvantage. As discussed at length in the first part of the paper, poverty entails more than economic hardship, although the negative impact of poverty at a material level is profound. The poor also are victims of distinctive and readily identifiable forms of "stereotyping, historical disadvantage [and] vulnerability to social and political prejudice" — the indicia of discrimination identified by Justice Wilson in the *Turpin* case.[124]

As the earlier discussion makes clear, for the poor and the children of the poor, poverty generally means inadequate diet, substandard housing, reduced health, lower levels of education, poor employment and economic prospects, prejudice, and social stigma. As documented above, social and economic marginalization, in turn, translates into political invisibility and exclusion. Those who are poor are effectively barred from running for or achieving political office. Their access to voting itself is attenuated. Lack of social and economic resources greatly reduces poor peoples' ability to engage in effective interest group activity, at both the legislative and policy levels. Because the poor have unequal, or no real, access to the political process through which the laws and policies affecting them are elaborated, such laws and policies are, as Mill, Ely, Michelman and others predict, likely to reflect, reinforce and facilitate continuing and systemic bias against them.

In summary, the structural barriers to class-based politics created by executive government and federalism, the absence of direct representation of the poor in the legislatures, their corresponding lack of direct electoral or indirect interest group influence, together promote the political exclusion of the poor which is the central preoccupation of the discrete and insular minority based approach to equal protection review endorsed by the Supreme Court in the *Andrews* and *Turpin* cases. Above all others, the poor are, to adopt the words of Justice Wilson, a group "lacking in political powers and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated."[125] In light of the social and economic stigma and marginalization which they experience individually and as a group, in their effective exclusion from political power, and from full participation

[124] *Ibid.*

[125] *Andrews*, *supra* note 6 at 152.

in social, economic and political life, the poor clearly warrant protection under section 15 of the *Charter*.

VI. Poverty-Related Case Law Under Section 15

As yet, no claim involving poverty as a ground of discrimination under section 15 has come before the Supreme Court. Nor has this issue been explored in any depth at the lower court level.[126] In the *Gosselin* case, referred to earlier, Justice Reeves' reflections on the nature and causes of poverty as essentially the product of intrinsic individual factors led him to conclude that "[l]a pauvreté n'est pas une caractéristique discriminatoire conférant un droit à l'égalité."[127] In his view, the state could not be held responsible for poverty, nor was it under any obligation to suppress it or to restore economic equality pursuant to section 15.[128] In the recent Tax Court of Canada decision in *Schaff* v. *The Queen*,[129] a low income custodial mother challenged the child maintenance provisions of the federal *Income Tax Act*, which required that child maintenance be included in the computation of the mother's income.[130] Justice Rip came to the opposite conclusion on the issue of whether poverty constitutes a prohibited ground of discrimination under section 15, but with little discussion. Speaking in general terms, Justice Rip suggested that: "the larger context within which this appeal should be considered is the social, political and legal disadvantage suffered by poor, divorced women and the growing trend in the feminization of poverty."[131] With regard to poverty in particular, Justice Rip found that it was a personal characteristic which could form the basis of a claim of discrimination under the *Charter*, although he concluded that the *Income Tax Act* did not discriminate against the plaintiff on that basis.[132]

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126 See generally, M. Jackman, "Poor Rights: Using the *Charter* to Support Social Welfare Claims" (1993) 19 Queen's L.J. 65.

127 *Gosselin*, *supra* note 74 at 1675.

128 *Ibid.* at 1676.

129 (1993) 18 C.R.R. (2d) 143.

130 S.C. 1970-71-72, c. 63, as amended.

131 *Supra* note 129 at 158.

132 *Ibid.*

Several lower court cases involving grounds of discrimination closely related to poverty have also been argued. Notwithstanding his obvious sympathy for the municipality's zoning efforts in *Alcoholism Foundation of Manitoba* v. *Winnipeg*,[133] Justice Monin came to the reluctant conclusion that a by-law targeting housing for a number of low income groups, including the aged, persons with disabilities, inmates on parole, and persons recovering from drug and alcohol addictions, did violate section 15. In accordance with the Supreme Court's reasoning in *Andrews*, Justice Monin found that potential residents of the various group homes subject to zoning restrictions were members of enumerated or analogous groups under section 15, and that the requirement that they obtain municipal permission to live together as a group or "family" discriminated against them.[134]

In its 1991 decision in *Federated Anti-Poverty Groups* v. *British Columbia (A.G.)*,[135] the British Columbia Supreme Court dismissed a motion to strike out the plaintiffs' claim that provincial requirements forcing poor sole support mothers to transfer spousal and child maintenance rights to the Crown as a condition of receipt of social assistance violated the *Charter*. With respect to the argument that the legislation discriminated on the basis of social and economic condition and, in particular, on the basis of receipt of social assistance, Justice Parrett stated that:[136]

> [I]t is clear that persons receiving income assistance constitute a discrete and insular minority within the meaning of section 15. It may be reasonably inferred that because recipients of public assistance generally lack substantial political influence, they comprise "those groups in society to whose needs and wishes elected officials have no apparent interest in attending."

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133 *Supra* note 77.

134 *Ibid.* at 711.

135 (1991) 70 B.C.L.R. (2d) 325.

136 *Ibid.* at 344.

Given this conclusion, and in light of his view that the plaintiffs also had a credible section 7 claim,[137] Justice Parrett decided that the case should be allowed to proceed to trial.[138]

In its 1993 decision in *Dartmouth/Halifax County Regional Housing Authority* v. *Sparks*[139] the Nova Scotia Court of Appeal struck down two sections of the Nova Scotia *Residential Tenancies Act*[140] which excluded subsidized tenants from the statutory right to three months' notice of eviction, and to security of tenure after five years' residence in a rental property, on the grounds that these provisions violated section 15. The Court found that the plaintiff, a black sole support mother who had been given 30 days' notice to vacate the apartment she and her family had occupied for over ten years, had been treated differently from non-subsidized tenants because of her status as a public housing tenant. In his decision for the Court, Justice Hallett identified poverty as a characteristic common to all those living in public housing:[141]

> Low income, in most cases verging on or below poverty, is undeniably a characteristic shared by all residents of public housing; the principal criteria of eligibility for public housing are to have a low income and have a need for better housing.

Justice Hallett also discussed poverty as a characteristic of particular sub-groups of public housing tenants, including sole support mothers such as the plaintiff:[142]

> Single mothers are now known to be the group in society most likely to experience poverty in the extreme. It is by virtue of being a single mother that this poverty is likely to affect the members of this group. This is no less a personal characteristic of such individuals than non-citizenship was in *Andrews*.

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137 *Ibid.* at 342.

138 *Ibid.* at 359, 361. The province of British Columbia subsequently amended the legislation to make the transfer of maintenance rights to the Crown voluntary rather than automatic; see the *Guaranteed Available Income for Need Act*, R.S.B.C. 1979, c. 158 as am. *Guaranteed Available Income for Need Amendment Act, 1992*, S.B.C. 1992, c. 41.

139 (1993) 101 D.L.R. (4th) 224 [hereinafter *Sparks*].

140 R.S.N.S. 1989, c. 401, ss. 10(8)(d), 25(2).

141 *Sparks*, *supra* note 139 at 233.

142 *Ibid.* at 233-234.

In deciding that the relevant sections of the *Act* were invalid under section 15, Justice Hallett also recognized that discrimination is often the combined effect of multiple factors, including poverty. He stated in this regard:[143]

> As a general proposition, persons who qualify for public housing are the economically disadvantaged and are so disadvantaged because of their age and correspondingly low incomes (seniors) or families with low incomes, a majority of whom are disadvantaged because they are single female parents on social assistance, many of whom are black. The public housing tenants group as a whole is historically disadvantaged as a result of the combined effect of several personal characteristics listed in section 15(1).

The decision in *Sparks* is especially welcome because of the flexible and contextual approach which the Court of Appeal took to the issues raised by the case. As suggested earlier, it is only to be expected that poverty, as one of the clearest indices of disadvantage in Canadian society, should be shared by members of many other enumerated or analogous groups under section 15. Instead of insisting that the plaintiff demonstrate that the discrimination which she experienced was the exclusive product of her status as a person of colour, as a woman, as a sole support mother, as a social assistance recipient, as a subsidized tenant, or as a poor person, the Court looked at the impact of these characteristics, and the disadvantaging effect of the legislative provisions in question, in a global and cumulative way — the way in which Irma Sparks herself experienced them.

As the *Sparks* case illustrates, it is important for the courts to take a broad approach to these claims, so that they recognize and address discrimination based not only on poverty *per se*, but on grounds closely related to poverty, such as receipt of social assistance, under-employment, or unemployment,

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[143] *Ibid.* at 234. See also *R.* v. *Rehberg (J.)* (1993) 127 N.S.R. (2d) 331 at 351-52, where the Nova Scotia Supreme Court stayed a fraud charge against a 39-year old single mother for falsely receiving family benefits on the grounds that the "man-in-the-house" rule upon which the accusation was based violated the *Charter*. In his decision, Justice Kelly found that, like the plaintiff in *Sparks*, the accused was a member of a group — single mothers on family benefits — "likely to experience poverty in the extreme"; that, along with sex, poverty was a personal characteristic of the group; and that poverty was an analogous ground of discrimination under s.15. On that basis, Justice Kelly concluded that, by imposing a restriction on single mothers not imposed on other classes of recipients, the regulation violated the accused's right to equal benefit of the law under s.15.

among others. As the Nova Scotia Court of Appeal pointed out with regard to public housing tenants, poverty is, in many cases, an actual pre-condition for the plaintiff's membership in the analogous group at issue. Conversely, it is imperative that the courts not compel plaintiffs to attempt to separate out the disadvantage which they suffer on intersecting grounds, such as on the basis of race, gender, disability, or poverty, in order to succeed in their section 15 claim.[144] The fact that poverty intersects with other grounds of discrimination should not be seen to weaken the argument that it ought also to be recognized as an independent ground. At the same time, recognizing poverty as a distinct ground of discrimination ought not to undermine poverty-related claims from equality seeking groups whose members are disproportionately poor.

