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

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*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.<sup>1</sup>

## 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."<sup>2</sup> 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:<sup>3</sup>

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*.<sup>4</sup> Women, the elderly, persons with disabilities, persons of colour, and aboriginal people are all disproportionately represented among Canada's poor.<sup>5</sup> Nevertheless, poverty itself does not figure as a distinct category of

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

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

<sup>3</sup> 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).

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

<sup>5</sup> 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*<sup>6</sup> and *R. v. Turpin*.<sup>7</sup> 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.<sup>8</sup>

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<sup>6</sup> [1989] 1 S.C.R. 143 [hereinafter *Andrews*].

<sup>7</sup> [1989] 1 S.C.R. 1296 [hereinafter *Turpin*].

<sup>8</sup> 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."<sup>9</sup> 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.<sup>10</sup>

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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.

<sup>9</sup> 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).

<sup>10</sup> *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.<sup>11</sup> On the basis of its low income cut-offs for 1992, Statistics Canada estimated that 16.8 percent of Canadians lived in poverty,<sup>12</sup> including 39.7 percent of unattached individuals, and 13.4 percent of persons in families.<sup>13</sup> Thirty-five percent of unattached men and 53.1 percent of unattached women over the age of 65 fell below the poverty line,<sup>14</sup> as did 18.9 percent of children under 18<sup>15</sup> — 43 percent of them in mother-led single-parent families.<sup>16</sup>

<sup>11</sup> *Ibid.* at 43.

<sup>12</sup> *Ibid.* at 23.

<sup>13</sup> *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.

<sup>14</sup> *Income Distributions, 1992, ibid.* at 29.

<sup>15</sup> *Ibid.* at 23.

<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup>

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.<sup>21</sup> These income levels clearly place the recipients well below the poverty line in all provinces.<sup>22</sup> For unattached individuals, for instance, maximum provincial

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<sup>17</sup> National Council of Welfare, *Poverty Profile 1992*, *ibid.* at 49.

<sup>18</sup> *Ibid.* at 58.

<sup>19</sup> *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.

<sup>20</sup> *Ibid.* at 51.

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

<sup>22</sup> 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.<sup>23</sup> Involuntary reliance on part-time<sup>24</sup> or minimum wage employment,<sup>25</sup> being a member of a mother led single-parent family,<sup>26</sup> being an elderly woman,<sup>27</sup> a person with a disability,<sup>28</sup> a member of a

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

<sup>24</sup> 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.

<sup>25</sup> 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.

<sup>26</sup> 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.

<sup>27</sup> 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).

<sup>28</sup> 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,<sup>29</sup> a recent immigrant,<sup>30</sup> or an aboriginal person,<sup>31</sup> 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."<sup>32</sup> The circumstances of children living in poverty are illustrative:<sup>33</sup>

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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.

<sup>29</sup> 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).

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

<sup>31</sup> 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.

<sup>32</sup> 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.

<sup>33</sup> 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<sup>34</sup> facing individuals and families who are poor.<sup>35</sup>

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.<sup>36</sup> The Canadian Association of Food Banks estimates that almost half a million Canadians turn to food banks and emergency meal programs each month,<sup>37</sup> large numbers of whom are children.<sup>38</sup> 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.<sup>39</sup> Many travel long distances to reach food

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<sup>34</sup> 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.

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

<sup>36</sup> 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).

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

<sup>38</sup> 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.

<sup>39</sup> *Ibid.* at 43-46.

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

The difficulty of obtaining adequate and affordable housing is another serious problem facing people who are poor.<sup>42</sup> 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.<sup>43</sup> 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."<sup>44</sup> 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."<sup>45</sup> This situation is not particular to Ontario. The shortage of subsidized low-income housing is acute across Canada,<sup>46</sup> with the result that social assistance

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<sup>40</sup> *Ibid.* at 42.

<sup>41</sup> *Ibid.* at 51-54.

<sup>42</sup> 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).

<sup>43</sup> 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.

<sup>44</sup> *Transitions*, *ibid.* at 60.

<sup>45</sup> *Ibid.* at 468.

<sup>46</sup> 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.<sup>47</sup>

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.<sup>48</sup> 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.<sup>49</sup> One formerly homeless woman described the severe problems caused by lack of secure housing in the following terms:<sup>50</sup>

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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<sup>47</sup> as their principal source of income; see generally Blakeney, *supra* note 43 at 20-24. 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.

<sup>48</sup> 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).

