THE PROTECTION OF WELFARE RIGHTS UNDER THE CHARTER

*Martha Jackman**

> We are not so traditionally accustomed, however, to say that without an unemployment insurance law, or without an old age pensions law, or laws providing for free universal education, there is no liberty. . . . The object of these laws is to free men and women from known and certain risks which exist in our industrialised society, and which if not insured against can destroy so much liberty among so many individuals as to make Bills of Rights to them a hollow mockery.
>
> — Frank R. Scott[1]

INTRODUCTION

While the ambiguity and uncertainty surrounding many of the provisions of the *Canadian Charter of Rights and Freedoms*[2] might be subject to criticism, I prefer the view that Canadians are now in the enviable position of deciding not only what their Constitution should say, but what it does say. This is particularly true with respect to section 7 of the *Charter*, which provides:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The scope and meaning of section 7 has generated considerable debate. Some commentators have suggested that section 7 only provides for procedural protection against state deprivations of life, liberty or physical security. Others have suggested that section 7 extends to a much wider range of interests, including those conducive to human dignity, and to the ability to carry on activities essential to a person's conception of how

---

* Faculty of Law, University of Ottawa. I wish to thank Jerry Mashaw and Kent Roach for their helpful comments on earlier drafts of this paper.

[1] F.R. Scott, *Expanding Concepts of Human Rights* in ESSAYS ON THE CONSTITUTION (Toronto: University of Toronto Press, 1977) 353 at 357.

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

to live "the good life" and to function with a degree of autonomy, self-direction, and social activism.[3]

Were it to be accepted by the courts, an unduly restrictive view of the scope of the section 7 right to life, liberty and security of the person, might lend credence to criticisms that the *Charter* "was not designed to change the *status quo*, but merely to give it greater appeal"[4], and that the *Charter* is important not because it will effect social change, but because it is part of "an integrated and rhetorical system of control and ordering".[5] While I readily acknowledge that the entrenchment of a charter of rights in a society's constitutional structure will not necessarily change its moral and economic foundation[6], I cannot accept the view that the *Charter* has nothing to say to those Canadians who are most in need of its protection.[7] Consistent with this belief, I will attempt to demonstrate that section 7 of the *Charter* guarantees what Frank R. Scott aptly described as "freedom from the risks inherent in an industrialised society through social security involving state action"[8]; what we now characterize as welfare rights. In the first part of the paper I will suggest that the general context in which the *Charter* was adopted, the background against which the language of specific sections must necessarily be understood, points to an interpretation of section 7 which encompasses welfare-related interests. I will examine Canadian social and political traditions with regard to the relationship between the individual, the community and the state; Canada's international human rights commitments; the American welfare rights experience; and the underlying purposes of the 1982 con-

---

[3] *See* N. Duplé, *L'article 7 de la Charte canadienne des droits et libertés et les principes de justice fondamentale* (1984) 25 C. DE D. 99; M. Manning, RIGHTS, FREEDOMS AND THE COURTS — A PRACTICAL ANALYSIS OF THE CONSTITUTION ACT, 1982 (Toronto: Emond Montgomery Limited, 1983); B. Schwartz, *The Charter and Due Process* [1983] ISAAC PITBLADO LECTURES 31; S. Green, *The Charter and Economic Regulation, ibid.* at 38; J.D. Whyte, *Fundamental Justice: The Scope and Application of Section 7 of the Charter* (1983) 13 MAN. L.J. 455; A.W. MacKay & M. Holgate, *Fairness in the Allocation of Housing: Legal and Economic Perspectives* (1983) 7 DALHOUSIE L.J. 383 at 405.

[4] R.A. Samek, *Untrenching Fundamental Rights* (1982) 27 McGILL L.J. 755 at 768.

[5] A.C. Hutchinson, *Charter Litigation and Social Change: Legal Battles and Social Wars* in R. J. Sharpe, ed., CHARTER LITIGATION (Toronto: Butterworths, 1987) 357 at 381. *See also* R.A. Macdonald, *Postscript and Prelude — The Jurisprudence of the Charter: Eight Theses* (1982) 4 SUP. CT L. REV. 321 at 343; A. Petter, *The Politics of the Charter* (1986) 8 SUP. CT L. REV. 473; H.J. Glasbeek & M. Mandel, *The Legalization of Politics in Advanced Capitalism: The Canadian Charter of Rights* (1984) 2 SOCIALIST STUDIES 84.

[6] Samek, *supra*, note 4 at 763.

[7] For an eloquent defense of rights and rights-assertion from the perspective of the disenfranchised, *see* P.J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights* (1987) 22 HARVARD CIVIL RIGHTS-CIVIL LIBERTIES L. REV. 403. *See also* C. Campbell, *The Canadian Left and the Charter of Rights* (1984) 36 STANFORD L.R. 509.

[8] Scott, *supra*, note 1 at 358.

stitutional reforms, to support this argument. In the second part of the paper, I will go on to consider the nature and scope of the barriers which section 7 erects against government deprivations of welfare rights. Finally, I will explore the implications of my argument for the role of the judiciary within the larger Canadian political framework.

I. Source of Protection: The Context in Which The Charter Was Adopted

As the Supreme Court of Canada has reiterated on numerous occasions, the task of expounding the *Charter of Rights and Freedoms*, as part of the "supreme law of Canada"[9] is crucially different from that of construing an ordinary statute. In *Skapinker* v. *Law Soc'y of Upper Canada*, Mr. Justice Estey declared that the *Charter* must "serve the Canadian community for a long time", and that "narrow and technical interpretation" could "stunt the growth of the law and hence the community it serves".[10] In *Hunter* v. *Southam* Chief Justice Dickson emphasized the importance of taking the special character of the constitution into account in fashioning principles of interpretation, and in particular, "the need for a broad perspective in approaching constitutional documents".[11] The court has explained the special requirements of constitutional interpretation primarily in relation to the fact that, once enacted, a constitution is difficult to amend, and so must be capable of growth and development over time to meet realities unforeseen by its framers.[12] Allan Cairns speaks to a second, fundamental, issue:

> A constitution is not just a bundle of machinery, a big tinker toy with substitutable parts facilitating easy assembling and dismantling. It is also a body of understandings, norms, and identities of those who live the ongoing constitutional life of the country. . . In its largest sense the constitution is a collective experience, and a body of evolving understandings and assumptions which interacts with that experience.[13]

As one witness appearing before the Special Joint Committee on the Constitution declared: "A constitution is more than a legal framework.

---

[9] *Constitution Act, 1982*, s. 52(1), *supra*, note 2.

[10] *Skapinker* v. *Law Soc'y of Upper Canada*, [1984] 1 S.C.R. 357 at 366, 53 N.R. 169 at 180.

[11] *Hunter et al.* v. *Southam Inc.*, [1984] 2 S.C.R. 145 at 155, 11 D.L.R. (4th) 641 at 649.

[12] *See ibid.* at 155, 11 D.L.R. (4th) 641 at 649; *Skapinker* v. *Law Soc'y of Upper Canada*, *supra*, note 10 at 366, 53 N.R. 169 at 180.

[13] A.C. Cairns, *The Canadian Constitutional Experiment* (1984) 9 Dalhousie L.J. 87 at 103. *See also* J.D. Whyte, *High Constitutionalism: Reading the Ideas of the Canadian Constitution*, (Faculty of Law, University of Toronto, Legal Workshop Series, January 17, 1986) at 6-12 [unpublished].

It must be an expression of our history, our character, our values as well as our aspirations".[14] Former Prime Minister Pierre Trudeau himself characterized the federal government's earliest proposal for an entrenched charter of rights as an instrument "which will permit the preservation of our traditions and the pursuit of the ideals which our society cherishes".[15] It is this unique constitutional quality which makes it impossible for courts to confine themselves to traditional sources and methods of legal reasoning in interpreting and applying the *Charter*. Rather they must move beyond the text itself, to the broader social and political context in which the *Charter* was enacted, in order to find authentic meaning in the often imperfect language of particular provisions. In the words of Chief Justice Dickson in *Regina* v. *Big M Drug Mart Ltd.*: "the *Charter* was not enacted in a vacuum, and must therefore . . . be placed in its proper linguistic, philosophic and historical contexts".[16]

The social, political, economic, and cultural values which the community shares; the values which, to a significant extent, inform its collective self-identity, are a crucial source of meaning in this regard. As Thomas Berger wrote, the *Charter* "is a valuable and uniquely Canadian undertaking, revealing in its own way our progress towards defining our idea of Canada".[17] For *Charter* interpretation to reflect this fact, the courts must, as Mr. Justice La Forest explained, "be guided by the felt needs and traditions of our own society".[18] Were one to ask individual Canadians themselves what they consider to be "the values most fundamental to the Canadian way of life"[19], and by definition, those which they would expect to find expressed in our constitutional *Charter*, one of the first responses would surely be the near-universal concern for individual social and economic security. Canadians, I would argue, attach great importance

---

[14] This comment was made by Mr. Fred Pennington, a board member of the Canadian Council on Social Development; *see* Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, First Session of the Thirty-second Parliament, 1980-1981, Issue no. 19 at 26 (4 December 1980) [hereinafter *Minutes*].

[15] P.E. Trudeau, *Constitutional Reform and Individual Canadians* (1969) 8 U.W.O. L. REV. 1 at 3.

[16] *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 344, 18 D.L.R. (4th) 321 at 360.

[17] T.R. Berger, *The Charter and Canadian Identity* (1985) 23 U. W. O. L. REV. 1 at 1. *See also* T.R. Berger, *The Judicial Role in Interpreting the Equality Provisions of the Charter of Rights*, in E.D. Pask *et al.*, eds, WOMEN, THE LAW AND THE ECONOMY (Toronto: Butterworths, 1985) 315 at 315.

[18] G.V. La Forest, *The Canadian Charter of Rights and Freedoms: An Overview* (1983) 61 CAN. BAR REV. 19 at 24.

[19] R.G.B. Dickson, C.J.C., *Address* (Canadian Bar Association Mid-Winter Meeting, February 2, 1985) [unpublished].

to the idea that Canada is an interdependent community;[20] that individual Canadians are not the sole guarantors of their own social and economic well-being;[21] and that there is a minimum level of welfare below which no Canadian will be allowed to fall. These deeply held values cannot be ignored in the general search for meaning in the *Charter*. However they have particular relevance for the interpretation of section 7. This can best be understood by looking to dominant Canadian perceptions of the relationship between the community, the individual and the state.

1. The Relationship Between the Individual and the State: the Right to "Life and Liberty"

A conception of the right to life and liberty, which is premised entirely on an adversarial view of the relationship between the individual and the state, ignores fundamental aspects of Canadian political culture.[22] From the colonial period onwards, Canadians have accepted an active role for the state in the promotion of economic and social objectives.[23] George Grant argues that the shared willingness, in the English and the French colonial communities, to "grant the state much wider rights to control the individual than was recognized in the libertarian ideas of the American Constitution" was a factor which facilitated the creation and maintenance of the Canadian union.[24] As Henri Brun suggests, by contrast to the American, the Canadian cultural identity is characterized by a greater trust in the state than in individual laissez-faire.[25] Confederation itself, and the politics of the following decades, reflect the widespread acceptance of the state as the principal agent of economic and social progress.