In contrast to the Court's approach in the *Sparks* case, comments made by Justice Hugessen in the Federal Court of Appeal's recent decision in *Thibaudeau* v. *The Queen*[145] raise the disturbing prospect that recognition of poverty as an analogous ground of discrimination under section 15 could be used to undermine the claims of women and other disadvantaged groups seeking to address poverty issues. Justice Hugessen states in this regard:[146]

> [I]t is a shameful truth that far more women in Canada suffer from poverty than men. Legislation which discriminated against the poor would therefore adversely affect more women than men. It could not be said, however, to discriminate on the grounds of sex unless it also drew a distinction against poor women which did not apply to poor men or unless it created a different effect on women than on men. Otherwise the outcome of a section 15 attack on such legislation would turn on whether poverty was a ground analogous to those enumerated.

This suggestion that legislation which adversely affects the poor cannot also be challenged by poor women on sex equality grounds unless they suffer some

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144 For an in-depth discussion of the problems which anti-discrimination law creates in forcing plaintiffs to fit themselves into narrowly defined categories, see N. Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19 Queen's L.J. 179; N. Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) 6 C.J.W.L. 25; Turkington, *supra* note 72; M. Eaton, "Patently Confused: Complex Inequality and *Canada* v. *Mossop*" (1994) 1:2 Rev. Const. Studies 203.

145 [1994] F.C.J. No. 577 (QL).

146 *Ibid.* at 11.

distinct gender-based harm, is fundamentally at odds with both U.S. and Canadian Supreme Court jurisprudence in the area of adverse effect discrimination.[147] As Bruce Porter argues:[148]

> Hugessen's comments in *Thibaudeau* would seem to undermine the concept of disproportionate impact which has been a cornerstone of adverse effect analysis in Canada since *O'Malley*. We can only assume that when the Supreme Court has the occasion to review the issue, it will recognize that discrimination on the basis of poverty, like discrimination because of pregnancy or because of caring for children or sexual harassment, disproportionately affects enumerated equality seeking groups even when it is recognized as a ground of discrimination in its own right.

In short, the courts must be careful to ensure that the most vulnerable members of Canadian society — those who are subject to multiple forms of discrimination, including on the basis of poverty, are not disentitled to remedial action because of the complex and intersecting nature of their claims. Rather, the courts must make particular efforts to understand discrimination as the plaintiffs actually experience it — this, in order to avoid what Nitya Iyer has characterized as the risk of achieving legal equality while social inequality is preserved.[149]

VII. The Poor as a Protected Group Under Canadian Human Rights Law

Federal and provincial human rights law provides an important example of an area in which judicial review based on recognition of poverty as a non-enumerated ground under section 15 of the *Charter* can have a direct and positive impact on the day-to-day lives of poor Canadians. Like the *Charter*, federal, provincial and territorial human rights codes prohibit discrimination on the basis of race, colour, national or ethnic origin, religion, age, disability

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147 See for example *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) (U.S.S.C.); *Canadian National Railway Co.* v. *Canada (Canadian Human Rights Commission) (Action Travail des Femmes)* [1987] 1 S.C.R. 1114; and see generally B. Vizkelety, *Proving Discrimination in Canada* (Toronto: Carswell, 1987).

148 B. Porter, "Case Comment: *Thibaudeau* v. *R.*" (unpublished manuscript on file with author); see also E.B. Zweibel, "*Thibaudeau* v. *The Queen*: Constitutional Challenge to the Taxation of Child Support Payments" (1994) 4 N.J.C.L. (forthcoming).

149 Iyer, *supra* note 144 at 207.

and sex, among other grounds.[150] The prohibitions set out in the federal and provincial codes generally extend to discrimination in the provision of services, goods, and facilities;[151] discrimination in accommodation and employment; and discriminatory publications. Unlike the *Charter*, the codes apply to non-governmental actors as well as to the actions of governments. As is the case with the *Charter*, however, the poor are not explicitly recognized as a protected group under any Canadian human rights code.[152]

The province of Québec comes closest to recognizing poverty as a proscribed ground of discrimination in providing, under section 10 of the Québec *Charter of Rights and Freedoms*, that: "Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on ... social condition."[153] The Québec Human Rights Commission guidelines for determining whether impermissible discrimination on the basis of social condition has occurred point to an individual's occupation, income, and education level; his or her social origins, in the sense of the occupation, income and education levels of his or her parents or ancestors; and his or her position in society, as relevant factors.[154] The Québec guidelines also suggests that, in light of generalized societal attitudes towards them, social assistance recipients may automatically rely on section 10 of the *Charter* to complain of discrimination which they experience because of that status.[155]

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150 See generally W.S. Tarnopolsky, *Discrimination and the Law*, 2d ed., revised by W.F. Pentney (Don Mills: De Boo, 1985).

151 For a discussion of the specific issue whether provincial social assistance programs can be characterized as "services offered to the public" see D. Greschner, "Why *Chambers* is Wrong: A Purposive Interpretation of 'Offered to the Public'" (1988) 52 Sask. L.Rev. 161.

152 See "A Special Advocate Report: Bias Against People on Welfare — Commissions' Record Uneven, Survey Reveals" (October 1986) Can. H.R. Advoc. 7; C. Pakkala, "Poverty as a Ground of Discrimination" (unpublished directed research project submitted to Professor Bill Black, Faculty of Law, University of British Columbia, April 1994, on file with author).

153 R.S.Q. 1977, c. C-12, as amended.

154 Commission des droits de la personne du Québec, "La condition sociale, lignes directrices," adopté le 18 décembre 1985, COM-256-18, 120-8.

155 *Ibid.* For commentary on s.10 of the Québec *Charter*, see H. Brun & A. Binette, "L'interprétation judiciaire de la condition sociale, motif de discrimination prohibé par la Charte des droits du Québec" (1981) 22 C. de D. 681; A. Collard, "La

More limited protection from discrimination based on characteristics which may be related to poverty is found under Newfoundland, Nova Scotia, Manitoba and Ontario human rights law. Section 7(1) of the Newfoundland *Human Rights Code* provides that:[156]

> No person shall deny to a person or class of persons admission to or enjoyment of the accommodation, services or facilities available in a place to which the public is customarily admitted by reason only of the ... social origin ... of that person or class of persons.

Section 5(1)(t) of the Nova Scotia *Human Rights Act*[157] prohibits discrimination on the basis of "source of income," as does section 9(2)(j) of the Manitoba *Human Rights Code*.[158] Section 2(1) of the Ontario *Human Rights Code*[159] provides protection from discrimination based on "receipt of public assistance," but only in relation to accommodation.[160]

As described in the first part of the paper, the poor experience direct and systemic discrimination in most areas covered by federal, provincial and territorial human rights law. Like many of the groups which are expressly protected under human rights legislation, people who are poor face discrimination in employment, in the provision of goods and services, and in accommodation. In the area of services, banking provides one example of the type and impact of discrimination against the poor. As one welfare advocacy group explains:[161]

> Most people on welfare are refused access to banks to cash welfare cheques because they don't have means to open a bank account or identification such as a driver's license or major credit card, required by the bank ... As a result, welfare recipients are forced to deal with third parties, such as cheque cashing businesses, landlords, stores, unscrupulous

condition sociale: est-ce vraiment un motif de discrimination" (1987) 47 R. du B. 188. For a review of recent Commission decisions see Pakkala, *supra* note 152.

156 S.N. 1988, c. 62.

157 S.N.S. 1991, c.12 (An Act to Amend Chapter 214 of the Revised Statutes, 1989, the Human Rights Act).

158 C.C.S.M., c. H175.

159 R.S.O. 1990, c. H19.

160 For a review of the Ontario *Code* provisions, see Turkington, *supra* note 72.

161 Coalition for the Cashing of Cheques, "Access to banks denied to persons on welfare" (October 1986) 2:9 Can. H. R. Advoc. 10.

individuals, which usually means the poorest people in society have to pay 6 to 30 per cent of the cheque for a service free to everyone else.

A recent report by the Association coopératrice d'économie familiale du Centre de Montréal on access to banking services, confirmed that discriminatory practices towards the poor, and towards those in receipt of government assistance in particular, are widespread.[162] A survey of over 200 banks and credit unions in the Montreal area found that many refused entirely to cash government assistance cheques for non-clients. Others required that individuals seeking to cash government cheques provide numerous pieces of identification. In addition, many banks and credit unions put government assistance cheques on hold for lengthy periods where individuals lacked the necessary I.D. or did not have savings in their account. In short, the report concluded: "[les] personnes à faible revenu bénéficiant de prestations gouvernementales ... éprouvent plus de difficultés que la moyenne des consommateurs à encaisser des chèques dans les institutions financières."[163]

The most obvious result of the unwillingness of traditional financial institutions to provide equal banking services to the poor is the proliferation of cheque cashing, loan brokering, rent-to-own financing, and other similar businesses in Canada — a "financial ghetto" or "parallel financial and commercial system in which some companies have found a thriving niche providing services and products to the poor."[164] The cost of cheque-cashing services, in terms of fees and service charges for cashing government cheques, has been estimated in 1993 to be $2.6 million in the province of British Columbia alone in 1993, and the value of cheques cashed nation-wide at over $1 billion.[165] One Vancouver community activist described the impact of having to resort to such services on poor people: "A couple of days' food is taken off the cheque every time they go to a Money Mart."[166]

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[162] Association coopératrice d'économie familiale du Centre de Montréal, *L'accès au services bancaires et les droits des consommateurs* (Montréal: ACEF Centre, Mars 1993) at i.