<sup>49</sup> McLaughlin, *ibid.*

<sup>50</sup> 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.<sup>51</sup> 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:<sup>52</sup>

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:<sup>53</sup>

[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.<sup>54</sup> 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.<sup>55</sup> Children who are poor also have twice the rate of mental and physical disability,

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<sup>51</sup> See, for example, Department of Public Health, *The Unequal Society: A Challenge to Public Health* (Toronto: City of Toronto, November 1985); *Evidence of the Subcommittee 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.

<sup>52</sup> 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.

<sup>53</sup> 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.

<sup>54</sup> *Children in Poverty*, *supra* note 16 at 62.

<sup>55</sup> *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.<sup>56</sup>

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.<sup>57</sup> 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.<sup>58</sup> 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."<sup>59</sup> 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.<sup>60</sup> 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.<sup>61</sup> 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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<sup>56</sup> *Ibid.*; see also *Evidence of the Sub-Committee on Poverty*, *supra* note 31 at 2:4-9 (21 February 1990).

<sup>57</sup> *The New Face of Poverty*, *supra* note 24 at 21.

<sup>58</sup> *Poverty Profile, 1980-1990*, *supra* note 16 at 36-37.

<sup>59</sup> *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.

<sup>60</sup> *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.

<sup>61</sup> 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.<sup>62</sup> Economist David Ross puts the problem as follows:<sup>63</sup>

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.<sup>64</sup> 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.<sup>65</sup>

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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<sup>62</sup> *Ibid.* at 62-63.

<sup>63</sup> 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.*

<sup>64</sup> 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.

<sup>65</sup> 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,"<sup>66</sup> 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*:<sup>67</sup>

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.<sup>68</sup> A 1912 Report of the Associated Charities of Winnipeg reflected the prevailing attitude towards poverty at the time:<sup>69</sup>

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.<sup>70</sup> 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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<sup>66</sup> Economic Council of Canada, *supra* note 2 at 104-105.

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

<sup>68</sup> 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.

<sup>69</sup> Cited in Guest, *ibid.* at 37-38.

<sup>70</sup> 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."<sup>71</sup>

Not surprisingly, these attitudes also pervade the Canadian legal system.<sup>72</sup> 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:<sup>73</sup>

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)*<sup>74</sup> 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:<sup>75</sup>

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

<sup>72</sup> 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.

<sup>73</sup> 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.

<sup>74</sup> [1992] R.J.Q. 1647 [hereinafter *Gosselin*].

<sup>75</sup> *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.<sup>76</sup>

Judicial prejudices around poverty are also evident in *Alcoholism Foundation of Manitoba v. Winnipeg*,<sup>77</sup> 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:<sup>78</sup>

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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<sup>76</sup> 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."

<sup>77</sup> (1990) 69 D.L.R. (4th) 697.

<sup>78</sup> *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:<sup>79</sup>

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<sup>80</sup> as additional causes of individual and family poverty, Selick concluded: "... the truth is that many poor people earn their poverty."<sup>81</sup> As one low income single mother wrote in response to Selick's

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<sup>79</sup> K. Selick, "If the Poor Don't Care, Why Should We?" (September 1990) 14:6 *Canadian Lawyer* 60.

<sup>80</sup> 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.

<sup>81</sup> 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."<sup>82</sup>

For people who are poor, negative stereotypes and social stigma are a constant fact of life: in the popular media,<sup>83</sup> 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.<sup>84</sup> To quote from one brief to the 1970 Senate Committee on Poverty:<sup>85</sup>

... 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.

<sup>82</sup> French, *supra* note 71.

<sup>83</sup> 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.

<sup>84</sup> 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.

<sup>85</sup> 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.<sup>86</sup>

[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:<sup>87</sup>

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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<sup>86</sup> Economic Council of Canada, *supra* note 64 at 112.

<sup>87</sup> 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:<sup>88</sup>

[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,<sup>89</sup> exclusionary enumeration rules facing those living in temporary shelters,<sup>90</sup> 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.<sup>91</sup> 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,<sup>92</sup> and the lower than average voter turn-out rates for poor people in general.<sup>93</sup>

<sup>88</sup> 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.

<sup>89</sup> National Anti-Poverty Organization, *ibid.* at 7-9.

<sup>90</sup> *Ibid.* at 6-7.

<sup>91</sup> *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.

<sup>92</sup> 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.