---

[20] As the federal government declared at the outset of the consitutional reform effort which led to the adoption of the Charter, "We all believe. . .in the sharing of the country's wealth and income among individuals and regions"; P.E. Trudeau, A TIME FOR ACTION — TOWARD THE RENEWAL OF THE CANADIAN FEDERATION (Ottawa: Supply and Services Canada, 1978) 6.

[21] This view was echoed by the Programme Director of the Canadian Council on Social Development in her testimony before the Special Joint Committee on the Constitution: "We believe that the vast majority of Canadians would subscribe to . . . the right to an adequate standard of living with access to the necessities of life."; *Minutes*, *supra*, note 14, Issue no. 19 at 31 (4 December 1980).

[22] For a more restrictive view of the content of the section 7 right to life and liberty, *see* P. Garant, *Fundamental Freedoms and Natural Justice*, in W.S. Tarnopolsky and G.A. Beaudoin, eds, CHARTER OF RIGHTS AND FREEDOMS: COMMENTARY (Toronto: Carswell, 1982) 257 at 263-64; *but see* P.W. Hogg, CONSTITUTIONAL LAW OF CANADA, 2nd ed. (Toronto: Carswell, 1985) at 745.

[23] *See* R. Presthus, ELITE ACCOMMODATION IN CANADIAN POLITICS (London: Cambridge University Press, 1973) at 21-24.

[24] G. Grant, LAMENT FOR A NATION (Toronto: McClelland & Stewart, 1965) at 68-69.

[25] H. Brun, *The Canadian Charter of Rights and Freedoms as an Instrument of Social Development* in C. Beckton & A.W. MacKay, Research Coordinators, THE COURTS AND THE CHARTER (Toronto: University of Toronto Press, 1985) 1 at 10.

The creation of a national economy, the establishment of a national transportation infrastructure, the promotion of immigration to populate the West, were all viewed primarily as responsibilities of the state.[26] In the twentieth century public enterprise and public marketing agencies are techniques commonly used by the Canadian state to further national objectives[27]. The activist attitude in Canadian governments of all political stripes is best explained by what Gad Horowitz, in his seminal application of Louis Hartz's fragment theory[28] to Canada, called the "tory touch"; the presence in Canadian political culture of a "corporate-organic-collectivist" conservatism, inherited from the original French settlers, and later, from the American loyalists. This tory strain in an otherwise liberal culture, Horowitz argued, manifest itself in Canadians' willingness to rely on the instrumentality of the state to achieve desired economic and social change. In addition, Horowitz maintained, this "tory touch" made it easier for socialism to implant itself in Canada. Where it was entirely antithetical to the unalloyed liberalism of the United States, socialism, like toryism, focussed on the good of the community as a corporate whole. Hence, after its introduction to Canada by British and European immigrants in the late nineteenth century, socialism was able to blend in and develop within the pre-existing ideological framework.[29]

The acceptance of a positive role for governments in the promotion of human rights is an important reflection of the prevailing attitude towards the state in Canadian political culture. Canadians not only recognize that there is no necessary contradiction between individual freedom and state power, but expect governments to act affirmatively to support and expand individual freedom, by providing the means for its exercise. The state's duty to protect and enhance individual liberty has been a recurring theme in Canadian political discourse since the second world war. In his introduction to Jack Pickerskill's history of the Liberal party, for example, former Prime Minister Lester Pearson emphasizes the centrality of positive as well as negative liberty, to Canadian liberalism:

> Liberalism . . . believes . . . that it is the first purpose of government to legislate for the liberation and development of the human personality. This

---

[26] *See* H.G.J. Aitken, *Defensive Expansion: The State and Economic Growth in Canada* in W.T. Easterbrook & M.H. Watkins, eds, APPROACHES TO CANADIAN ECONOMIC HISTORY (Toronto: McClelland and Stewart Limited, 1967) 183; D.V. Smiley, *Canada and the Quest for a National Policy* (1975) 8 CAN.J.POL.SCI. 41 at 42-46.

[27] *See* G.B. Doern & R.W. Phidd, CANADIAN PUBLIC POLICY — IDEAS, STRUCTURE, PROCESS (Toronto: Methuen, 1983) at 110-137; M.J. Trebilcock *et al.*, THE CHOICE OF GOVERNING INSTRUMENT (Ottawa: Minister of Supply and Services, 1982).

[28] *See* L. Hartz, THE FOUNDATION OF NEW SOCIETIES (Toronto: Longmans, 1964).

[29] G. Horowitz, *Conservatism, Liberalism and Socialism in Canada: An Interpretation* (1966) 32 CAN.J.ECON.POL.SCI. 143; *see also* W. Christian & C. Campbell, POLITICAL PARTIES AND IDEOLOGIES IN CANADA, 2nd ed. (Toronto: McGraw-Hill Ryerson, 1983). For a recent critique of the Horowitz theory, *see* H.D. Forbes, *Hartz-Horowitz at Twenty: Nationalism, Toryism and Socialism in Canada and the United States* (1987) 20 CAN.J.POL.SCI. 287.

> includes the negative requirement of removing anything that stands in the way of individual and collective progress . . . The Liberal Party, however, must also promote the positive purpose of ensuring that all citizens, without any discrimination, will be in a position to take advantage of the opportunities opened up; of the freedoms that have been won.[30]

Former Conservative Prime Minister John Diefenbaker's efforts to reduce interregional economic disparities in Canada were also reflections of a belief that the government bore a positive duty to enhance the liberty and opportunity of individual Canadians, in all parts of the country.[31] More recently, the Task Force on Canadian Unity defined liberty as comprising both a "right of non-interference by the state", and a "right to claim state intervention to provide an opportunity on a basis of equality with others". In the latter sense, liberty entailed "a claim for positive assistance by the state in securing certain opportunities".[32]

Frank R. Scott's 1960 commentary on the Diefenbaker Bill of Rights represents the clearest legal articulation of the view that governments have a positive obligation to promote individual liberty:

> In the early struggles for liberty, it was nearly always the state or some part of it that was the enemy. . . .Hence the very strong tradition grew up. . . . that it was liberty against government that mattered. . . .This concept, however, has had in recent times to be supplemented by another idea, which I may call liberty through government. Certain human rights, of great value to a great number of people, can only be realised through governmental action.[33]

In his discussion of the *Bill of Rights* Scott acknowledges that liberty against government and liberty through government pose separate problems. While the former can be secured simply by prohibiting certain forms of state action, the latter requires the imposition on the state of a positive duty to act. However Scott rejects the idea that this distinction precludes the constitutional entrenchment of rights involving positive conceptions of liberty. He asserts that the constitution itself should include an expression of "the now universally accepted notions of social security and human welfare", and that a constitution consonant with Canadians' "agreed goals of securing the largest possible freedom and security for all citizens" would be "a more lively, more contemporary, and a more human constitution. It would be a citizen's constitution and not just a lawyer's constitution".[34]

In a contemporaneous discussion of the *Bill of Rights*, the late Chief Justice Bora Laskin also recognizes liberty involving state action, which

---

[30] J.W. Pickerskill, THE LIBERAL PARTY (Toronto: McClelland & Stewart, 1962) at ix.

[31] Christian & Campbell, *supra*, note 29 at 115.

[32] The Task Force on Canadian Unity, COMING TO TERMS — THE WORDS OF THE DEBATE (Ottawa: Supply and Services Canada, 1979) at 17.

[33] Scott, *supra*, note 1 at 356-357.

[34] *Ibid.* at 358.

he calls liberty "in [an] egalitarian sense", as a fundamental class of liberty, along with traditional legal, political and economic liberties.[35] He includes unemployment insurance, public health care, and public education as "some of the better known and partly realized objectives in this class of liberty".[36] Chief Justice Laskin's belief that the protection of civil liberties was a matter for exclusive federal jurisdiction precluded him from accepting constitutional status for what he characterized as egalitarian liberty.[37] However his judgments on the scope of the federal spending power reflected a firm belief that the state bore a positive responsibility to intervene actively to secure egalitarian liberty, through the establishment of universal economic and social programs.[38]

The positive conception of liberty also finds voice in more recent Canadian legal theory. In a 1983 Cambridge Lecture, Peter Hogg echoes Scott's claim that "without a decent income, housing, health care and education, an individual cannot be free in the sense of being able to fulfil his or her potentiality, and he or she certainly cannot be equal with those who do enjoy those things".[39] Rod Macdonald's jurisprudential analysis of the *Charter* rejects the view that it entrenches a purely negative concept of freedom. He contends:

> The most important fundamental right for the majority of Canadians is not a right to be free from certain kinds of governmental activity, but rather the right to be free to benefit equally from the advantages that organized government fosters.[40]

Marc Gold attributes much of the difficulty in interpreting and applying the *Charter* to the fact that, although it is intended to limit public enterprise, at the same time, "we expect government to act positively in the pursuit of social justice".[41] In a study of the evolution of civil rights in Canada since the second world war, Cynthia Williams finds that Canadian rights demands in general have come to focus less on negative civil liberties, and "more on demands that place expectations and obligations on governments to intervene through public policies".[42] On a

---

[35] B. Laskin, *An Inquiry into the Diefenbaker Bill of Rights* (1959) 37 CAN. BAR REV. 77 at 81-82.

[36] *Ibid.* at 82.

[37] *See* R.J. Sharpe, *Bora Laskin and Civil Liberties* (1985) 35 U.T.L.J. 632 at 639.

[38] N. Finkelstein, *Laskin's Four Classes of Liberty* (1987) 66 CAN. BAR REV. 227 at 246.

[39] P.W. Hogg, *The Charter of Rights and Social and Economic Reform*, in Canadian Institute for Advanced Legal Studies, THE CAMBRIDGE LECTURES 1983 (Toronto: Butterworths, 1983) 45 at 47. *See also* P.H. Russell, *A Democratic Approach to Civil Liberties* (1969) 19 U.T.L.J. 109 at 119.

[40] Macdonald, *supra*, note 5 at 344.

[41] M. Gold, *A Principled Approach to Equality Rights: A Preliminary Inquiry* (1982) 4 SUP. CT L. REV. 131 at 158.