[163] *Ibid.*

[164] B. Marotte, "Profitting From the Poor" *The Ottawa Citizen* (18 June 1994) A4.

[165] *Ibid.*

[166] *Ibid.* In the case of rent-to-own financing for furniture, appliances and other consumer items, "rates often end up costing customers five times the average retail price of the merchandise.," *ibid.*; see also B. Marotte, "Fringe money lenders thrive

Discrimination against the poor in the area of accommodation is even more pervasive.[167] As the *Sparks* case illustrates, where they are tenants in government owned or subsidized housing, the poor are often denied the ordinary protections which private sector tenants enjoy under residential tenancies legislation.[168] In the private housing market, landlords frequently discriminate against people who are poor on the basis of their poverty or related attributes, such as receipt of social assistance. Some landlords refuse to rent to poor people outright. In other cases landlords refuse to provide rental accommodation to people on welfare or other forms of government assistance; impose minimum income requirements which the poor cannot meet; require credit checks, credit references, lengthy rental histories, or guarantors; or impose other conditions with the intent or effect of discriminating against the poor.[169] One group appearing before the Ontario Social Assistance Review Committee described the experience of tenants in receipt of social assistance:[170]

> Some landlords simply say they do not rent to people on social assistance knowing that ... they are unlikely to see any complaint lodged ... More often, recipients are simply told that there is a more suitable applicant for the tenancy or that the apartment is suddenly unavailable.

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on hard times" *The Ottawa Citizen* (18 June 1994) A4.

167 See generally B. Porter, "Discrimination in Housing: An Equality Rights Perspective on Canada's Rental Housing Problem" (Spring 1989) 6:1 Canadian Housing 36; J.D. Hulchanski, *Discrimination in Ontario's Rental Housing Market: The Role of Minimum Income Criteria* (Toronto: Ontario Human Rights Commission, 1994); R. Ellsworth, *et al.*, "Poverty Law in Ontario: the Year in Review" (1993) 9 J.L. & Social Pol'y 1 at 58-60; Turkington, *supra* note 72.

168 Provisions under Newfoundland residential tenancies legislation, similar to those at issue in *Sparks*, were unsuccessfully challenged in *Newfoundland and Labrador Housing Corporation* v. *Williams*, (1987) 62 Nfld. & P.E.I.R. 269 (Nfld. C.A.), and in *Newfoundland and Labrador Housing Corporation* v. *Ryan*, (1987) 62 Nfld. & P.E.I.R. 287 (Nfld. C.A.).

169 See *Dawn Kearney* v. *Bramalea Limited*, Ontario Human Rights Commission Board of Inquiry No. 92-0213; *Catarina Luis* v. *Creccal Investments Ltd.*, Ontario Human Rights Commission Board of Inquiry No. 92-0214; *Julie Lupo* v. *The Shelter Corporation*, Ontario Human Rights Commission Board of Inquiry No. 92-0216; Centre for Equality Rights in Accommodation, "Income Discrimination in Housing: Upcoming Board of Inquiry Hearings" (Toronto: Centre for Equality Rights in Accommodation, April 1994); Hulchanski, *supra* note 167.

170 *Transitions*, *supra* note 43 at 478.

As a recent Peterborough case illustrates, discrimination in accommodation is often compounded by discrimination in the provision of utilities services, where hydro and other utilities companies often require large deposits which poor tenants cannot meet, as a condition of providing services.[171]

The *Wiebe* case,[172] currently before the Ontario Human Rights Commission, gives some indication of the importance of providing protection for the poor under federal and provincial human rights legislation. On May 5, 1989, the Wiebes, a family of seven with an annual income below $17,500 from seasonal minimum-wage farm work, unemployment insurance, and social assistance benefits, were evicted from their apartment because of complaints they made to their landlord about the apartment's condition. Prior to their eviction, the family searched unsuccessfully for a month for alternate housing. No three or four bedroom apartments were available at a rent below $700 a month, and landlords consistently refused to consider such a large family for the one and two bedroom apartments which the Wiebes could afford. Following their eviction, the family spent one night in the garage they had rented to store their furniture, two nights in a motel at their own expense before running out of money, and one night in a motel paid for by the Salvation Army. On May 9, Mr. and Mrs. Wiebe made arrangements to place their children in the care of the local Children's Aid Society, while they moved into their van. The family was only reunited a month later, after the Children's Aid Society provided a tent trailer for them to live in.

On the reasoning outlined above, the Wiebes' experience amounts to a clear violation of their human rights. Nevertheless, situating the case within existing human rights legislation presents serious difficulties. Fortunately for the Wiebes, the Ontario *Human Rights Code* guarantees equality in accommodation for social assistance recipients. In the majority of provinces

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171 *Clarke & Baker* v. *Peterborough Utilities Commission and Welfare Administrator City of Peterborough* (Ont. Ct. Gen. Div. File Nos. 6605/91, 6900/91, 7045/91); see also Charter Committee on Poverty Issues, *Report to Members* (Ottawa: Charter Committee on Poverty Issues, October 1993) at 11.

172 *Elizabeth Wiebe* v. *The Queen in Right of Ontario et al.*, Ontario Human Rights Commission Complaint No. 20-106S; see also C.C.P.I., *Report to Members*, *ibid.* at 7-8; S. Fine, "Poverty Campaigners Seek Action on Behalf of Poor" *The Globe and Mail* (25 November 1992) A1, A10.

where receipt of social assistance is not a protected ground, however, the Wiebes' complaint of discrimination would have been hard if not impossible to bring forward. By the same token, had they not qualified for social assistance, or had they been subsisting entirely on low wage employment at the time of their housing search, the Wiebes would have been excluded from protection in Ontario as well.

Once poverty is recognized as a non-enumerated ground of discrimination under section 15 of the *Charter*, the failure of federal and provincial human rights laws to protect against discrimination on the basis of poverty clearly becomes suspect. The Ontario Court of Appeal's 1992 decision in *Haig and Birch* v. *Canada*,[173] regarding the omission of sexual orientation as a proscribed ground of discrimination under the *Canadian Human Rights Act*,[174] is relevant in this regard:[175]

> Homosexual persons ... are, by exclusion, denied access [to the ameliorating procedures of the *Canadian Human Rights Act*]. Because of the omission of that ground of discrimination, the *Canadian Human Rights Act* withholds benefits or advantages available to other persons alleging discrimination on the enumerated grounds from persons who are and, on the evidence, have historically been, the object of discrimination on analogous grounds ... The failure to provide an avenue for redress for prejudicial treatment of homosexual members of society and the possible inference from the omission that such treatment is acceptable create the effect of discrimination offending section 15(1) of the *Charter*.

On the basis of its finding that failure to extend protection to gays and lesbians under the *Canadian Human Rights Act* violated section 15 of the *Charter*, the Court of Appeal in *Haig* chose to read sexual orientation into the *Act* as a further proscribed ground of discrimination.[176]

The Court's reasoning in *Haig* is clearly applicable to the situation of people who are poor. Failure by the federal and provincial governments to include poverty as an impermissible ground of discrimination under human rights legislation deprives the poor of equal protection and equal benefit of the

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[173] (1992) 9 O.R. (3d) 495 [hereinafter *Haig*].

[174] R.S.C. 1985 c. H-6.

[175] *Supra* note 173 at 502-3.

[176] *Ibid.* at 508.

prohibitions and remedial procedures set out under Canadian human rights laws. This legislative omission is inconsistent with the goals of promoting "a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration,"[177] and of "remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society" — objectives which the Supreme Court has identified as underlying section 15.[178]

The very failure to include poverty or the most common attributes of poverty under federal and provincial human rights legislation is, in some regards, the clearest evidence of the socially and politically marginalized status of the poor. Such an omission demonstrates that, notwithstanding overwhelming statistical evidence, poverty as a source of systemic social, economic and political disadvantage is not even formally recognized or acknowledged under legislation designed specifically to ameliorate the condition of groups facing historic and continuing discrimination. For persons who are poor, this omission reflects, reinforces, and facilitates continued systemic bias against them in Canadian society. It is evident, therefore, that failure to include poverty under federal and provincial human rights codes violates the equality rights of the poor under section 15. To remedy this violation, poverty should, as did the Ontario Court of Appeal in the case of sexual orientation in *Haig*, be read into human rights legislation as a prohibited ground of discrimination.

The argument that poverty must be addressed as a human rights issue was recently endorsed by the United Nations Committee on Economic, Social and Cultural Rights in its second periodic review[179] of Canada's compliance with

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[177] *Andrews*, *supra* note 6 at 171.

[178] *Turpin*, *supra* note 7 at 1333.