<sup>93</sup> 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.<sup>94</sup> It is conceded that Canadian public policy-making, at both the federal and provincial levels, is a closed, elite-dominated process.<sup>95</sup> 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.<sup>96</sup> 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."<sup>97</sup>

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

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- <sup>95</sup> 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).
- <sup>96</sup> 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.
- <sup>97</sup> 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.<sup>98</sup> Historically, federalism has also focused attention on inter-regional concerns, rather than on class-based issues. As Donald Smiley explains:<sup>99</sup>

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.<sup>100</sup> As one commentator describes it:<sup>101</sup>

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.

<sup>98</sup> 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.

<sup>99</sup> 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.

<sup>100</sup> 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.<sup>102</sup> 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.<sup>103</sup> 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:<sup>104</sup>

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<sup>101</sup> 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.

<sup>102</sup> 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.

<sup>103</sup> National Anti-Poverty Organization, *supra* note 88 at 3.

<sup>104</sup> 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. Kroecker, 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*,<sup>105</sup> 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."<sup>106</sup> Justice McIntyre then defined discrimination within the meaning of section 15 as:<sup>107</sup>

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<sup>105</sup> *Supra* note 6 [hereinafter *Andrews*].

<sup>106</sup> *Ibid.* at 171.

<sup>107</sup> *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.<sup>108</sup>

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.<sup>109</sup> 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*,<sup>110</sup> involving the equal protection clause under the U.S. Constitution.<sup>111</sup> 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."<sup>112</sup> The concept of discrete and insular minorities was expanded upon by John Hart Ely in his 1980 book *Democracy and Distrust*.<sup>113</sup> As Ely described it, this

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<sup>108</sup> *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.

<sup>109</sup> *Ibid.*

<sup>110</sup> 304 U.S. 144 (1938).

<sup>111</sup> 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.

<sup>112</sup> *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.

<sup>113</sup> 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.<sup>114</sup> 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.<sup>115</sup> In a classic application of this theory in the welfare context, Frank Michelman explains the relationship between these two concerns:<sup>116</sup>

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."<sup>117</sup> 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,"<sup>118</sup> and in the words of John Stuart Mill, as an obvious

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<sup>114</sup> *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.

<sup>115</sup> Ely, *ibid.* at 101-04.

<sup>116</sup> 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.

<sup>117</sup> *Andrews*, *supra* note 6 at 152.

<sup>118</sup> *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 ..."<sup>119</sup>

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."<sup>120</sup> Justice Wilson reiterated this point in her judgment for the Court in *R. v. Turpin*.<sup>121</sup> 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.<sup>122</sup> 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."<sup>123</sup>

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

<sup>120</sup> *Ibid.*

<sup>121</sup> *Supra* note 7 [hereinafter *Turpin*].

<sup>122</sup> *Ibid.* at 1333.

<sup>123</sup> *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.<sup>124</sup>

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."<sup>125</sup> 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

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<sup>124</sup> *Ibid.*

<sup>125</sup> *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.<sup>126</sup> 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."<sup>127</sup> 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.<sup>128</sup> In the recent Tax Court of Canada decision in *Schaff v. The Queen*,<sup>129</sup> 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.<sup>130</sup> 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."<sup>131</sup> 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.<sup>132</sup>

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

<sup>127</sup> *Gosselin*, *supra* note 74 at 1675.

<sup>128</sup> *Ibid.* at 1676.

<sup>129</sup> (1993) 18 C.R.R. (2d) 143.

<sup>130</sup> S.C. 1970-71-72, c. 63, as amended.

<sup>131</sup> *Supra* note 129 at 158.

<sup>132</sup> *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*,<sup>133</sup> 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.<sup>134</sup>

In its 1991 decision in *Federated Anti-Poverty Groups v. British Columbia (A.G.)*,<sup>135</sup> 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:<sup>136</sup>

[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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<sup>133</sup> *Supra* note 77.

<sup>134</sup> *Ibid.* at 711.

<sup>135</sup> (1991) 70 B.C.L.R. (2d) 325.

<sup>136</sup> *Ibid.* at 344.

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

In its 1993 decision in *Dartmouth/Halifax County Regional Housing Authority v. Sparks*<sup>139</sup> the Nova Scotia Court of Appeal struck down two sections of the Nova Scotia *Residential Tenancies Act*<sup>140</sup> 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:<sup>141</sup>

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:<sup>142</sup>

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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<sup>137</sup> *Ibid.* at 342.

<sup>138</sup> *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.

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

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

<sup>141</sup> *Sparks*, *supra* note 139 at 233.

<sup>142</sup> *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:<sup>143</sup>

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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<sup>143</sup> *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.<sup>144</sup> 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*<sup>145</sup> 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:<sup>146</sup>

[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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<sup>144</sup> 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.