[42] C. Williams, *The Changing Nature of Citizen Rights* in A. Cairns & C. Williams, Research Coordinators, CONSTITUTIONALISM, CITIZENSHIP AND SOCIETY IN CANADA (Toronto: University of Toronto Press, 1985) 99 at 124.

different plane, the valorization of Canadian traditions recognizing a positive role for the state in the promotion of individual freedom underlies the unwillingness in some commentators to place excessive reliance on the American constitutional experience in interpreting the *Charter*.[43]

Beyond the realm of political and legal discourse, however, the positive conception of freedom articulated by Scott and others finds even clearer expression. In a brief presented to the Royal Commission on the Economic Union and Development Prospects for Canada, the Canadian Mental Health Association underscores the critical importance of certain key elements to individual well-being. Among these is a "sense of freedom", which the Association explains as follows:

> The sense of freedom from oppression and restriction comes not only, nor even primarily, from freedom from government restriction. It requires freedom of opportunity, not only in the sense of having no governmental barriers to reasonable aspirations, but of being able to avail oneself of opportunities. A person boxed in by debilitating circumstances will not be free, even if the government does not intervene. In fact, that person will be unfree because of government inaction.[44]

Theoretical concerns that liberty has positive, as well as negative, content reflect the practical reality that life and liberty, in many if not all circumstances, cannot be enjoyed in the absence of affirmative state action. At a traditional jurisprudential level, it is widely admitted that there can be no freedom without law.[45] However at a more basic level, a person who lacks access to adequate income, food, shelter, medical care and educational opportunity cannot be said to enjoy a right to life and liberty in any real sense. As Scott declared in 1949: "We are more aware today of the foolishness of pretending that a man is "free" when he is unemployed and without income through no fault of his own, or when he cannot pay for good health or good education for his children".[46] And, as Robert Samek reiterated more recently in connection with the *Charter*, "It is idle and obscene to talk about fundamental rights unless we acknowledge the absolute priority of fundamental needs".[47]

If we accept a positive conception of liberty as grounded in Canadian legal and political culture, it can legitimately be claimed that welfare

---

[43] *See* Petter, *supra*, note 5 at 493-494. *See also* R.I. Cheffins & P.A. Johnson, THE REVISED CANADIAN CONSTITUTION — POLITICS AS LAW (Toronto: McGraw-Hill Ryerson, 1986) at 130, 152-153.

[44] 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 82. [hereinafter THE OTHER MACDONALD REPORT]

[45] For a survey of adherents to this view, from classical to modern times, *see* F.A. Hayek, LAW, LEGISLATION AND LIBERTY — A NEW STATEMENT ON THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY (London: Routledge & Kegan Paul, 1979) at 51-52.

[46] F.R. Scott, *Dominion Jurisdiction Over Human Rights and Fundamental Freedoms* (1949) 27 CAN. BAR REV. 497 at 507.

[47] Samek, *supra*, note 4 at 773.

rights are protected by the section 7 "right to life and liberty". This is true because, as will be seen in the next part of the paper, it is the Canadian state, acting through the welfare system, which is charged by Canadian society with the task of protecting individuals against the deprivations and needs which preclude the enjoyment of a genuine right to life and liberty. A failure by the state to extend welfare protection to an individual who is unable to satisfy his or her fundamental needs thereby constitutes a deprivation of his or her constitutional right to life and liberty.

Inaction on the part of the state in this respect results most dramatically in direct deprivations of life and liberty. We think, for example, of the deaths of homeless people, or of the thousands of hungry Canadians who are forced to rely on private charity for basic sustenance.[48] The response of a Vancouver widow and food bank user to the question what would happen if Canadian food banks closed down illustrates this point:

> I think we would see such a rise in crime and suicides. And, I don't know about marches on government . . . . [B]ut I think you would see so many desperate people taking really desperate moves, like crime, for instance. I wouldn't consider it myself at this point, but I think a lot of people would. If you have a family and you have to feed them, and it becomes a choice of stealing something or letting your child starve, you're going to steal. I would if my children were at home.[49]

Less visible, but in the aggregate equally harmful, state inaction results in deprivations of liberty in the sense, alluded to by Macdonald and the Canadian Mental Health Association, of freedom to benefit from the opportunities and advantages of living in modern Canadian society. Again, in the words of Scott: "To deprive people of . . . essentials to the good life, or to allow the still unresolved problems of our economic system to deprive them of them without taking steps to alleviate the deprivations, is to take away human rights".[50]

A Canadian who suffers from basic want is not free. To recognize this reality, is to recognize that the *Charter*, by declaring that every Canadian has a right to life and liberty, imposes an affirmative obligation on the state to ensure that no Canadian is in need. A failure by the state to meet that obligation constitutes a denial of fundamental constitutional rights.

---

[48] *See* P. Taylor, "Winter Deaths Feared Despite More Hostels" *The Globe and Mail* (17 November 1986) A18; J. Layton, "Homeless Die Beside an Empty Apartment" *The Toronto Star* (9 February 1987) A15; C. Bainbridge, "Death Rate Among Homeless Labelled "scary"" *Winnipeg Free Press* (23 February 1987) 1, 4. *See also*, *infra*, note 114. With respect to the problem of hunger in Canada, *see* the discussion accompanying notes 112-117, *infra*.

[49] G. Riches, FOOD BANKS AND THE WELFARE CRISIS (Ottawa: Canadian Council on Social Development, 1986) 138.

[50] Scott, *supra*, note 1 at 357.

2. *The relationship between the individual and the community: the right to "security of the person"*

The need to look to indigenous sources of meaning in interpreting the expression "security of the person" as it appears in section 7 is equally, if not more, compelling than with respect to the more traditional notions of life and liberty.[51] A strong argument can be made that the protection which the right to security of the person affords extends beyond mere physical security from arbitrary state action, to protect all aspects of human personhood. A broad definition of the concept of security of the person was put forward prior to the adoption of the *Charter* by the Law Reform Commission of Canada,[52] and has been urged by most commentators since.[53] This argument gains enormous strength from the distinctive way in which Canadians have come to conceive of personal security since the depression and the second world war.

Where the dominant view of the relationship between the individual and the state informs the Canadian ideal of positive liberty, conceptions of the relationship between the individual and the community as a whole provide the basis for the modern Canadian understanding of personal security. Since the thirties, Canadians have come to perceive personal security increasingly in social insurance terms. Pooling its resources, and acting through the agency of the state, the community establishes a network of social benefits and services which it extends to each of its members in case of need. Personal security becomes the knowledge in each individual that this social "safety-net" exists, and that access to it is collectively guaranteed. By the late 1960's, this conception of personal security had become so fundamental to our idea of Canada as to be considered a matter for constitutional entrenchment. In 1968, when it launched the constitutional review process which culminated in the adoption of the *Charter*, the federal government proposed the following as

---

[51] While "security of person" is guaranteed by article 9 of the *International Covenant on Civil and Political Rights* THE INTERNATIONAL BILL OF HUMAN RIGHTS (New York: United Nations, 1978), and by article 5 of the *European Convention* EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS (Dordrecht: M. Nijhoff, 1987), the right to "security of the person" is unique to the Canadian Charter.

[52] The Law Reform Commission wrote that: "The right to security of the person means not only protection of one's physical integrity, but the provision of necessaries for its support". The Commission cited Blackstone's COMMENTARIES ON THE LAWS OF ENGLAND as one authority for this proposition: "The law not only regards life and member, and protects every man in the enjoyment of them, but also furnishes him with every thing necessary for their [sic] support". Law Reform Commission of Canada, MEDICAL TREATMENT AND THE CRIMINAL LAW (Working Paper 26) (Ottawa: Law Reform Commission of Canada, 1980) at 6.

[53] *See* Manning, *supra*, note 3 at 235-36; Schwartz, *supra*, note 3 at 35; Whyte, *supra*, note 3 at 40-41; Garant, *supra*, note 22, 257 at 271.

one of the four "objectives of Confederation" which should be formally included in the preamble of the Constitution:

> To promote national economic, social and cultural development and the general welfare and equality of opportunity for all Canadians, in whatever region they may live, including the opportunity for gainful work, for just conditions of employment, for an adequate standard of living, for security, for education, and for rest and leisure.[54]

The deep-seated character of this vision of security in the Canadian national consciousness is reflected both in characterizations of the relationship between individual and community in Canadian social and political thought, and in the growth of the welfare system generally.[55]

Western Canadian historian William Morton sets out a classic vision of the relationship between the individual and Canadian society in his 1960 essay *The Relevance of Canadian History*[56]. Morton argues that the individual is "the object of the justice the state exists to provide and of the welfare society exists to ensure". While the individual possesses ultimate autonomy "since he is the end to which both state and society are means", that autonomy "carries with it a sovereign obligation to respect and safeguard the autonomy of his fellows". This mutual obligation and respect, Morton suggests, is manifest both through direct relations between individuals and through the Canadian social and political order. "So reciprocal and delicate a complex of justice, welfare, and good manners may function", Morton concludes, "only in an organic unity of state, society and individual".[57] More recently, philosopher Leslie Armour suggests that the idea of an organic society, "in which mutual interest, mutual dependence and a common good which surpasses all individuals have a place", has very old roots in Canada.[58] While Morton sees the individual as pre-eminent, and Armour focusses on society, each

---

[54] P.E. Trudeau, THE CONSTITUTION AND THE PEOPLE OF CANADA — AN APPROACH TO THE OBJECTIVES OF CONFEDERATION, THE RIGHTS OF PEOPLE AND THE INSTITUTIONS OF GOVERNMENT, (Published by the Government of Canada on the Occasion of the Second Meeting of the Constitutional Conference, Ottawa, February 10, 11, 12, 1969) (Ottawa: Queen's Printer, 1969) at 48.

[55] For a discussion of the development of the Canadian social security system, *see* D. Guest, *The Emergence of Social Security in Canada*, rev'd 2d ed. (Vancouver: University of British Columbia Press, 1985); R.D. Bureau, D. Lippel & L. Lamarche, *Development and Trends in Canadian Social Law, 1940 to 1984* in I. Bernier & A. Lajoie, Research Coordinators, FAMILY LAW AND SOCIAL WELFARE LEGISLATION IN CANADA (Toronto: University of Toronto Press, 1986) 71; 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.

[56] W.L. Morton, in A.B. McKillop, ed., CONTEXTS OF CANADA'S PAST — SELECTED ESSAYS OF W.L. MORTON (Toronto: Macmillan, 1980) 163.

[57] *Ibid.* at 183.

[58] L. Armour, THE IDEA OF CANADA AND THE CRISIS OF COMMUNITY (Ottawa: Steel Rail Pub., 1981) at xiii.

emphasizes the organic nature of the relationship between the two, and the centrality of the ideal of mutual welfare in our conception of the Canadian community. In a similar vein, constitutional scholar William Lederman depicts the emergence of the social welfare system in Canada since the depression as a reflection of Canadians' adhesion to the ideal of mutual help: "Regardless of things that may divide us, we have had this recognition in Canada that we are our brothers' keepers".[59] In the words of a Canadian food bank coordinator: "In Canada, there is an understanding about people's need to survive and our interdependence".[60] Serious objections were raised to the adoption of the *Charter* of Rights and Freedoms itself precisely because of the threat it poses to indigenous Canadian perceptions of the relationship between the individual and the community. Ronald Cheffins and Patricia Johnson, for example, warned:

> We will move away from what Horowitz calls the "Tory touch" into the vortex of American Lockeian liberalism. We will be moving from a nation based on an evolutionary, pragmatic, moderately collectivist approach to one in which the assertion of individual rights will become of paramount concern.[61]

As suggested above, the evolution of Canadian thinking about society's responsibility for the welfare and security of its members, from the end of the second world war through to the period leading up to the adoption of the *Charter*, can be seen in the parallel development of the Canadian social security system. In the late nineteenth and early twentieth centuries, Canada was transformed from a predominantly rural and agrarian society to a highly urbanized and industrialized one. At the same time, the inadequacy of industrial wages for the support of the worker and the worker's family, and the frequent downturns in the Canadian economy, generated tremendous social and material insecurity. It was this insecurity which prompted early social reformers, such as Stephen Leacock and James Woodsworth, to reject nineteenth century attitudes

---

[59] W.R. Lederman, *Constitutional Amendment and Canadian Unity*, in SPECIAL LECTURES OF THE LAW SOCIETY OF UPPER CANADA 1978: THE CONSTITUTION AND THE FUTURE OF CANADA (Toronto: Richard de Boo, 1978) 17 at 35.