[179] United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, "Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights (Canada)," Geneva, 10 June 1993, E/C. 12/1993/5, forthcoming in (1993) 20 C.H.R.R.; see also *The Right to an Adequate Standard of Living in a Land of Plenty: Submissions of the National Anti-Poverty Organization and the Charter Committee on Poverty Issues to the Committee on Economic, Social and Cultural Rights* (Ottawa: National Anti-Poverty Organization

the *International Covenant on Economic, Social and Cultural Rights.*[180] The *Economic Covenant*, ratified by Canada in 1976 after lengthy discussion with the provinces, sets out a number of social and economic rights which state parties commit to implementing. Among these are the right to social security under article 9; the right to an adequate standard of living, including adequate food, clothing and housing under article 11; the right to the highest attainable standard of physical and mental health under article 12; and the right to education under article 13.[181]

The U.N. Committee opened its review of Canada's performance under the *Economic Covenant* by commenting favourably on the general strengthening of the protection of human rights in Canada through the *Charter* and other human rights legislation.[182] The Committee went on, however, to question the lack of any real progress in combating poverty in Canada over the past ten years. The Committee stated in this regard:[183]

> In view of the obligation arising out of article 2 of the Covenant to apply the maximum of available resources to the progressive realization of the rights recognized in the treaty, and considering Canada's enviable situation with regard to such resources, the Committee expressed concern about the persistence of poverty in Canada. There seems to have been no measurable progress in alleviating poverty over the last decade, nor in alleviating the severity of poverty among a number of particularly vulnerable groups.

/ Charter Committee on Poverty Issues, May 1993); S. Walsh, "Taking Canadian Poverty Issues to the U.N." (Summer 1993) 40 NAPO News (Special Edition with the Charter Committee on Poverty Issues) 1.

180 Annex to G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966).

181 See generally, V. Kartashkin, "Economic, Social and Cultural Rights" in K. Vasak, ed., *The International Dimensions of Human Rights* (Westport, Conn: Greenwood Press, 1982) 111; P. Alston & G. Quinn, "The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights" (1987) 9 Hum. Rts Q. 156; C. Scott, "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights" (1989) 27 Osgoode Hall L.J. 769.

182 Committee on Economic, Social and Cultural Rights, "Concluding Observations," *supra* note 179 at para. 4; the Committee commended the application of s.15 of the *Charter* to extend security of tenure in the field of housing, in reference to the *Sparks* decision, in particular; *ibid.* para. 5.

183 *Ibid.* para. 12.

The U.N. Committee took particular note of the high rate of poverty among single mothers and children in Canada, and the inaction of governments in this regard;[184] the lack of procedures to ensure that welfare rates do not fall below the poverty line;[185] the evidence of hunger and of reliance on food banks;[186] the prevalence of discrimination against the poor in housing;[187] the problem of homelessness;[188] the characterization of social and economic rights in recent Canadian constitutional discussions and court decisions as mere policy objectives;[189] and the failure by the courts to apply the *Charter* and provincial human rights legislation to provide for improved remedies against violations of social and economic rights.[190]

First among the measures which the Committee recommended that Canada adopt with a view to bringing itself into compliance with the terms of the *Economic Covenant*, was the incorporation into Canadian human rights legislation of more explicit reference to social, economic and cultural rights.[191] The Committee also encouraged Canadian courts to adopt a broad and purposive approach to the interpretation of the *Charter* and of human rights legislation, so as to provide appropriate remedies against violations of social and economic rights.[192] To this end, the Committee also recommended that the Canadian judiciary be provided with training courses on Canada's obligations under the *Economic Covenant*, and on their effect on the interpretation and application of Canadian law.[193] In summary, recognition of poverty under domestic human rights legislation is, as the U.N. Committee argues, a necessary step for Canada to meet its obligations under international human rights law, as well as under the Canadian *Charter*.

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184 *Ibid.* para. 13.
185 *Ibid.* para. 15.
186 *Ibid.* para. 16.
187 *Ibid.* para. 18.
188 *Ibid.* paras. 19-20.
189 *Ibid.* para. 21.
190 *Ibid.* paras. 23, 24.
191 *Ibid.* para. 25.
192 *Ibid.* para. 30.
193 *Ibid.* para. 29.

VIII. Conclusion

As acknowledged at the outset of the paper, recognition of poverty as a protected ground under the *Charter* and under federal and provincial human rights law will not automatically eradicate social and economic inequality in Canada. Even with the inclusion of poverty as a non-enumerated ground of discrimination under section 15, a number of difficult issues remain. These include the question of what forms of government action will be open to *Charter* and human rights scrutiny. The courts' approach to this issue is particularly important because many of the decisions which bear most heavily on the lives of the poor are the result, not of overt legislative choice, but rather of delegated and highly discretionary decision-making within federal, provincial, municipal and quasi-governmental bureaucracies, often in the form of informal and unwritten directives, guidelines and practices.[194] Although this issue has not yet been directly addressed by the Supreme Court, there is also the real possibility that state inaction will not be considered subject to *Charter* review, even where such inaction is a direct or a major contributing cause of poverty.[195] Poverty-related claims also raise complex socio-economic, evidentiary, and remedial issues, with which the courts may feel unwilling and ill-equipped to deal.[196] Judicial attitudes towards poverty and the poor, as evidenced in *Gosselin*, *Alcoholism Foundation of Manitoba* v. *Winnipeg*, and other cases, also reduce the probability that poverty-related equality claims will ultimately be successful.[197] Finally, as critics of the *Charter* point out, the prohibitive cost of *Charter* litigation makes it very hard for most low income claimants to get to the courts at all.

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194 See generally M.Jackman, "Rights and Participation: the Use of the Charter to Supervise the Regulatory Process" (1990) 4 C.J.A.L.P. 23.

195 See for example *Symes* v. *Canada* [1991] 3 F.C. 507 (F.C.A.) at 529-30; and for a discussion of this issue D. Pothier, "*Charter* Challenges to Underinclusive Legislation: The Complexities of Sins of Omission" (1993) 19 Queen's L.J. 261; R. Moon, "A Discrete and Insular Right to Equality: Comment on *Andrews* v. *Law Society of British Columbia*" (1989) 21 Ottawa L. Rev. 563 at 571-73.

196 See Jackman, *supra* note 94 at 330-334.

197 For a general discussion of these issues, see Jackman, *supra* note 126.

Yet, notwithstanding these many and real obstacles, it remains that granting formal legal recognition to the role and impact of poverty as a source of individual and group based disadvantage is a necessary first step towards recognizing poverty for what it really is — an issue of basic human rights. As the foregoing analysis attempts to demonstrate, poverty is one of the most invidious and, at the same time, accurate indicators of disadvantage in Canadian society. To treat poverty as a neutral classification under the *Charter*, or under federal and provincial human rights law, is to exempt one of the most significant determinants of social condition, opportunity and status from equality rights review. As Havi Echenberg and Bruce Porter contend:[198]

> [U]nderstanding poverty as inequality ... confronts human rights jurisprudence with the deprivations of poverty and economic inequality as issues of fundamental injustice, as discrimination — precisely as poor people have always understood them.

In an era of fiscal restraint and ongoing government cut-backs, claims for procedural or substantive improvements in legislation and programs benefiting the poor are increasingly untenable in the political arena. Framed in terms of legal rights and remedies, however, the prevailing rationale for legislative inaction in the poverty area — because "we" can't afford it — takes on a different complexion. Once it is understood that the failure to promote or support legislative measures which benefit the poor is the predictable outcome of their lack of representation and influence in the legislative process, the prejudicial impact of majoritarian indifference or hostility towards the poor becomes a matter for serious constitutional concern. In other words, the generalized legislative resistance to anti-poverty measures can be seen to reflect the majority's unwillingness to redirect government expenditures or to raise additional revenues in a way which would benefit a constituency which it does not represent and to whose needs it has no interest in attending. While this resistance may be unobjectionable in purely political terms, recast as a *Charter* issue, it becomes legally unacceptable. In this way, recognition of poverty as a non-enumerated ground of discrimination under section 15 of the *Charter* has the potential to bring not only the Canadian constitution and

[198] H. Echenberg & B. Porter, "The Case for Social and Economic Rights" (Spring 1989) 6:1 Canadian Housing 26 at 27; see also R.S. Abella, "Social Justice in Hard Times: A Generation of Equality" (1992) 26 L. Soc. Gaz. 45.

human rights law, but Canadian politics also, into closer contact with the disparities in the world.

NEW-AGE CONSTITUTIONALISM: A REVIEW OF *REASONING WITH THE CHARTER*

by Leon E. Trakman
(Toronto: Butterworths, 1991).

Dale Gibson*

Let me get some stylistic concerns off my chest at the outset. This is a book by a distinguished legal scholar about how the *Canadian Charter of Rights and Freedoms*[1] should be interpreted and applied by the courts. It ought, therefore, to be read by judges, lawyers, professors and students who have occasion to work with or to study the *Charter*, and, indeed, by all Canadians interested in how this cardinal constitutional instrument affects them and the country in general. Yet I doubt that it has been, or will be, widely read, and I think the blame lies largely in Professor Trakman's opaque writing style.

Post-modern[2]/New-Age jargon ("knowledge as an experiential process," "radically incommensurable"[3]) abounds. "Within a relational community," we are told, "human interaction, including the act of agreeing, is conceived of as correlative rather than competitive."[4] Courts should seek a broader than "relational" perspective, taking account of wider communal interests:[5]

> In so enlarging community beyond correlative relations, courts shift their frame of reference to encompass a mediated public life. They identify communal life with a co-operative humanity whose guiding ontology lies in a co-existent state.

If courts act on that advice, Professor Trakman believes that the situation of the individual will be transformed:[6]

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1. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
2. The author refers, at one point, to "the *tradition* of post-modernism"; L.E. Trakman, *Reasoning With the Charter* (Toronto: Butterworths, 1991) at 24 [emphasis added].
3. *Ibid.* at 143.
4. *Ibid.* at 65.
5. *Ibid.* at 69.
6. *Ibid.* at 60.