<sup>145</sup> [1994] F.C.J. No. 577 (QL).

<sup>146</sup> *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.<sup>147</sup> As Bruce Porter argues:<sup>148</sup>

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.<sup>149</sup>

## 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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<sup>147</sup> 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).

<sup>148</sup> 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).

<sup>149</sup> Iyer, *supra* note 144 at 207.

and sex, among other grounds.<sup>150</sup> The prohibitions set out in the federal and provincial codes generally extend to discrimination in the provision of services, goods, and facilities;<sup>151</sup> 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.<sup>152</sup>

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."<sup>153</sup> 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.<sup>154</sup> 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.<sup>155</sup>

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

<sup>151</sup> 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.

<sup>152</sup> 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).

<sup>153</sup> R.S.Q. 1977, c. C-12, as amended.

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

<sup>155</sup> *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:<sup>156</sup>

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

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:<sup>161</sup>

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

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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.

<sup>156</sup> S.N. 1988, c. 62.

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

<sup>158</sup> C.C.S.M., c. H175.

<sup>159</sup> R.S.O. 1990, c. H19.

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

<sup>161</sup> 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.<sup>162</sup> 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."<sup>163</sup>

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."<sup>164</sup> 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.<sup>165</sup> 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."<sup>166</sup>

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<sup>162</sup> 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.

<sup>163</sup> *Ibid.*

<sup>164</sup> B. Marotte, "Profiting From the Poor" *The Ottawa Citizen* (18 June 1994) A4.

<sup>165</sup> *Ibid.*

<sup>166</sup> *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.<sup>167</sup> 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.<sup>168</sup> 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.<sup>169</sup> One group appearing before the Ontario Social Assistance Review Committee described the experience of tenants in receipt of social assistance:<sup>170</sup>

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.

<sup>167</sup> 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.

<sup>168</sup> 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.).

<sup>169</sup> 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.

<sup>170</sup> *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.<sup>171</sup>

The *Wiebe* case,<sup>172</sup> 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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<sup>171</sup> *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.

<sup>172</sup> *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*,<sup>173</sup> regarding the omission of sexual orientation as a proscribed ground of discrimination under the *Canadian Human Rights Act*,<sup>174</sup> is relevant in this regard.<sup>175</sup>

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.<sup>176</sup>

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

<sup>174</sup> R.S.C. 1985 c. H-6.

<sup>175</sup> *Supra* note 173 at 502-3.

<sup>176</sup> *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,"<sup>177</sup> 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.<sup>178</sup>

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<sup>179</sup> of Canada's compliance with

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<sup>177</sup> *Andrews*, *supra* note 6 at 171.

<sup>178</sup> *Turpin*, *supra* note 7 at 1333.

<sup>179</sup> 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*.<sup>180</sup> 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.<sup>181</sup>

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.<sup>182</sup> 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:<sup>183</sup>

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.

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/ 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.

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

<sup>181</sup> 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.

<sup>182</sup> 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.

<sup>183</sup> *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;<sup>184</sup> the lack of procedures to ensure that welfare rates do not fall below the poverty line;<sup>185</sup> the evidence of hunger and of reliance on food banks;<sup>186</sup> the prevalence of discrimination against the poor in housing;<sup>187</sup> the problem of homelessness;<sup>188</sup> the characterization of social and economic rights in recent Canadian constitutional discussions and court decisions as mere policy objectives;<sup>189</sup> 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.<sup>190</sup>

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.<sup>191</sup> 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.<sup>192</sup> 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.<sup>193</sup> 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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<sup>184</sup> *Ibid.* para. 13.

<sup>185</sup> *Ibid.* para. 15.

<sup>186</sup> *Ibid.* para. 16.

<sup>187</sup> *Ibid.* para. 18.

<sup>188</sup> *Ibid.* paras. 19-20.

<sup>189</sup> *Ibid.* para. 21.

<sup>190</sup> *Ibid.* paras. 23, 24.

<sup>191</sup> *Ibid.* para. 25.

<sup>192</sup> *Ibid.* para. 30.

<sup>193</sup> *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.<sup>194</sup> 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.<sup>195</sup> Poverty-related claims also raise complex socio-economic, evidentiary, and remedial issues, with which the courts may feel unwilling and ill-equipped to deal.<sup>196</sup> 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.<sup>197</sup> 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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<sup>194</sup> 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.

<sup>195</sup> 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.

<sup>196</sup> See Jackman, *supra* note 94 at 330-334.

<sup>197</sup> 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:<sup>198</sup>

[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

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<sup>198</sup> 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.