[60] Riches, *supra*, note 49 at 40.

[61] Cheffins & Johnson, *supra*, note 43 at 130; *see also ibid.* at 151-53; D.A. Schmeiser, *The Case Against Entrenchment of a Canadian Bill of Rights* (1973) 1 DALHOUSIE L.J. 15 at 49; Doern & Phidd, *supra*, note 27 at 23. Similar concerns were articulated by Saskatchewan Premier Allan Blakeney during the 1980-81 constitutional debate; *see* D.A. Milne, THE NEW CANADIAN CONSTITUTION (Toronto: James Lorimer, 1982) at 69.

towards poverty and "poor relief"[62], and to press for legislative reforms to meet the economic insecurities faced by workers and their families. Writing in the first decades of the twentieth century, Leacock described the progressive rejection of nineteenth century individualism — the doctrine of "every man for himself" — and the awakening sense in Canadians of the collective responsibility of society towards its weaker members.[63] In his view, the experience of the first world war greatly increased this sense of social solidarity in Canada. On one level the war made it clear to Canadians "that our fortunes are not in our individual keeping. We stand or fall as a nation".[64] On another, Leacock claimed, Canadians reasoned from the experience of conscription: "The obligation to die must carry with it the right to live. If every citizen owes it to society that he must fight for it in case of need, then society owes to every citizen the opportunity of a livelihood".[65] Leacock argued, in terms which became increasingly familiar as the century progressed, that the economic losses involved in unemployment, illness and infirmity should be shifted from the individual to society at large, where they could more easily, and more efficiently, be absorbed.[66] In his 1911 book *My Neighbour*, Woodsworth wrote, in a similar theme, about urban Canada: "By slow degrees we are learning that 'the welfare of one is the concern of all'. . . In the city, for good or ill, we are members of one another".[67] In response largely to the critiques of social reformers such as Woodsworth and Leacock, and to the demands of organized labour and their supporters, the federal and provincial governments began, during and after the first world war, to enact workmen's compensation acts, minimum wage legislation, mothers' allowances, and old age pension legislation.[68]

---

[62] In the nineteenth century, in both English and French Canada, individuals who were unable to meet their own needs were expected to rely on their families. Only when family resources were exhausted could they turn to private or public charity for support. Public assistance, in the British Poor Law tradition of "less eligibility", was set at a level inferior to what the lowest paid labourer in the community could earn, and was dispensed at the local or parish level in the form of poor relief. *See* Guest, *supra*, note 55 at 2-17. Not surprisingly, the major Canadian social reform of the second half of the nineteenth century was the introduction of free, universal, primary school education; *see* A.L. Prentice, THE SCHOOL PROMOTERS — EDUCATION AND SOCIAL CLASS IN MID-NINETEENTH CENTURY UPPER CANADA (Toronto: McClelland & Stewart, 1977).

[63] S. Leacock, *The Unsolved Riddle of Social Justice* in A. Bowker, ed., THE SOCIAL CRITICISM OF STEPHEN LEACOCK (Toronto: University of Toronto Press, 1973) 71 at 135-36. *See also* D.V. Smiley, ed., THE ROWELL-SIROIS REPORT/BOOK I (Toronto: McClelland & Stewart, 1963) at 136.

[64] Leacock, *ibid.* at 136.

[65] *Ibid.* at 135.

[66] *Ibid.* at 136.

[67] J.S. Woodsworth, MY NEIGHBOUR (Toronto: University of Toronto Press, 1972) at 14.

[68] Guest, *supra*, note 55 at 18-82. *See also* J. Struthers, NO FAULT OF THEIR OWN: UNEMPLOYMENT AND THE CANADIAN WELFARE STATE 1914-1941 (Toronto: University of Toronto Press, 1983).

With the depression in the 1930's came a growing awareness in Canada that individual social and economic insecurity was a product of structural factors in the Canadian economy, and could not simply be attributed to isolated economic and industrial incidents, or to individual behaviour.[69] The depression also underscored the inadequacy of traditional solutions to large-scale Canadian economic problems.[70] Canadian social commentators and policy-makers alike referred increasingly to the necessity for collective responsibility for the security of individual members of society. The Cooperative Commonwealth Federation was at the forefront of this movement, calling in its 1933 *Regina Manifesto* for a new social order "in which the principle regulating production, distribution and exchange will be the supplying of human needs and not the making of profits".[71] The Regina Manifesto called for a national system of unemployment insurance; for social insurance against sickness, death, disability, and old age; and for free universal health care. In 1945, M.J. Coldwell, the leader and a founding member of the C.C.F., described the party's social security proposals as a "new Magna Carta" of social rights for Canadians: "The idea behind the proposals is that insofar as a person is unable to care for himself, or herself, it is a collective responsibility to see that those things necessary for physical welfare and cultural life are made available to him".[72]

In the face of growing popular support for the Left[73], and under particular pressure from the C.C.F., the federal government responded to the depression by instituting grants in aid to the provinces for the provision of direct relief, public works projects to stimulate employment, and an ambitious package of "New Deal" social and economic legislation.[74] In 1937 the federal government also appointed the Rowell-Sirois

---

[69] During the first four years of the depression, the Canadian G.N.P. declined by a third; unemployment rose from 2.9 per cent to 19.3 per cent of the labour force; industrial production was cut by half; exports fell by two-thirds, and construction fell to one-tenth of its previous level; *see* Rice, *supra*, note 55 at 227.

[70] For a compelling account of the impact of the depression, and the inadequacy of traditional relief measures, on the lives of individual Canadians, *see* L.M. Grayson & M. Bliss, eds, THE WRETCHED OF CANADA: LETTERS TO R.B. BENNETT 1930-1935 (Toronto: University of Toronto Press, 1971).

[71] Cooperative Commonwealth Federation, *The Regina Manifesto*, (Adopted at the First National Convention, held at Regina, Saskatchewan, July, 1933), reproduced in D. Lewis & F.R. Scott, MAKE THIS YOUR CANADA: A REVIEW OF C.C.F. HISTORY AND POLICY (Toronto: Central, 1943) Appendix A at 199.

[72] M.J. Coldwell, LEFT TURN, CANADA (London: Victor Gollancz, 1945) at 103-04.

[73] For an account of the impact of the left on social welfare policy making during the depression and into the post-war period, *see* A. Finkel, *Origins of the Welfare State in Canada* in L. Panitch, ed., THE CANADIAN STATE, POLITICAL ECONOMY AND POLITICAL POWER (Toronto: University of Toronto Press, 1977) at 344.

[74] Most of this legislation was subsequently declared *ultra vires* by the courts on division of powers grounds; *see* Guest, *supra*, note 55 at 84-91; W.H. McConnell, *The Judicial Review of Prime Minister Bennett's 'New Deal'* (1968) 6 OSGOODE HALL L.J. 39.

Commission on Dominion Provincial Relations, to re-examine the fiscal basis of the federal union, and the federal-provincial division of powers. The Commission's Report, tabled in 1940, recommended, among other measures, that the federal government assume responsibility for the unemployed, and institute a system of equalization grants to enable the poorer provinces to provide an adequate level of social services to their residents.[75] That same year, after the provinces agreed to a constitutional amendment providing for exclusive federal jurisdiction over unemployment insurance, the federal government enacted *The Unemployment Insurance Act, 1940*,[76] the first large scale income maintenance program in Canada.[77]

Canada's participation in the second world war ended the economic crisis of the thirties, and led to a dramatic expansion in the productive capacity of the Canadian economy, with a corresponding improvement in the standard of living for most Canadians. Nevertheless, with the experience of the depression fresh in the collective memory, Canadians solidified their commitment to the idea that the community had a duty to ensure the security and welfare of its members. Contributors to a series of essays commissioned by the Canadian Institute of International Affairs in 1942 reflect the growing Canadian preoccupation with personal security, in a social and economic sense.[78] McGill economics professor B.S. Keirstead launched his discussion of post-war national policy by reflecting on Canadians' social aspirations for the post-war period. He found that Canadians' foremost concern was for security in their domestic lives: security both in the negative sense, of freedom from unemployment, inadequate wages and poor living conditions; and in the positive sense, of freedom to pursue the personal goals which material insecurity forestalled.[79] This security, Keirstead asserted, Canadians continued to seek in their relations with the community:

> "Out of our community life we want on the one hand the sense that the community protects, fosters, and guarantees our right and our security to live our individual lives to the fullest, and on the other hand we want the sense of sharing in and contributing to the social functioning of the community as a group, of helping to achieve those social objectives which we share, which are group interests, so that we feel both that the group supports, protects, and enriches us as individuals and that we in our turn also sustain and maintain the group with which we identify ourselves and in whose proper functioning we participate.[80]

In her discussion of the post-war reconstruction of Canadian social services, Charlotte Whitton made the same point, that the average Canadian's

---

[75] Guest, *ibid.* at 91-93.

[76] S.C. 1939-40, c.44.

[77] *See* Guest, *supra*, note 55 at 83-103.

[78] A. Brady & F.R. Scott, eds, CANADA AFTER THE WAR — STUDIES IN POLITICAL, SOCIAL AND ECONOMIC POLICIES FOR POST-WAR CANADA (Toronto: Macmillan, 1943).

[79] B.S. Keirstead, *National Policy*, in Brady & Scott, eds, *ibid.* 1 at 5-6.

[80] *Ibid.* at 5.

social expectations for the post-war period included a guarantee by society, through government, of "social defenses which will allow no life within the state to drop below minimum levels of decency and survival".[81] Social security, Leonard Marsh maintained, in his 1943 government-commissioned REPORT ON SOCIAL SECURITY FOR CANADA, was widely accepted by Canadians as one of the things for which the second world war was being fought; "one of the concrete expression of "a better world" ", for those who had experienced the extreme social and material insecurity of the depression.[82]

In the post-war period, collective responsibility for individual economic security was increasingly perceived, by governments and the public alike, as a matter for state intervention. Jack Pickerskill expressed the prevailing post-war view: "In today's complicated, mechanized society. . .the state must use its authority to give the individual not only help in distress and destitution, but also security through good social legislation . . .".[83] This consensus in Canadian society was reflected in a tremendous expansion in social security legislation after the war, a period in which Canada took on the characteristics of a modern welfare state. From the mid-forties to the late fifties, the federal government enacted family allowance legislation, retirement and disability pension legislation, old age security legislation, and legislation providing for cost-sharing of provincially administered hospital insurance programs.[84] The mid-sixties saw the enactment of the *Canada Assistance Plan*,[85] which consolidated all pre-existing federal-provincial social assistance programs. In the Parliamentary debates leading up to its adoption, the *Canada Assistance Plan* was characterized in the following terms:

> This plan extends a bold, new guarantee to all Canadians in need. In accepting it the people of Canada for the first time accept responsibility to meet all the needs, no matter how great they may be, of Canadian children, widows, the disabled, the blind, the elderly and the unemployed. Under this plan we accept unlimited liability. We undertake to charge the public treasury to discharge our responsibilities to the needy throughout Canada.[86]

The *Canada Assistance Plan* was conceived as a comprehensive program of social assistance benefits to meet financial need, regardless of cause. For the first time, social security benefits were extended to the working poor, and all programs funded under the *Plan* were required to provide

---

[81] C. Whitton, *The Reconstruction of the Social Services*, in Brady & Scott, eds, *supra*, note 78, 88 at 88-89.