> Subsumed within the group that surrounds her, the individual is rendered into its creature, yet somehow her own person in terms of it.

If that individual is a pregnant woman seeking to terminate her pregnancy, the situation will engage the interests of a wider group, because:[7]

> Reproductive autonomy personifies more than sycophantic (sic) individualism.

Judges involved in abortion disputes are exhorted to:[8]

> Attribute the "rational" content of foetal life conversationally ...

This "conversational" (or "communicative,"[9] "discursive,"[10] "dialogic"[11]) approach to the judicial function has been facilitated, Trakman thinks, by the *Charter*, which:[12]

> serves as a wide-angle lens, indeed, a focal point from which to gaze in upon Canadian society ...

There is meaning behind most of these obscure words (though I doubt I shall ever fathom "sycophantic individualism"), but the task of deciphering them is more difficult than many readers will want to trouble themselves with. This is not to deny that the book also contains some effective writing, or that certain Trakmanisms are quite striking. I especially like his reference to the *Charter's* "perforated principles,"[13] his comparison of some judges to

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7 *Ibid.* at 196

8 *Ibid.* at 167.

9 *Ibid.* at 5.

10 *Ibid.*

11 *Ibid.* at 92.

12 *Ibid.* at 5. The impossible metaphor embedded in this remark, simultaneously claiming both broad compass and narrow resolution, is characteristic of a "having your cake and eating it too" quality to be found throughout the book. See *infra* note 35, for example.

13 *Ibid.* at 3.

orchestral conductors,[14] and his hope that constitutional adjudication will shift from "a textual past to a contextual future."[15] It seems a shame, though, that Professor Trakman's generally recondite writing style hampers easy access to his message.

As to the substance of that message, I regret to say that parts of it leave me even more uncomfortable than the style. Stripped of its overburden of new-speak, the book examines several relatively familiar constitutional and jurisprudential ideas in an often unfamiliar manner. The major propositions advanced, as best I can sort out and paraphrase them, are:

1. Too much emphasis has been placed on individual rights under the *Charter*, and not enough on group rights.

2. Applying *Charter* rights uniformly to everyone operates to the detriment of the less favoured segments of Canadian society, whose past disadvantages ought to entitle them to special consideration under the *Charter*.

3. Restricting the *Charter's* operation chiefly to "negative" rights, such as the prohibition under section 2 of governmental interference with the fundamental freedoms of religion, expression, association and peaceful assembly, rather than to "positive" entitlements like economic benefits and affirmative action, is undesirable, especially for disadvantaged groups.

4. It is also undesirable to limit the *Charter*'s operation to infringements of rights by the State and its agents.

5. In order for the courts to apply the *Charter* most effectively, they must be able to take account of general community interests extending well beyond those of the immediate litigants.

6. The method that courts should adopt in balancing communal and private interests in *Charter* litigation should be "discursive," or "conversational," an approach which involves flexible, selective and contingent decision-making.

7. In carrying out this task, courts should be wary of rationalism, and should be prepared to take sentiment into consideration when appropriate.

8. Courts should also avoid a rigidly hierarchial treatment of *Charter* rights, whereby disputes are resolved on the basis of the formal *à priori* weight of each right claimed,

[14] *Ibid.* at 18.
[15] *Ibid.* at 155.

with section 33 and section 1 "trumping" *Charter* rights, the *Charter* "trumping" ordinary legislation and so on, without regard to the broader communal interests involved.

9. The "strict legal positivism" with which the legal profession has been too deeply imbued stands in the way of the above principles being effectively implemented, and must be abandoned.

10. What lies behind most of the judicial attitudes and approaches which require transformation is a philosophy of legal liberalism, which must be greatly modified, if not rooted out altogether.

While I do not, by any means, dispute all these propositions, I do take issue with some of them, as well as with the manner in which Professor Trakman deals with others. To explain these differences of opinion it will be necessary to examine the propositions a little more thoroughly.

I. Group Rights

Professor Trakman's concern that individual rights are over-emphasized to the detriment of group rights permeates the book, from the first page to the last. On page one he asserts that:[16]

> In protecting the rights of the self-directed individual who holds herself out against a single foe, the State, *Charter* interpreters bypass the identity crises of groups within the Canadian polity. They concentrate upon conflicts between individuals and government. They pass over social issues that transcend both.

This concern involves much more than regret that more is not being made of those few *Charter* provisions commonly thought to recognize "group rights": minority language education,[17] aboriginal and treaty rights,[18] and so on. Trakman asserts that *all Charter* rights are group rights in part, even though most of them expressly pertain only to individuals. This is true, for example, of "liberty" under section 7 of the *Charter*, he asserts. In fact, he claims that liberty *cannot* be exercised by an isolated individual:[19]

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16 *Ibid.* at 1.

17 Section 23.

18 Section 25; s.35 of the *Constitution Act, 1982, supra* note 1.

19 *Supra* note 2 at 10.

> Liberty is a manifestation of communal life itself. Being free, like the act of voting, is a shared, not wholly sequestered enterprise. To be an individual is to interact with others, not to subsist wholly apart from them.

At times, he waxes lyrical, if not mystical, about the communal nature of liberty:[20]

> To endorse affirmative liberty ... is to affirm a social programme that encompasses more than those things which all of us happen to hold in common ... Affirmed is the substance of social and political life, well beyond the competitive and exclusionary interests of individuals and groups alike.

And he is critical of:[21]

> (j)udges who suppose that what is good for the parts is also good for the whole ...

This attempted communalization of individual rights makes little sense to me. To contend, as Trakman does, that "liberty is meaningless within a social vacuum,"[22] and that: "to be an individual is to interact with others,"[23] denies the sense of liberty, vital for certain people, that comes from being *freed*, temporarily or permanently, from contact with other humans. While it is true that almost everyone needs some interaction with others, and that most of us require a lot of it, we all also have, in varying measures, a need for privacy. I consider the right to satisfy that need to be free from contact with or influence by others, to assert or experience one's individuality, to be an important component of the constitutional entitlement to liberty. Professor Trakman's claim that over and above the total liberty claims of all individuals and groups in the country there is some additional "social and political life" to be taken into account, requiring judges to consider what is "good for the whole" and not just what is "good for the parts," strikes me as illogical (I wrote "1 + 1 = 3!!" in the margin at one point) and politically disturbing[24] (I wrote "totalitarianism!!" at another point).

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20 *Ibid.* at 36.

21 *Ibid.* at 94.

22 *Ibid.* at 16.

23 *Ibid.* at 10.

24 Trakman makes no bones about the political mission he wants judges to play: "Judges who try to provide social justice enter into a class struggle." See *ibid.* at 49.

Why does all this matter to Professor Trakman, or to me? From his perspective, there appear to be two reasons, both of which are connected to other Trakman propositions. Establishing a significant communal dimension to what are usually considered individual rights is important to him, first, as a basis for his insistence, to be discussed more fully below, that courts should consider more than the interests of the immediate litigants when adjudicating disputes about rights. It also appears to be a key component of his assertion that members of disadvantaged groups should be the primary beneficiaries of *Charter* rights, since there would be little justification for favouring disadvantaged groups if there were no group interest in the rights in the first place. My chief concern about Trakman's fixation on group rights is that although I agree about the need for courts to bear all affected interests in mind when adjudicating *Charter* rights, I am intensely opposed to *favouring* any category of persons, disadvantaged or otherwise, in access to those rights, except in pursuance of a special affirmative action scheme. Let us consider next the arguments Professor Trakman advances in support of such favouritism.

II. Special Treatment for the Disadvantaged

As with his overarching interest in group rights, Professor Trakman's concern for the plight of the disadvantaged appears on the first page of his Introduction, where he complains about the fact that "*Charter* liberalism unduly circumscribes social practice" by imposing a rights regime that is uniform across the board: "upon ... rich and poor, men and women alike."[25] The Supreme Court of Canada's "still largely libertarian" approach to the *Charter*, he objects, does not "redress group disadvantage."[26] Building on a remark by Madam Justice Wilson that the *Charter* creates fences "over which the State will not be allowed to trespass," he comments that:[27]

> Courts, in turn, are required to maintain fences equally for all, whether or not those fences protect barren private land.

The note of sarcasm in his tone stems from the fact that the disadvantaged

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25 *Ibid.* at 1.
26 *Ibid.* at 8.
27 *Ibid.* at 12.

often lack the ability or resources necessary to benefit equally from their theoretically equal *Charter* rights:[28]

> Judges ... insist upon an equal right to free speech. However, they pass over the unequal ability of people to speak, listen and understand.
>
> ...
>
> Few individuals have the economic and personal resources to mount a *Charter* challenge. Few, beyond the corporate wealthy and politically agile, have the stomach for the arduous battle up the judicial ladder to the Supreme Court of Canada.

He assails the "*Charter* elitism"[29] that results in this "selective protection of the individual rights of corporations and professionals,"[30] and he argues that judges are responsible for it because "they themselves reinforce inequality of status by protecting those who are best able to benefit from ... liberties from those who are not so able."[31] Thus, he says, "*Charter* rights are biased against aboriginal peoples or women"[32] or members of other disadvantaged groups.