[82] L. Marsh, REPORT ON SOCIAL SECURITY FOR CANADA (Toronto: University of Toronto Press, 1975) at 15 (originally published in 1943 by the King's Printer, Ottawa).

[83] Pickerskill, *supra*, note 30 at 69.

[84] Guest, *supra*, note 55 at 142-49; D.V. Smiley, THE CANADIAN POLITICAL NATIONALITY (Toronto: Methuen, 1967) at 35-39.

[85] S.C. 1966-67, c.45.

[86] Canada, *House of Commons Debates*, No. VII at 7142 (4 July 1966).

for administrative appeal procedures.[87] In 1966, following the lead of the C.C.F. government in Saskatchewan, the federal government also enacted the *Medical Care Act, 1966*,[88] which provided for federal sharing of provincial medicare program costs, and resulted in the availability of fully subsidized medical care throughout Canada by the beginning of the 1970's.[89]

In the late 1960's, after two decades of steady economic growth, intense public attention was focused on the problem of the continued existence of serious poverty in Canada. In 1968, the Economic Council of Canada's annual review indicated that one in five Canadians lived in poverty:

> Poverty in Canada is real. Its numbers are not in the thousands, but the millions. There is more of it than our society can tolerate, more than the economy can afford, and far more than existing measures and efforts can cope with. Its persistence, at a time when the bulk of Canadians enjoy one of the highest standards of living in the world, is a disgrace.[90]

The 1971 report of the Special Senate Committee on Poverty, *Poverty in Canada*[91], underscored the existence of serious poverty among a large number of working Canadians. *The Real Poverty Report*[92], published the same year, emphasized the structural causes of poverty in Canada, and the disproportionate impact of poverty on women, racial minorities, and native people. The 1970 *Report of the Royal Commission on the Status of Women*[93] also pointed to the extreme risk of poverty for single mothers and for single, elderly women. Dominating the public debate was the proposal for the replacement of the existing piecemeal Canadian social security system by a comprehensive guaranteed annual income scheme.[94]

The federal government responded to public pressure for social security reform in the early seventies by expanding the national unemployment insurance program, and by launching a comprehensive social security review in cooperation with the provinces. By the mid-seventies, however, the energy crisis, growing unemployment and rising inflation

---

[87] For a detailed discussion of the *Canada Assistance Plan*, *see*: D.P.J. Hum, FEDERALISM AND THE POOR: A REVIEW OF THE CANADA ASSISTANCE PLAN (Toronto: Ontario Economic Council, 1983).

[88] S.C. 1966-67, c.64.

[89] Guest, *supra*, note 55 at 162-63. *See also* J.L. Granatstein, CANADA 1957-1967 — THE YEARS OF UNCERTAINTY AND INNOVATION (Toronto: McClelland & Stewart, 1986) at 169-97.

[90] Economic Council of Canada, FIFTH ANNUAL REVIEW — THE CHALLENGE OF GROWTH AND CHANGE (Ottawa: Economic Council of Canada, 1967) at 1.

[91] Canada, Senate, Special Committee on Poverty, POVERTY IN CANADA (Ottawa: Queen's Printer, 1971).

[92] I. Adams, *et al.*, THE REAL POVERTY REPORT (Edmonton: Hurtig, 1971).

[93] Canada, ROYAL COMMISSION ON THE STATUS OF WOMEN IN CANADA (Ottawa: Queen's Printer, 1970).

[94] *See* A. Armitage, SOCIAL WELFARE IN CANADA — IDEALS AND REALITIES (Toronto: McClelland & Stewart, 1975) at 137-43.

generated pressure from the Canadian business community for limits on government spending. The major product of the three year federal social security review, a national income support and supplementation plan, foundered on federal-provincial jurisdictional disputes, administrative complications and the general climate of fiscal restraint.[95] A child tax credit for low income families, the extension of old age pension benefits to spouses, and a renewed commitment to the principle of universality in health care were the only positive federal reforms from the mid-seventies onwards.[96] At the same time, unemployment insurance benefits were cut back[97], family allowances were reduced[98], and general welfare spending decreased in real terms.[99]

This is not to suggest that there was a corresponding reduction in the level of social and economic insecurity in Canada during this same period. Government cut-backs occurred at a time of severe economic recession; a period in which increased benefits, or at least the maintenance of existing programs and benefits, should have been expected. It is paradoxical, as a 1984 report of the International Labour Organization points out, that social security was put into question at a time when unemployment was at depression levels, when workers in many sectors of the economy were being forced into early retirement, when many families faced the economic insecurity of marriage break-up, when large numbers of young people were unable to acquire job-related skills, in short, when the need was greatest.[100] Since the mid-seventies, numerous victims of the new recession have joined the ranks of the traditional poor. Statistics Canada's "low-income cut-offs", the most conservative of the Canadian poverty lines, show that some 40 per cent of unattached in-

---

[95] *See* D.P.J. Hum, *Social Security Reforms During the 1970s* in J.S. Ismael, ed., CANADIAN SOCIAL WELFARE POLICY — FEDERAL AND PROVINCIAL DIMENSIONS (Kingston: McGill-Queen's University Press, 1985) 29; Rice, *supra*, note 55 at 238-43.

[96] Guest, *supra*, note 55 at 186-241.

[97] L.A. Pal, *Revision and Retreat: Canadian Unemployment Insurance 1971-1981*, in Ismael, ed., *supra*, note 95 at 75.

[98] A.F. Johnson, *Restructuring Family Allowances: "Good Politics at No Cost"?*, in Ismael, ed., *ibid.* at 105.

[99] Riches, *supra*, note 49 at 88-93; K.G. Banting, THE WELFARE STATE AND CANADIAN FEDERALISM, 2d ed. (Kingston: Queen's-McGill University Press, 1987) at 186-92; I. Taylor, CRIME, CAPITALISM AND COMMUNITY — THREE ESSAYS IN SOCIALIST CRIMINOLOGY (Toronto: Butterworths, 1983) at 137-40.

[100] International Labour Office, INTO THE TWENTY-FIRST CENTURY: THE DEVELOPMENT OF SOCIAL SECURITY (Geneva: International Labour Organization, 1984) at 18. *See also* Bureau, Lippel & Lamarche, *supra*, note 55 at 90.

dividuals, and 12 per cent of families, are poor in Canada.[101] Of low-income families, over 50 per cent have a head of household in the work force.[102] In 1984, the national income share of the bottom 20 per cent of Canadian households was 2.2 per cent, and of the top 20 per cent of households, 43.2 per cent.[103] Over one million Canadian children live in poverty[104] and almost half of Canadian women over 65 year of age are poor[105].

The level of Canadian dependence on government income transfers also warrants consideration. Banting suggests that more than 20 per cent of Canadian families and unattached individuals receive at least half their income from government transfer programs.[106] He argues further that, if one assumes that an individual isn't truly independent of an income source unless it contributes less than 10 per cent of his or her income, fewer than half of all Canadian families and unattached individuals are independent of the Canadian income security system.[107] "In no other policy area", Banting contends, "are so many Canadians dependent on the state in such an obvious way".[108] David Ross also finds government transfer payments to be the major source of income for the bottom quintile of

---

[101] D.P. Ross, THE CANADIAN FACT BOOK ON POVERTY-1983 (Toronto: James Lorimer, 1983) at 69-71. The highest incidence of poverty among Canadian families occurs where the head of the household is under 25 or over 65 years of age, or is a woman; where the head of the household does not work, or works only part time; where there are four or more children; and where the family relies mainly on transfers, pensions, or self-employed income. The incidence of poverty among unattached individuals is highest for those who are not in the work force; who rely on transfers or pensions; who are over 65 years of age; and who are female. *See* M. Gunderson, ECONOMICS OF POVERTY AND INCOME DISTRIBUTION (Toronto: Butterworths, 1983) at 62-65.

[102] Ross, *ibid.* at 70. *See also* Hum, *supra*, note 95 at 120; P. Edwards, "Poverty Trap Snares Working Poor", *The Toronto Star* (5 September 1988) A1, A8.

[103] When tax and transfers are taken into account, the 1984 figures are 7.1 for the lowest 20 per cent of households; 20.4 for the lowest 40 per cent, and 37.3 for the highest 20 per cent: Banting, *supra*, note 96 at 196. *See also* D.P. Ross, THE CANADIAN FACT BOOK ON INCOME DISTRIBUTION (Ottawa: Canadian Council on Social Development, 1980) at 89.

[104] National Council of Welfare, POVERTY PROFILE 1988 (Ottawa: Supply and Services, 1988) at 26. For a discussion of poverty among Canadian children, *see also* Canadian Child Welfare Association, *et al.*, A CHOICE OF FUTURES: CANADA'S COMMITMENT TO ITS CHILDREN (Ottawa: Canadian Child Welfare Association, 1988).

[105] "Statistics at a Glance", in *Perception* (Winter 1988) Volume 12, No. 1, at 42. With respect to the incidence of poverty among women generally, *see* L. Dulude, *Women, Poverty and the Constitution* in A. Doerr & M. Carrier, eds, WOMEN AND THE CONSTITUTION IN CANADA (Ottawa: Canadian Advisory Council on the Status of Women, 1981) at 165. *See also* the first hand accounts of the experiences of women living in poverty, compiled in S. Baxter, ed., NO WAY TO LIVE: POOR WOMEN SPEAK OUT (Vancouver: New Star Books, 1988).

[106] Banting, *supra*, note 99 at 27-28, 193-94.

[107] *Ibid.* at 29.

[108] *Ibid.* at 27. In particular, the welfare state has become the main recourse for elderly women, and for women raising children alone; *see* C. Andrew, *Women and the Welfare State* (1984) 17 CAN.J.POL.SCI. 667 at 678-82.