Trakman's proposed solution for this perceived problem seems to be that judges should change their ways, and adopt an approach to *Charter* enforcement that would reverse the bias he detects. They should, after engaging in the "dialogic method of reasoning"[33] he recommends, "react to social attitudes towards rights, less to rights themselves."[34] And then they should "formulate ... perceptions of fundamental rights and freedoms selectively ..."[35]

I said that this "seems" to be his advice, because there is also a passage in which he could be understood to eschew such an approach. He draws attention to a well-known article in which Andrew Petter, who shares Trakman's concerns about systemic discrimination against the disadvantaged, regards the

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28 *Ibid.* at 20, 13-14.
29 *Ibid.* at 27.
30 *Ibid.* at 28.
31 *Ibid.* at 20.
32 *Ibid.* at 14.
33 *Ibid.* at 93.
34 *Ibid.* at 159.
35 *Ibid.* at 86.

application of *Charter* rights as a "zero sum game," and calls for compensatory favoured treatment of the disadvantaged. Then, to the reader's considerable surprise, Trakman takes issue with the Petter position.[36] He fails, however, to distinguish his position clearly from Petter's, other than to indicate that he, unlike Petter, does not favour treating all members of a disadvantaged group uniformly, regardless of their individual states of comparative advantage.[37] The difference between Trakman and Petter would appear to be one of degree only, therefore, with Trakman being willing to accord greater flexibility to judges in taking account of the particular circumstances of particular cases. Both seem committed to the view that judges ought to apply the entire *Charter* selectively to the advantage of the members of disadvantaged groups.

Although it exposes some major weaknesses in Canada's rights protection mechanisms, the Petter/Trakman analysis is flawed, and the remedy they propose is ill-conceived. It is certainly true that the most pressing needs of groups that have suffered historic disadvantage — aboriginals, disabled persons, women, the poor — are not adequately addressed by the *Charter*, and that the members of such groups are generally unable to enjoy the benefit of their *Charter* rights as fully as those who are better off. It is a gross exaggeration, however, to suggest that because few disadvantaged persons have the resources to fight a case to the Supreme Court of Canada they are wholly deprived of *Charter* benefits. The overwhelming majority of successful *Charter* claims occur in criminal courts at the trial level,[38] tribunals with which, alas, the poor and otherwise disadvantaged are familiar in disproportionate numbers. By no means all important *Charter* challenges that reach appellate courts and the Supreme Court of Canada are brought by corporations or wealthy business and professional people. In fact, only 12 of the first 100 Supreme Court of Canada *Charter* cases involved challenges by

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36 *Ibid.* at 51. There is a confusing tendency throughout the book for the author, having developed an argument that appears to lead to a certain conclusion, to disclaim that conclusion, and to substitute a less drastic, and often far from sharply delineated position.

37 *Ibid.* at 90.

38 See D. Gibson, "The Deferential Trojan Horse: A Decade of Charter Decisions" (1993) 72 Can. Bar Rev. 417.

such over-advantaged claimants.[39] Legal aid, self-help organizations,[40] and the (regrettably now defunct) Court Challenges Program[41] have all assisted in placing the claims and perspectives of the non-elite before upper-level courts. And upper-level decisions originally rendered in challenges brought by members of the socially or economically elite become precedents available for use by litigants of all backgrounds at every judicial level.[42] It is wrong, therefore, if not mischievous, for Professor Trakman to state that "the spoils of the *Charter* will go to the rich and educated."[43] While it is true that the *Charter* is seriously deficient in not addressing some of the more urgent "positive"[44] needs of disadvantaged Canadians, it falsifies both the text of the document and the manner in which it has generally been applied by the courts to describe the rights which the *Charter* does contain as "biased against aboriginal peoples or women."[45]

And it is an altogether unjustified leap of logic to draw from the fact that some people are better able than others to benefit from *Charter* rights the conclusion that courts protect the rights of such persons "*from* those who are not so able."[46] The only way that the *Charter,* which operates solely against governmental agencies, could conceivably be used to *protect* the advantaged from the disadvantaged, would be by somehow preventing governments from implementing social welfare programs that employ public funds (to which the

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39 *Ibid.* 73% of the cases involved challenges by individuals, and a further 10% dealt with challenges by trade unions or non-commercial organizations. The remaining 5% of the cases were references, in which various organizations enjoyed intervenor status.

40 The role of the Women's Legal Action and Education Fund (LEAF) has been especially large and influential. See S. Razack, *Canadian Feminism and the Law: the Women's Legal Education and Action Fund and the Pursuit of Equality* (Toronto: Second Story Press, 1991). There is much room for improvement in the recognition of intervenor status, however. See Canadian Bar Association, *Public Interest Intervention Policy* (Ottawa: The Association, 1991).

41 See Canada, *Minutes and Proceedings of Evidence of the Standing Committee on Human Rights and the Status of Disabled Persons*, 2d Sess., 34th Parl. (1989-91).

42 For example see *Hunter* v. *Southam*, [1984] 2 S.C.R. 145, which is cited with great frequency in arguments by individual rights claimants.

43 *Ibid.* at 27.

44 See below, text associated with note 49, *ff.*

45 *Supra* note 2 at 14.

46 *Ibid.* at 20 [emphasis added].

rich may contribute proportionately more and benefit less than the poor). Even that explanation makes little sense, however, since provisions like section 1 and section 15(2) permit such programs to be shielded from *Charter* attack, and there is little evidence in over a decade of *Charter* litigation of schemes to benefit the disadvantaged being set aside by *Charter* challenges on behalf of the advantaged.

Even if the *Charter* bias against disadvantaged persons which Professors Petter and Trakman allege were a reality, the remedy they propose — to shrink *Charter* benefits for the majority — would be uncalled for. Petter is mistaken in portraying *Charter* adjudication as a zero sum game. The fact that a television company's freedom of expression is narrowly construed,[47] for example, does not in any way enlarge the expressive rights of the poor or illiterate. In that particular illustration, it might even abridge those rights.

The Supreme Court of Canada has adopted an approach somewhat akin to that which Petter and Trakman advocate, but only in relation to unlisted grounds of prohibited discrimination under section 15(1) of the *Charter*, not to the entire document, as Petter and Trakman propose. The Court has ruled that discrimination based on factors other than the familiar grounds explicitly listed in section 15(1) ("race, national or ethnic origin, colour, religion, sex, age or mental or physical disability") will not be considered to contravene the *Charter* unless, among other things, the discrimination detrimentally affects a "discrete and insular minority." By that awkward and inaccurate expression is meant a group that has historically experienced disadvantage over and above the particular act of discrimination being objected to.[48] That pruning of equality rights by the Supreme Court, which has been criticized elsewhere for the reasons discussed above,[49] is not easily transferable to the other *Charter* rights which Professor Trakman would like to see similarly trimmed. For one thing, the "discrete and insular minority" principle is properly applicable only to unlisted forms of discrimination, not to those forms of discriminatory treatment which section 15(1) expressly recognizes. For

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47 As in *New Brunswick Broadcasting Co.* v. *Nova Scotia* (1993), 100 D.L.R. (4th) 212 (S.C.C.).

48 *Andrews* v. *Law Society of British Columbia* (1989), 56 D.L.R. (4th) 1 (S.C.C.); *R.* v. *Turpin*, [1989] 1 S.C.R. 1296.

49 See: D. Gibson, "Equality for Some" (1991) 40 U.N.B.L.R. 2.

another, the notion is based on an inference drawn from the word "discrimination" in section 15(1), which has no counterpart in other sections of the *Charter*. There is no basis, therefore, for extending the idea to other *Charter* rights.

III. Positive and Negative Rights

It is a common criticism of the *Charter*, as of all rights instruments based on the classic western model, that it concerns itself chiefly with "negative rights" (a person's right not to be interfered with by the State in the exercise of individual freedom in relation to such matters as thought, religion, expression, association, peaceful assembly, and so on) rather than with "positive rights" (entitlements to receive positive benefits, such as health care, economic security or educational benefits, from the State). The *Charter* does contain a few positive rights.[50] They are relatively sparse, however, and do not touch upon many of the fundamental socio-economic benefits which constitute the material component of the "good life" as understood in modern (and post-modern) times.

Professor Trakman laments this fact, and so do I. He exaggerates the problem, however, by referring to "a *wholly* negative theory of individual rights,"[51] by failing to acknowledge the few positive rights that do exist under the *Charter*,[52] and by underestimating the significance of section

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[50] To vote or run for public office, federally or provincially — s.3; to have annual legislative sessions, and elections at least every five years — ss. 4 and 5; to enter and leave the country, and move around within it — s.6; to be told, upon arrest, about one's right to counsel — s.10; to trial by jury for serious criminal charges — s.11(f); to an interpreter in legal proceedings — s.14; to have access to statutes and certain other legislative documents issuing from Parliament and certain provincial legislatures in both official languages, as well as to government services in both languages from the governments of Canada and New Brunswick — ss. 18, 20 and 21; to education in the minority official language — s.23; and to the benefit of certain aboriginal and treaty rights — s.25 and s.35 of the *Constitution Act, 1982, supra* note 1.

[51] *Supra* note 2 at 7 [emphasis added].

[52] See *supra* note 50. Trakman refers to the right to trial by jury as a "negative right" (*supra* note 2 at 10), for example. At other points he appears to confuse negative rights with individual rights (*e.g.*: first two sentences of Chapter II, *ibid.* at 7).

15(2),[53] which permits, though it does not require, affirmative action programs for the special benefit of disadvantaged individuals and groups.[54]

Implicit in all of Trakman's remarks about negative rights is the supposition that courts could recognize more positive rights if they chose to do so. While that may be true to a limited extent (as by interpreting the right to counsel in section 10(b) to bestow an entitlement to legal aid, for example[55]), the reader should be told that, for the most part, the negative emphasis in *Charter* law comes from the primarily negative nature of its text, rather than from unduly narrow construction by the courts.