Canadian income recipients, and that this reliance is growing.[109] Statistics show that in 1984 1.2 million Canadians were receiving regular unemployment insurance benefits, an increase of 67 per cent over 1981 levels; and that a further 1 million Canadians were receiving social assistance benefits, an increase of 37 per cent over 1981 levels. When beneficiaries' spouses, children and other dependents are taken into account, these figures double.[110]

Graham Riches points out that in 1983, long term social assistance benefits for individuals and families were, in general, less than half of the poverty lines established by the Social Planning Council of Metropolitan Toronto, the Canadian Council on Social Development, and Statistics Canada. This in spite of the fact that living on the budgets upon which these poverty lines are based has been characterized as "scraping by".[111] Riches argues that continuing high levels of unemployment have forced many Canadians to move onto provincial welfare rolls after their unemployment insurance benefits run out. In turn, the inadequacy of welfare benefits has meant that increasing numbers of Canadians have had to turn to food banks to obtain enough to eat for themselves and their families:

> It is also evident . . . that emergency food is becoming a substitute for public cash benefits. This view is borne out by the increase in demand for food following the imposition of cutbacks, the heavy demand for food towards the end of each month when social assistance cheques run out, and by the fact that government assistance workers in all provinces are referring their clients to food banks.[112]

Riches attributes the inadequacy of provincial benefit levels to a failure by the federal government to police the terms of the *Canada Assistance Plan*, which implicitly requires that cost-shared benefits provided by a province be adequate.[113] He also points to the impact of neoconservative thinking on Canadian public policy-making since the mid-seventies. In an effort to limit the growth of the public debt, and consistent with the view that social spending in Canada is too high, and is the major contributor to the deficit, the Mulroney government, in particular, has imposed strict limits on federal social spending. Many provincial governments have adopted similar attitudes, applying more stringent eligi-

---

[109] Ross, *supra*, note 101 at 85.

[110] Riches, *supra*, note 49 at 77-78.

[111] *Ibid.* at 83-84.

[112] *Ibid.* at 120. In 1985, the provincial social assistance benefits for a family of four varied from $671 a month in New Brunswick to $1090 a month in Saskatchewan; the benefits for a single, employable individual varied from $160 a month in Quebec to $484 a month in Alberta; *see*: Banting, *supra*, note 99 at 190. *See also* Baxter, *supra*, note 105 at 48-55.

[113] Riches, *ibid.* at 93-94.

bility criteria and cutting back program benefits.[114] The collapse of Canadian government commitment to social welfare spending has resulted, Riches claims, in a national crisis of hunger. Food banks exist in eight of ten provinces, and are used by thousands of Canadians of all ages. Families comprise a large proportion of food bank users[115], as do the single elderly[116]. Food bank users are on unemployment insurance, social assistance, fixed incomes, no income, and income from low wage employment. Some are residents of hostels and institutions; many are homeless. People travel long distances to reach the food banks, and are often turned away empty-handed because the demand for food exceeds the available supply. Surveys show that 30 per cent of food bank applicants have no food in the house and 70 per cent haven't enough to last until the next day.[117]

The set of claims for protection from the insecurities of modern society which the Canadian state has established since the thirties is, as Keith Banting points out, deeply embedded in the fabric of Canadian life. Allan Moscovitch refers to the many Canadians who believe not only in the collective obligation of society to provide for the welfare of its citizens, but that this obligation constitutes the essence our nation.[118]

---

[114] *Ibid.* at 106-107. For an in depth account of the situation in British Columbia, *see* W. Magnusson *et al.*, eds, THE NEW REALITY — THE POLITICS OF RESTRAINT IN BRITISH COLUMBIA (Vancouver: New Star Books, 1984).

[115] Surveys show that a third to half of the users of the Greater Vancouver, Calgary and Regina food banks are children. *See* Riches, *supra*, note 49 at 43.

[116] This is hardly surprising given that, in 1983, the maximum combined federal-provincial benefits for the aged varied between $6,147 and $7,347 a year, depending on the province of residence. *See* National Council of Welfare, *Fighting Poverty: the Effect of Government Policy* in Drache & Cameron, eds, *supra*, note 44, 63 at 73.

[117] *Ibid.* at 51-54. Hunger and food banks are but one symptom of the lack of commitment by Canadian governments to the eradication of social and economic insecurity. Another is the growing problem of homelessness in Canada; *see e.g.*, Municipality of Metropolitan Toronto, NO PLACE TO GO — A STUDY OF HOMELESSNESS IN METROPOLITAN TORONTO (Toronto: Municipality of Toronto, 1983). Not surprisingly, the lack of adequate low-cost housing and hunger are often related problems. Following Toronto's 1987 Thanksgiving food drive, the director of one of the city's food banks called for increased government assistance for those on low incomes — "starting with ensuring that people don't have to spend so much of their income on housing that they can't afford food"; "Share Thanksgiving Sets a Food Drive Record", *The Toronto Star* (Saturday October 17, 1987) A6. The Canadian Council on Social Development made a similar point in a recent report on homelessness:

> "Both low income earners and people on social assistance experience serious difficulty in their search for adequate housing. Many who rent housing in the private market spend half or even three quarters of their meagre incomes on housing, leaving very little for food and other essentials.

(M.A. McLaughlin, HOMELESSNESS IN CANADA: THE REPORT OF THE NATIONAL ENQUIRY (Ottawa: Canadian Council on Social Development, 1987) at 9).

[118] A. Moscovitch, "The Rise and Decline of the Canadian Welfare State", *Perceptions* (November-December, 1982) at 28.

Canadians have come to rely on the existence of government funded social welfare programs and to accept them as important "social rights to benefits and services".[119] Banting points to public attitudes towards unemployment insurance as illustrative of the fact that income security is no longer an issue in Canada, at least for the general public, and that discussion about major social programs takes place within a broad consensus as to their basic necessity in Canadian life.[120] Although unemployment insurance was the income security program which generated the most controversy throughout the 1970's, an overwhelming majority of Canadians remained convinced that the program was necessary.[121] Banting contends that "The basic legitimacy of the welfare state is not an issue for the general public, and the experience of the recession has probably strengthened popular support for many important social programs".[122] This assumption is borne out by data cited in a study prepared for the Royal Commission on the Economic Union and Development Prospects for Canada, showing that, in 1983, 78 per cent of Canadians favoured increased government benefits and social services for the poor; and 66 per cent of Canadians favoured an increase in the level of benefits for the unemployed.[123] Similarly, Canadian organizations which represent individuals, rather than corporations — labour groups, consumers' associations, church groups and women's organizations — press for more welfare measures, not less.[124] Yet, in spite of high levels of public support for the ideal of social welfare in all parts of Canada, government commitment to social security has declined since the mid-seventies.[125] The dominant pattern has been "a dreary one of restraint and retrenchment, for the most part incremental, but occasionally more severe".[126]

When a majority of Canadians remain firmly committed to the idea that the state, as agent for the community, has a duty to safeguard the security of its members, how can the stance of Canadian governments on social security since the mid-seventies be explained. In part, as alluded

---

[119] Rice, *supra*, note 55 at 232.

[120] Banting, *supra*, note 99 at 127.

[121] *Ibid.* at 127-29.

[122] *Ibid.* at 185.

[123] R. Johnson, PUBLIC OPINION AND PUBLIC POLICY IN CANADA, (Toronto, University of Toronto Press, 1986) at 140, 210.

[124] D. Guest, *Social Policy in Canada* (1984) 18 SOCIAL POLICY & ADMINISTRATION 130 at 145. *See also* the various briefs contained in Drache & Cameron, eds, *supra*, note 44; Andrew, *supra*, note 108.

[125] *See* Social Planning Council of Metropolitan Toronto, *The Rise and Fall of the Welfare State*, in Drache & Cameron, eds, *supra*, note 44 at 51. It is ironic that a comprehensive public opinion survey published by the Canadian Council on Social Development in 1975 found 88 per cent of Canadians in favour of a guaranteed annual income scheme, and only 9 per cent opposed; *see* J. Laframboise, A QUESTION OF NEEDS (Ottawa: The Canadian Council on Social Development, 1975) at 407.

[126] Banting, *supra*, note 99 at 187.

to earlier, one must look to the presence of an ideological neo-conservatism in Canadian policy-making circles:

> Throughout the postwar era, the prevailing assumption was that a welfare state would complement the market economy: it would be an instrument of automatic countercyclical stabilization, it would ensure an educated and healthy workforce; and it would provide the complex social infrastructure essential to an urban economy . . . . The problems of the last ten years, however, have revived older conceptions of a fundamental incompatibility between economic efficiency and social equity. A resurgent conservative critique insists that the modern Welfare State and its associated taxes undermine growth by creating a "deadweight drain" on the economy, stifling entrepreneurship, distorting the incentive structure, undermining the operation of labour markets, and reinforcing dependency among the recipient population.[127]

However, to the extent that recent government attitudes on social security do not reflect the popular consensus described above, the broader explanation lies in the Canadian political process. It is generally conceded that Canadian public policy-making, at both the federal and provincial levels, is a closed, elite-dominated process.[128] This is a product of both parliamentary government and federalism. Modern parliamentary government concentrates power in the executive branch — direct participation in decision-making is limited to the Prime Minister and the members of Cabinet, and their senior bureaucratic advisors.[129] As for the legislative branch, rules of confidence, party discipline and the growing complexity of government, have dramatically reduced parliament's ability to initiate policy in response to voters' concerns.[130]

Cohesive, well-organized producer interests have been most successful in gaining access to the current public decision making process.[131] As Hugh Thorburn 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 interest groups".[132]

---

[127] K.G. Banting, *The Welfare State and Inequality in the 1980s*, (1987) 24 CAN. REV. OF SOCIOLOGY AND ANTHROPOLOGY 309 at 319. *See also* Rice, *supra*, note 55 at 241-44.

[128] *See* Banting, *supra*, note 99 at 109; A.P. Pross, *Pressure Groups: Adaptive Instruments of Political Communication*, in A.P. Pross, ed., PRESSURE GROUP BEHAVIOURS IN CANADIAN POLITICS (Toronto: McGraw-Hill Ryerson, 1975) 1 at 18. *See also* the various essays collected in Panitch, ed., *supra*, note 73.

[129] *See* D.V. Smiley, CANADA IN QUESTION: FEDERALISM IN THE EIGHTIES, 3d ed. (Toronto: McGraw-Hill Ryerson, 1980) at 91-92; Doern & Phidd, *supra*, note 27 at 30-31.

[130] Doern & Phidd, *ibid.* at 30.

[131] *Ibid.* at 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, 3rd ed. (Toronto: Holt, Rinehart and Winston, 1979) 224 at 234-38.

[132] H.G. Thorburn, INTEREST GROUPS IN THE CANADIAN FEDERAL SYSTEM (Toronto: University of Toronto Press, 1985) at 121.

Groups which are poorly organized, and the general public, "can only exhort from outside, or hope that the dictates of electoral politics will ensure sensitivity to their preferences".[133] Federalism, the other major Canadian political institution, generates an ongoing requirement of intergovernmental bargaining, which also takes place at the executive level.[134] The division of legislative authority, the complexity of federal-provincial policy relations and the secrecy which surrounds the process, confuse and weaken the lines of accountability between government and the electorate.[135] Historically, federalism in Canada has also focussed attention on inter-regional concerns, rather than on class-based issues. Donald Smiley explains:

> Federalism is . . . an important influence in perpetuating inequalities among Canadians . . . one 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.[136]

All of these factors help to account for the failure of recent government policy to reflect popular attitudes towards social security. From the mid-seventies onwards, Canadian business and financial interests, two groups which have traditionally enjoyed greatest access to government decision-making, have pressured governments for restraint in public spending and reduced deficits. As James Rice describes it:

> The private sector has been encouraging both levels of government to "hold the line" on tax increases and to redesign social welfare programs to encourage people to remain at or return to work, rather than live on the benefits of a "generous" welfare system. They have also been encouraging the government to privatize parts of the welfare system and to expand reliance on the voluntary sector.[137]

As Thorburn points out, the irony here is that while it is generally assumed that recent deficits stem from governments' giving in to the excessive and ever-growing welfare expectations of the general public, in actual fact a major source of the Canadian deficit is the tax reduction

---

[133] Banting, *supra*, note 99 at 109.

[134] *See* Smiley, *supra*, note 129 at 91-118; L. Panitch, *The Role and Nature of the Canadian State*, in Panitch, ed., *supra*, note 73, 3 at 11.

[135] 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 of Canada, 1979) 105 at 106-07; Banting, *supra*, note 99 at 109.

[136] Smiley, *ibid.* 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; Task Force on Canadian Unity, A FUTURE TOGETHER (Ottawa: Minister of Supply and Services Canada, 1979) at 109.

[137] Rice, *supra*, note 55 at 246.

policies and the economic incentives granted to the business community by governments "anxious to re-establish confidence and satisfactory investment climate".[138] James Rice has also argued that the federal government's granting of major tax incentives for businesses almost every year between 1972 and the early eighties, undermined its ability to meet the obligations of the social security system without borrowing.[139]

In contrast to the Canadian financial and business community, those groups which have been most affected by social welfare cutbacks, although numerically significant, are both poor and inadequately organized. The Executive Director of the National Anti-Poverty Organization made the following telling remarks during the hearings of the Special Joint Committee on the Constitution:

> I cannot too strongly emphasize the importance of the right to participate. A recent study we have done of over 600 organizations of the poor which were in existence one year ago indicates that 40 per cent of them had to go out of business primarily due to funding cuts and economic restraints. Their right to participate is being taken from them, and we strongly urge that some steps be taken to have a commitment from the federal government to ensure that all people in this country can participate equally.[140]

The end result of the inability of these groups to compete for the attention of policy makers is that their interests have largely been ignored.[141]

General public support for the principle of social security is typical of many widely held, collective interests. In the face of a narrow, but cohesive opposition, representing powerful economic interests, it has not been reflected by the policy-making process. As will be discussed at greater length in the second part of the paper, an interpretation of section 7 as protective of welfare rights will have the important merit of providing disadvantaged Canadians with an alternate forum in which to challenge a significant bias in the Canadian political process. At a more fundamental level, an interpretation of section 7 as protective of welfare rights is consistent with longstanding understandings, values, and social traditions in Canada. To say that the right to security of the person guarantees welfare rights is simply to acknowledge that section 7 gives constitutional expression to expectations, "deeply rooted in Canadian culture"[142], that the state, acting on behalf of the community, has an obligation to guarantee

---

[138] Thorburn, *supra*, note 132 at 122. *See also* D.A. Wolfe, *The Politics of the Deficit*, in G.B. Doern, Research Coordinator, THE POLITICS OF ECONOMIC POLICY (Toronto: University of Toronto Press, 1985) at 111.

[139] Rice, *supra*, note 55 at 241.

[140] *Minutes*, *supra*, note 14, Issue No. 29 at 22 (18 December 1980). *See also* P.C. Vrooman, *The Power Dilemma in Citizen Participation* (1972) 48:3 CANADIAN WELFARE 3 at 5-6.

[141] *See* Rice, *supra*, note 55 at 246.

[142] Armour, *supra*, note 58 at 108.

that every Canadian is ensured a decent standard of living as a right of "social citizenship".[143]

3. *Canada's International Human Rights Obligations*

International human rights law in general, and Canada's international human rights commitments in particular, are another important element of the contextual background to which reference should be made in interpreting the *Charter*. Some of the values which the *Charter* expresses are of special domestic concern.[144] However many others have been shaped by social and political forces operating on a trans-national level, and reflect aspirations which Canadians share with other members of the international community. Since the second world war, most of these values have been codified in a variety of international human rights conventions. Reference to these instruments is particularly appropriate in connection with the *Charter*, as Canada is a long-standing member of the United Nations and has, since the mid-sixties, participated actively in its efforts towards greater international protection of human rights, including the drafting of the two International Covenants on Human Rights.[145] In addition, the legislative history and the language of the *Charter* itself indicate a significant reliance on a number of international human rights agreements.[146] As Mr. Justice Belzil of the Alberta Court of Appeal declared in his dissenting opinion in *R.* v. *Big M Drug Mart*: ". . .it can

---

[143] *See* Social Planning Council of Metropolitan Toronto, *supra*, note 125; R. Manzer, PUBLIC POLICIES AND POLITICAL DEVELOPMENT IN CANADA (Toronto: University of Toronto Press, 1987) at 60.

[144] *E.g.*, the minority language guarantees; *see A.G. Québec* v. *Québec Ass'n of Protestant School Bds.* [1984] 25 C.R. 66 at 78, 10 *D.L.R.* (4th) 321 at 331.

[145] For an account of Canada's international human rights involvement since the second world war, *see* J. Humphrey, *The Role of Canada in the United Nations Program for the Promotion of Human Rights* in R.St.J. Macdonald, G.L. Morris & D.M. Johnston, eds, CANADIAN PERSPECTIVES ON INTERNATIONAL LAW AND ORGANIZATION (Toronto: University of Toronto Press, 1974) at 612; A. Gotlieb, *The Changing Canadian Attitude to the U.N. Role* in A. Gotlieb, ed., HUMAN RIGHTS, FEDERALISM AND MINORITIES (Toronto: Canadian Institute of International Affairs, 1970) at 16; M. Cohen, *Towards a Paradigm of Theory and Practice: The Canadian Charter of Rights and Freedoms — International Law Influences and Interactions*, (1986) CAN. HUM. RTS Y.B. 47.

[146] For a general discussion of international law influences on the Charter, *see* J. Claydon, *The Application of International Human Rights Law by Canadian Courts*, (1981) 30 BUFFALO L.R. 727; J. Claydon, *International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms*, (1982) 4 SUP. CT L.R. 287; M. Cohen & A.F. Bayefsky, *The Canadian Charter of Rights and Freedoms and Public International Law*, (1983) 61 CAN. BAR REV. 265; D. Turp, *Le recours au droit international aux fins de l'interprétation de la Charte canadienne des droits et libertés: un bilan jurisprudentiel*, (1984) 18 R.J.T. 353. For a textual comparison of the provisions in the European Convention on Human Rights, the U.N. Covenants, the Universal Declaration of Human Rights, and the Canadian Charter, *see* T. Christian, *The Limitation of Liberty: A Consideration of Section 1 of the Charter of Rights and Freedoms*, (1982) U.B.C. L. REV. (CHARTER ED.) 105.

be seen that the Canadian *Charter* was not conceived and born in isolation. It is part of the universal human rights movement. . .".[147]

The international conventions to which Canada is a signatory are of special interest, as they can legitimately be taken to reflect a serious commitment by the Canadian government to the specific rights and obligations which they contain. This expectation was confirmed during the Special Joint Committee deliberations on the *Charter* by then federal Justice Minister Jean Chrétien's assertion that "I do think that the rights that we have agreed upon in international agreements should be reflected in the laws or the Charter of Rights that we will have in Canada".[148] The *Charter* can therefore be taken to reflect an intention on the part of the Canadian government to live up to the domestic obligations which it has undertaken in signing international human rights agreements. The contrary view, that the *Charter* was framed in such a way as to exclude or ignore those obligations, some to which Canada has formally subscribed since the end of the second world war, is more difficult to accept.

To assess the particular relevance of Canada's international human rights commitments to the argument that section 7 of the *Charter* protects welfare rights, it will be useful to first examine the source of Canada's international social welfare obligations: the *Universal Declaration of Human Rights*[149] and the *International Covenant on Economic, Social and Cultural Rights*[150], and then to consider the legal basis for interpreting section 7 in a manner consistent with the spirit and substance of those documents. While civil and political rights were the principal focus of human rights guarantees in the 18th and 19th centuries, the 20th century saw a growing concern, in both national constitutions and international agreements, with the protection of social and economic rights.[151] Alexandre Berenstein traces this evolution as follows:

> Au fur et à mesure qu'est né, dans les différents pays, l'« interventionnisme » de l'Etat. . .on a pris conscience du fait que la collectivité ne devait pas se borner à garantir aux individus l'absence d'une intervention tyrannique de la part de l'Etat, mais qu'il était de son devoir de fournir une intervention bienfaisante, destinée à améliorer les conditions de vie des administrés. . .La nouvelle conception qu'on se fait du rôle de l'Etat. . .a ainsi son correspectif dans la notion des droit de l'Homme. . .En d'autres termes, l'individu a le droit d'obtenir de l'Etat une action positive en sa faveur, et ce droit est

---

[147] *R.* v. *Big M Drug Mart*, (1984) 5 *D.L.R.* (4d) 121 at 149, 28 Alta. L.R. (2d) 289 at 317 (C.A.).

[148] *Minutes*, *supra*, note 14, Issue no. 3 at 28 (12 November 1981).

[149] *Universal Declaration of Human Rights*, U.N.G.A. Res. 217 (III), 3 U.N. GAOR, Supp. (No. 13) 71, U.N. Doc. A/810 (1948).

[150] *International Covenant on Economic, Social and Cultural Rights*, Annex to G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316, (1966).

[151] *See* V. Kartashkin, *Economic, Social and Cultural Rights* in K. Vasak, ed., THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS (Westport, Conn.: Greenwood Press, 1982) at 111.

> devenu tout aussi fondamental que le droit d'être protegé contre les interventions abusives du pouvoir.[152]

In the international arena, this movement toward greater protection of social and economic rights took its first comprehensive form in the *Universal Declaration of Human Rights*, endorsed by the members of United Nations General Assembly, including Canada, in 1948. Building upon the statement in Article 55(a) of the U.N. Charter, that the achievement of "higher standards of living, full employment, and conditions of economic and social progress and development" is a primary goal of the United Nations, the *Universal Declaration of Human Rights* contains a number of important social and economic guarantees. These include the right to social security and to the social and economic rights which are indispensible to a person's dignity and to the free development of his or her personality (Article 22); the right to work, to free choice of employment, to protection against unemployment, and to remuneration ensuring "an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection" (Article 23); and the right to education (Article 26). Paragraph 1 of Article 25 provides, in particular, that:

> 1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

The social and economic rights contained in the *Universal Declaration of Human Rights* are set out in greater detail in the *International Covenant on Economic, Social and Cultural Rights* which, along with the *International Covenant on Civil and Political Rights*[153], was adopted by the U.N. General Assembly in 1966, and was ratified by Canada, after lengthy discussion with the provinces, in 1976. The Preambles of both Covenants recognize, in identical terms, that:

> [I]n accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights. . .