IV. Governmental and Private Obligations

The courts certainly did play an important role, however, in restricting the *Charter's* scope to governmental matters. The *Charter* undeniably imposes major obligations on governments and their agents; its "application" section (section 32(1)) refers explicitly *only* to governmental activities, in fact). There was also considerable potential in the bare text of the *Charter*, however, to employ it, as well, as a shield against rights infringements by private sector operators.[56] That potential was dashed by the Supreme Court of Canada's ruling, in the *Dolphin Delivery* case,[57] that non-governmental activities are immune from *Charter* scrutiny. Professor Trakman, who was disappointed by this decision (as was I), devotes many pages of his book to an unconvincing attempt to circumvent it:[58]

> I challenge the sometimes strict separation which judges draw between private and public

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53 A more limited additional "affirmative action" provision is s.6(4).

54 The passing reference on *ibid.* at 45, n.189, to *Apsit* v. *Manitoba Human Rights Commission*, [1988] 1 W.W.R. 629 (Man. Q.B.), [1989] 1 W.W.R. 481 (C.A.), an early and inconclusive ruling on affirmative action, is in error, both as to the facts of the case and as to the statement that the Court of Appeal affirmed the trial decision.

55 See *Ictense* v. *Minister of Employment and Immigration* (1988), 43 C.R.R. 147 (Ont. H.C.J.), for example.

56 See D. Gibson, *Law of the Charter: General Principles* (Calgary: Carswell, 1986) at 110.

57 *R.W.D.S.U.* v. *Dolphin Delivery Ltd.* (1986), 33 D.L.R. (4th) 174 (S.C.C.).

58 *Supra* note 2 at 97.

> life, and the application of the *Charter* to a narrow public sphere, identified with the State.

Much as I would like to see the *Charter* applied to at least those private enterprises that perform services analogous to governmental functions (private security services and private schools, for example), I find it difficult to accept Professor Trakman's reasoning.

His approach is to stress the public aspects of most all things in life, including those that are widely supposed to be purely private concerns:[59]

> The *Charter* does not represent merely the apex of public law; it is part of a wider public realm that encompasses so-called private life.
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> ...
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> There is no absolute private world. Individuals are not united, without precondition, against a monolithic State. Nor is the State the sole repository of public life. Private rights, so-called, are implicitly public concerns as well.

Among such "public concerns" he includes sexual harassment:[60]

> Whether the individual is discriminated against as an employee or woman is decided in light of public attitudes towards employment and sexual relations. Her suffering is an incident of public life, not private misfortune.

and pregnancy:[61]

> [P]regnancy, instead of being an isolated state, is a communal condition that embarrasses groups in which individuals, including pregnant women participate.
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> ...
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> Reproductive freedom is private only in the immediate sense that the woman herself exercises it. It is public in the expectation that she ought to have that freedom according to an image of life and liberty that she and others share. Conversely, protecting life *in utero* highlights, not simply the right to be born, but the expectation of others that birth ought to follow pregnancy. That expectation is distinctly public.

"Ultimately," he claims, "public is private, and private is public ..."[62]

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59 *Ibid.* at 97-8.

60 *Ibid.* at 118.

61 *Ibid.* at 188, 136.

62 *Ibid.* at 115.

Some readers will find this extreme communitarianism surprising, if not disturbing. Others will agree that no individual can or should escape interaction with the community. Be that as it may, my objection to Professor Trakman's argument is unaffected. The fundamental flaw in the argument is not that Trakman's social analysis is wrong, but that he employs a rhetorical trick — a "bait and switch" technique familiar to anyone who ever did much high school debating — to reach his conclusion. That technique involves substitution for the concept under scrutiny for a related (analogous, semi-synonymous, or out-of context) notion; and disposition of the substituted idea on grounds that are not common to the original one. For example (if animal rights were the issue):

> My worthy opponents claim that animals have no rights. But human beings are animals — the highest order of mammals, in fact — and human beings are entitled to life, as well as to liberty, by section 7 of the *Charter*. So it is obvious animals have *Charter* rights, ladies and gentlemen.

Consider Professor Trakman's argument (my paraphrase):

> The Supreme Court tells us that section 32(1) of the *Charter* says that document applies solely to governmental actions. Governmental actions are public. Just about every activity or situation imaginable has a public aspect, no matter how private other aspects of it may be. Therefore, the *Charter* applies to just about every activity and situation imaginable.

The flaw, of course, is that "governmental" and "public" are not synonymous concepts; it is not all *public* activities that the Supreme Court declared to be *Charter*-prone, but only those which are *governmental*. Even such important "public" activities as publishing newspapers or operating universities are beyond *Charter* scrutiny, in the Court's view. Therefore, as much as I share Professor Trakman's concern about the exclusion of private sector activities from *Charter* protection, I do not agree that the problem can be solved by sophistry. What the Supreme Court of Canada exempted from the *Charter* in *Dolphin* was non-governmental enterprises, not non-public enterprises, and the only way to make the *Charter* apply to the private sector, short of constitutional amendment, is to persuade the Court to reconsider or modify its ruling in *Dolphin*.

V/VI. Community Conversations

It is hard to disagree with Trakman's call for courts to be constantly conscious of community interests when adjudicating *Charter* disputes. I am nervous, however, about some of the methods he seems to contemplate for accomplishing this.

I don't see why, with reasonably liberal rules on standing and interventions, the opportunity which section 1 offers courts to consider whether *Charter* limits are "reasonable and demonstrably justified in a free and democratic society" cannot satisfy Trakman's concern about adequate weight being given to the impact of *Charter* decisions on interests beyond those of the immediate parties. Rules about standing and related matters (about which the book has surprisingly little to say) could certainly be improved, but that fact does not justify the short shrift Trakman accords to section 1.

Instead of improved procedures for making use of section 1, Trakman touts what he calls "discursive," "dialogic," or "conversational" adjudication. With a view to "community through conversation,"[63] he urges judges to:[64]

> ... test and retest suppositions ... converse about justified ways to explain those suppositions, and ... verify their suppositions by selecting reasons in support of them. They do all this by talking and listening.

To whom should they talk and listen? That never becomes entirely clear, but it seems that much more than formal sources are contemplated:[65]

> Thus, judges decide upon the legal significance of social behaviour, not abstractly, but in light of the observations and comments of others who inform them and whom they, in turn, inform. No matter how formal their judicial proceedings, they draw upon the substance of social debate, *both within and outside of the courtroom*.

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63 *Ibid.* at 3.

64 *Ibid.* at 184.

65 *Ibid.* at 93 [emphasis added].

Professor Trakman's suspicion of elected legislators' ability to represent adequately the public interest is unmistakable:[66]

> [J]udicial deference toward legislative authority, understandable in a democratic society, is dysfunctional when it is rigidly applied.

The assumption "that legislators are truly representative of the population at large, that they both reflect and effect its popular will ... is seriously questionable."[67] "Doubtful too," he says:[68]

> is the supposition that legislatures, once elected, perpetuate a plural good. Modern history demonstrates that legislatures priorize the public interest as much in response to political favouritism as to accommodate a truly popular will. They choose to whom to speak and listen. They reflect a political conscience that is selective, not all-embracing.

Why are judges more likely to be less selective, more accurately representative of the public will, and more protective of the public interest than elected legislators? So long as they are restricted by even-handed procedural rules to known sources of information, presented in an open and challengeable manner by representatives of the parties and of all relevant intervening interest groups, I believe that judges *can* be reasonably objective social barometers. But if they are encouraged, or even permitted, to rely on the casual, untestable, sources of information Professor Trakman seems to have in mind, I have grave doubts that they would represent more than the point of view of the narrow, highly favoured, social stratum they themselves inhabit. If I had to choose between legislators and completely free-wheeling judges, I would unhesitatingly opt for the former. A group more distant than judges from "discrete and insular minorities," or less normally cognizant of their needs, would be difficult to imagine.

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66 *Ibid.* at 176.
67 *Ibid.*
68 *Ibid.* at 176-7.

VII/VIII/IX. Rationality, Positivism, Hierarchy and Sentiment

Trakman is skeptical about the use of logic and rationality in judicial decision-making.

Many passages of the book seem to reject the restraint of reason altogether. Trakman describes as a "risk," for example, the possibility that a judge who adopts "principled distinctions" might bring about the following consequences:[69]

> Fundamental freedoms will become unavoidable incidents of pre-structured rights, subject only to the very general principles embodied in section 1 of the *Charter*. The judge will distinguish between different methods of acting and different consequences that flow from them. She will regard her decisions as scientific. More importantly, *she will detach them from sentiment*, just as she will separate reason from desire ... *Her underlying goal will be to resolve conflicts in terms of, not outside of law* ...
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> ...
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> Those who adhere to such hierarchial method of interpretation unduly constrain constitutional interpretation. They bypass the fact that *Charter* principles are general, and that human judgment is integral to the interpretation of general principles. They overlook the extent to which *human judgment both precedes and post-dates analytical reason.*

Courts are criticized for endorsing the constitutional right of security of the person under section 7 of the *Charter*, without deciding "whether the right to security of the person is socially valuable."[70]

Judges who take that approach, it is contended, would see no difference between a Ku Klux Klan rally and a hunger march, because they:[71]

> ... cannot assume that rights to express views on the mastery of the Aryan race are illegitimate, while marching for the hungry and needy is legitimate ...

The limited usefulness attributed section 1 seems to be the product, in part at least, of Trakman's odd view that establishing whether a limit placed on

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69 *Ibid.* at 151-2 [emphasis added].

70 *Ibid.* at 174.

71 *Ibid.* at 23. The sentence continues:

> ... unless they also choose substantive reasons to justify each cause.

That is precisely what s.1 calls for.

Charter rights is "rationally connected" to a "pressing and substantial" social objective, which section 1 analysis requires, is an illusory exercise:[72]

> There is *no* necessarily logical connection between an objective and a social effect.

The basis for this nihilism is not altogether obvious. What Professor Trakman may have in mind is the fact that there is rarely a *single* satisfactory means of achieving a given social objective. Granted. But the "rational connection" test established under section 1 merely asks the courts to decide whether the particular means chosen by the legislature is one which is reasonably likely to achieve the objective. That is an exercise capable of being assisted by logic, and one which courts have shown themselves fairly adept at performing since the *Charter* came into operation in 1982.

In place of a "rationalized"[73] and "hierarchical"[74] approach to *Charter* decision-making, Professor Trakman recommends that judges:[75]

> ... react to social attitudes towards rights, less to rights themselves.

The danger of encouraging judges to make their *Charter* determinations "outside of law," independent of "analytical reason," and to base them upon "sentiment" and "social attitudes towards rights," rather than on the "rights themselves," should be self-evident. If it is not, one has only to think briefly about Trakman's contrast of demonstrations in support of Aryan mastery and poverty rights to see the point. As economic problems and fanatical nationalism re-kindle racial hatred and strident anti-socialism across the world, it becomes increasingly likely that at least some judges invited to disregard "rights themselves" and to take account only of popular "sentiment" and "social attitudes" about the question (gleaned, one assumes, from the "conversations" discussed earlier), would favour the Ku Klux Klan march over the poor peoples' demonstration.

My own view is that logic is a necessary, though not a sufficient

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72 *Ibid.* at 157 [emphasis added].
73 *Ibid.* at 180.
74 *Ibid.* at 174.
75 *Ibid.* at 159.

component of acceptable legal reasoning.[76] It provides connective tissue between premises and conclusions that is relatively inert ideologically and is reasonably capable of objective application. It also provides a powerful critical tool for those whose task or desire it is to review or take issue with particular judicial decisions. The substantive outcome of any reasoning process depends most heavily on the premises from which the inquiry proceeds, of course, and logic has a small role, if any, to play in the selection of premises. Logic can determine, for example, whether a statutory reversal of the Crown's normal onus of proof arising from possession of a small quantity of marijuana is "rationally connected" to a legislative objective of suppressing drug trafficking.[77] It is of less assistance in deciding how socially pressing and substantial that objective is, and even less so in deciding *what* the objective of a particular provision, or of a particular *Charter* right, might be. While the determination of rational linkages is admittedly susceptible of some bias, such bias is open to exposure through rational criticism. Since the primary source of bias lies in the selection of premises, a satisfactory approach to legal reasoning must address that highly discretionary function as well as the relatively objective matter of rational connections.

Perhaps this is all that Professor Trakman's salvoes against rationality and logic are intended to establish. Many of his observations are less extreme than those quoted above. His rejection of "mechanical jurisprudence"[78] and his insistence that judges should be "social engineers"[79] are consistent with the now widely accepted views of "American realists" who pointed out, more than a half century ago, the teleological nature of judicial reasoning, and the need to expose the value assumptions which affect the process, chiefly at the premise-selection level. It is difficult to disagree with Trakman's criticism of judges who "seek to avoid debating social practice,"[80] and who "overstate the

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76 See D. Gibson, "Defending Pragmatism From a Bum Rap" (1988) 17 Man. L.J. 227.

77 *R.* v. *Oakes* (1986), 26 D.L.R. (4th) 200 (S.C.C.). The process is not absolutely devoid of teleological weighting, since "rational connection" depends in part on what makes sense to the rational person, a matter with some room for difference of opinion among individuals. There is much less room for personal bias, however, than in the case of goal selection.

78 *Supra* note 2 at 172.

79 *Ibid.* at 24, 161.

80 *Ibid.* at 165.

division between judicial process and substantive law-making,"[81] or with his conclusion that since "judges do not reach decisions independently of either faith or reason,"[82] "absolute reign" should be denied to both.[83]

Professor Trakman's overall treatment of rationality remains disturbing, however, for several reasons. His more extreme remarks are capable of being construed as a wholesale denial of logic's usefulness to legal analysis, and as an invitation to substitute "sentiment" and "social attitudes," as determined by the hocus-pocus of "conversational" reasoning. His unfocused attacks on "analytical legal positivism" in which he claims that (presumably all) "Canadian lawyers are schooled"[84] are exaggerated. *They also fail to target the worst feature of that approach: its cloaking of the real reasons for decisions behind formal rituals, thereby preventing effective analysis and criticism occurring.* His downplaying of the importance of section 1, under which forthright, scrutinizable, policy analysis can take place, encourages judges to evade that exercise, and to continue their *sub rosa* injection of unarticulated policy assumptions into their definition and application of "the rights themselves."

The general impression left by Trakman and other New-Age constitutionalists is that since judicial decisions of the past have been marred by logical lapses and by favouritism for the elite, today's judges should abandon the pretence of rationality and rely instead on their felt need (resulting from "social conversations" with compatible souls) to compensate the non-elite for past injuries. This approach involves several difficulties. For one thing, it simply substitutes new elites for old. For another, it creates the problem of determining who gets to "converse" with the judges, and of developing techniques of quality-control to replace the formalities of the courtroom, over these contributions. The most troubling difficulty is the fact that deliberately non-rational decision-making is all but irrefutable. The decisions of a judge who makes no claim to being logical are almost entirely immune from persuasive criticism, because no common standard exists by which his or her reasoning may be tested. All that remains is: "Whose side are

81 *Ibid.*
82 *Ibid.* at 166.
83 *Ibid.* at 201.
84 *Ibid.* at 5.

you on?" That was an efficacious standard in the days of blood feud, but is it really appropriate for the New Age as well?

I don't think that judges should be on anyone's side, *à priori*. Since that undoubtedly brands me as a liberal, let me turn to Professor Trakman's views of liberalism.

X. Liberalism

Professor Trakman wastes no time identifying liberalism (or at least unmitigated liberalism) as the principal villain. In the second paragraph of the Introduction he tells us that "*Charter* liberalism unduly circumscribes social practice."[85] In the fourth, he promises to "reconcile *Charter* liberalism with the modern needs of Canadian society ..."[86]

Liberalism is marked by stress on the worth of individual self-fulfilment, and on equality of opportunity as a means to that end. Where the sterner forms of liberalism fall short, in my opinion, is in supposing that equality of opportunity means only the opportunity of each individual to snatch self-fulfilment from a competitive free-for-all, without regard to his or her personal strengths or frailties, or his or her prior preparation for the contest. Nor do the more primeval versions of liberalism make adequate provision for the fact that some people will never be able to compete effectively, not matter how much preparation they receive.

The kind of liberalism I prefer recognizes, as Professor Trakman does, that real equality of opportunity cannot exist for many individuals who have suffered long-term social, economic or other disadvantage, and are, therefore, ill-equipped to compete on an equal footing with those who have the benefit of good health, a good education, and beneficial social contacts. It acknowledges, therefore, that special, publicly-funded, catch-up measures are needed to put such people in a position to compete fairly with the socially favoured. It also accepts the responsibility of society to contribute to the fulfilment of those who will never be able to fend for themselves.

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85 *Ibid.* at 1.

86 *Ibid.*

Where I differ from Professor Trakman is that I believe these catch-up programs and social supplements for the disadvantaged can be made generously available without seriously compromising the liberal ideal of equal treatment for those who are not in need of special consideration. There is nothing inconsistent in my view, in providing affirmative action employment programs to members of disadvantaged "target groups" (as section 15(2) and section 6(4) of the *Charter* permit), while simultaneously insisting that there be no discrimination of any kind among other job candidates. Fair play need not be traded off against humanitarianism.

As we have seen, the Supreme Court of Canada has chosen to abandon fair play among the non-disadvantaged, so far as unlisted forms of discrimination under section 15(1) of the *Charter* are concerned. Professor Trakman seems to propose the same approach for all *Charter* rights. That proposal would shrink a constitutional guarantee of the rights of all, which permits affirmative action for the disadvantaged, to an instrument that does *nothing more* than permit affirmative action. The sacrifice of fair play for all would achieve absolutely nothing that is not already possible under the *Charter*, except to wreak a little vengeance on the perceived "elite," a group that comprises, in this context, the majority of Canadians.

It is possible that Professor Trakman does not intend to be as radical as I suggest. He does say, after all, that he wishes to "reconcile" his views with legal liberalism, and he takes pains to note more than once that he does not want to see individual rights abandoned altogether,[87] preferring to merge liberal notions of individualism and rational adjudication with communitarian concepts and "conversational" reasoning. Many of his attacks on liberalism look more like assassination attempts than reform proposals, however. The desired compromise, if one exists, is never made clear.[88] The problem may lie, once again, in Trakman's style. Perhaps, in the course of articulating what he intends to be a message of reconciliation, he has simply allowed his rhetoric to slip its leash too frequently. If so, it is unfortunate that rhetoric has obscured constructive proposals.

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87 For example see *ibid.* at 71, 141-2.

88 Unless mystical statements like that referenced in *supra* note 6 can be considered clear explanations.

If the assassination of constitutional liberalism really was Professor Trakman's goal, I am pleased to report that the attempt has failed. Although he deplores the fact that several Supreme Court of Canada judges he interviewed while writing the book displayed a "broadly liberal orientation towards rights and ... apparent lack of consciousness of credible alternatives to liberal jurisprudence,"[89] his book provides no such credible alternative.

[89] *Ibid.* at vii.

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Edited by R.C. Macleod and David Schneiderman

Published by University of Toronto Press

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