The preamble of the Covenants thereby underscores the fundamental link between civil and material freedom, and the conditions necessary for

---

[152] A. Berenstein, *Les droits économiques et sociaux garantis par la Charte sociale européenne* in D. Turp & G.A. Beaudoin, eds, PERSPECTIVES CANADIENNES ET EUROPÉENNES DES DROITS DE LA PERSONNE — ACTES DES JOURNÉES STRASBOURGEOISES DE L'INSTITUT CANADIEN D'ÉTUDES JURIDIQUES SUPÉRIEURES — 1984 (Cowansville: Yvon Blais, 1986) 405 at 411.

[153] Annex to G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316, (1966).

their achievement. The U.N. General Assembly initially planned to include the full panoply of rights contained in the Universal Declaration in a single convention, and in 1950 officially adopted the principle that "the enjoyment of civil and political freedoms and that of economic, social and cultural rights are interdependent"; and that, "in cases where the individual is deprived of his economic, social and cultural rights, he does not represent the human person who is considered by the Declaration to be the ideal of the free man".[154] It was subsequently decided to include the rights in two distinct covenants to allow for differences in the requisite implementing measures, and not to suggest that one set was independent from, or of lesser significance than, the other.[155]

Unlike the *Universal Declaration of Human Rights*, which was intended to stand as a general statement of principle[156], the *International Covenant on Economic, Social and Cultural Rights* creates binding obligations for those states which, like Canada, are parties to it.[157] Article 2 provides that:

> Each State Party to the present Covenant undertakes to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures".

The flexibility allowed for by Article 2 was designed to accommodate those countries whose level of economic development presents a serious

---

[154] General Assembly Resolution 543(iv); *see* I. Szabo, *Historical Foundations of Human Rights and Subsequent Developments* in Vasak, ed., *supra*, note 151, 11 at 29-30.

[155] Kartashkin, *supra*, note 151 at 112. The Council of Europe took a similar step in re-codifying the guarantees contained in the Universal Declaration into two separate instruments: the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter. The significance of the European Convention in relation to the Canadian Charter has been examined by several authors; *see e.g.*, G. Tremblay, *La Charte canadienne des droits et libertés et quelques leçons tirées de la Convention européenne des droits de l'homme*, (1982) 23 C. DE D. 795; G. Zellick, *The European convention on Human Rights: Its Significance for Charter Litigation* in Sharpe, ed., *supra*, note 5 at 97. Although the question has not yet been considered in depth, the European Social Charter is presumably relevant to the Canadian Charter for many of the same reasons. For a discussion of the European Social Charter, *see* Berenstein, *supra*, note 152.

[156] It is now accepted by many scholars however, that the Universal Declaration has achieved the status of customary international law, and hence applies in Canada to the same extent as conventional international law; *see* Claydon, *supra*, note 146 at 288-89; Turp, *supra*, note 146 at 374-75.

[157] 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. It should also be noted that, by declaring that the provisions of the International Covenant on Economic, Social and Cultural rights extend to "all parts of federal states without any limitation or exception" Article 28 obligates Canada to implement the Covenant in areas of provincial as well as federal jurisdiction.

obstacle to the realization of the rights contained in the *Covenant* and was not, as it has sometimes been suggested, intended to derogate in any way from the binding character of its obligations, particularly for countries like Canada which enjoy a high level of economic development.[158]

The *Covenant* sets out a number of social and economic rights which the parties to it are held to recognize, and in some cases details specific measures for their achievement. For example, Paragraph 1 of Article 6 provides that the states party to the Covenant "recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts". Paragraph 2 lists vocational guidance and training programs, economic development and full employment policies as particular measures to be adopted to further that right. Article 7 sets out the right to just and favourable conditions of work, including the right to wages which allow for a decent standard of living for the worker and his or her family. Article 9 recognizes everyone's right to social security, including social insurance. Article 10 calls for the widest possible protection and assistance for the family, in particular for children; and for pregnancy leave with pay and/or adequate social security benefits. Article 11 provides, in similar terms to the *Universal Declaration of Human Rights*, for everyone's right to an adequate standard of living, including adequate food, clothing and housing, and to the "continuous improvement of living conditions". Article 12 recognizes "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health", and article 13, the right to education.

At a symbolic level, as a reflection of the importance attached by Canadians to these values, the scope of Canada's social welfare undertakings under the *Universal Declaration of Human Rights* and the *International Covenant on Economic, Social and Cultural Rights*, provide strong support for the argument that *Charter* rights to life, liberty and security of the person should be interpreted to protect welfare rights in their broadest sense.

There exists a further legal rationale, based on international law principles of statutory interpretation, for the suggestion that section 7 should be read to give effect to those undertakings. Generally speaking, a principle of international customary law, or an international convention, becomes a direct source of obligation in Canadian law only if it is implemented by domestic legislation.[159] This rule is designed in part to

---

[158] *See* Alston & Quinn, *ibid.* at 172-81; Kartashkin, *supra*, note 151 at 114.

[159] *Re Arrow River and Tributaries Slide & Boom Co.*, [1932] S.C.R. 495 at 510-11, [1932] 2 D.L.R. 250 at 260-261. *See* Claydon, *supra*, note 146 at 735; R.St.J. Macdonald, *supra*, note 145 at 88. An important corollary to the requirement of implementing legislation before a court will enforce a treaty is the *Labour Conventions* rule preventing the federal government from legislating in areas of provincial jurisdiction in pursuance of a treaty; *see A.G. Canada v. A.G. Ontario (Labour Conventions Case)*, [1937] A.C. 326 at 347, [1937] 1 D.L.R. 673 at 678 (P.C.).

protect the authority of Parliament, since the ratification of treaties in Canada is a prerogative power which can be exercised by the executive without Parliamentary consent.[160] This is not, as Mr. Justice Pigeon pointed out in his dissenting opinion in *Capital City Communications* v. *Canadian Radio-Television and Telecommunications Commission*, to suggest that international treaties are of no legal effect unless they are implemented by legislation.[161] While a given treaty, or principle of customary international law may not in itself operate as a direct source of law, it may serve as a guide for the interpretation of other legislative obligations.

In the case of the *Charter*, reliance on international human rights agreements as a source of interpretation can be justified on two principal grounds. The first, as suggested earlier, is contextual. The *Charter* is part of the post-war international human rights movement; its purpose, legislative history and language point to international human rights conventions as an important source of principle and inspiration. As Maxwell Cohen and Anne Bayefsky argue:

> The very fact . . . that . . . the *Charter* is indissolubly linked by language and ideology to important international instruments and principles to which Canada subscribes, assures the inevitability of some resort to these "external" international legal documents and ideas in order to be certain that on appropriate occasions the "proper" meaning is given to the *Charter*.[162]

The second ground for looking to international human rights agreements for interpretive guidance, one which is particularly relevant to the argument that section 7 protects welfare rights, is based on the legal presumption against violation of international obligations.[163] In *Mitchell* v. *A. G. Ontario*,[164] Mr. Justice Linden of the Ontario High Court articulates this presumption in connection with the *International Covenant on Civil and Political Rights*:

> The Covenant may, however, be used to assist a court to interpret ambiguous provisions of a domestic statute, notwithstanding the fact that the Covenant has not been formally incorporated into the law of Canada, provided that the domestic statute does not contain express provisions contrary to or inconsistent with the Covenant . . . . This rule of construction is based on

---

[160] R.St.J. Macdonald, *International Treaty Law and the Domestic Law of Canada* (1975) 2 DALHOUSIE L.J. 307 at 316. Cohen & Bayefsky point out that the same concern does not exist with respect to customary international law, where obligations arise out of general practice recognized as law, rather than a simple act of executive authority, as is the case with treaties; *see supra*, note 146 at 285.

[161] *Capital Cities Communictions v. Canadian Radio-Television and Telecommunications Comm'n*, [1978] 2 S.C.R. 141 at 188, 81 D.L.R. (3d) 609 at 641-42.

[162] Cohen & Bayefsky, *supra*, note 146 at 267.

[163] Claydon, *supra*, note 146 at 737-38.

[164] (1984), 48 O.R. (2d) 481, 7 C.R.R. 153 (H.C.).

> the presumption that Parliament does not intend to act in violation of Canada's international obligations.[165]

The following year, in *R.* v. *Videoflicks*,[166] Mr. Justice Tarnopolsky of the Ontario Court of Appeal reiterated the presumption without reference to the traditional requirement that the domestic legislation being construed be ambiguous before the court may resort to an international treaty as an aid in interpreting it. Mr. Justice Tarnopolsky found that: "Since Canada ratified that Covenant in 1976, with the unanimous consent of the federal and provincial governments, the Covenant constitutes an obligation upon Canada, by Article 2 thereof, to implement its provisions within this country".[167] He stated that although the Covenant was not self-executing in Canada, domestic law should be interpreted in conformity with it, and hence it was pertinent to a consideration of the meaning of a specific provision of the *Charter*; in that case, freedom of religion.[168] Cohen and Bayefsky maintain that the presumption against violation of international obligations should operate with special force with respect to the *Charter*, since: "Here, we have comprehensive human rights legislation, as opposed to isolated statutes touching human rights matters, and which was enacted after the fairly recent assumption of international obligations under major human rights conventions".[169] They also contend that, in the context of the *Charter*, where considerable difficulty in interpretation is likely to arise, the ambiguity requirement should not be invoked in a rigid fashion, so as to restrict recourse to international aids.[170] Applied to section 7 of the *Charter*, the presumption that Parliament and the legislatures do not intend to legislate in violation of international obligations points to an interpretation of the right to "life, liberty and security of the person" which is in accordance with Canada's international social welfare obligations.[171]

In the *Universal Declaration of Human Rights*, and more recently, in the *International Covenant on Economic, Social and Cultural Rights*, the Canadian government, with the consent of the provinces, undertook substantial international human rights commitments. Both documents recognize in unequivocal terms, the primacy of social and economic need, and the fundamental right of every citizen to call upon the state for fulfilment of those needs, as a necessary corollary to the enjoyment

---

[165] *Ibid.* at 420, 9 C.R.R. at 166 .

[166] (1984), 48 O.R. (2d) 395, 9 C.R.R. 193 (C.A.).

[167] *Ibid.* at 420, 9 C.R.R. at 216-17.

[168] *Ibid.* at 420, 9 C.R.R. at 217.

[169] Cohen & Bayefsky, *supra*, note 146 at 305.

[170] *Ibid. See also* Turp, *supra*, note 146 at 376-78.

[171] If it is accepted that, as suggested earlier, the *Universal Declaration of Human Rights* has achieved the status of customary international law, the presumption would operate equally to allow reference to it as a source of international obligation for Canada; *see Daniels* v. *R.*, [1968] S.C.R. 517 at 541, 2 D.L.R. (3d) 1 at 23; Claydon, *supra*, note 146 at 733.

of other basic human rights. Canada endorsed the principles set out in the *Universal Declaration of Human Rights* at the end of the second world war. It reconfirmed its adherence to those principles, and assumed formal legal obligations with respect to them, in the *International Covenant on Economic, Social and Cultural Rights*, only a few years before adopting the Canadian *Charter*.[172] All of the rights in question, *i.e.*, the right to work and to protection against unemployment, the right to education and to medical care, the right to social security, and the right to other fundamentals of economic and social well-being, such as food, clothing and shelter, are consistent with Canadian values and aspirations. On this basis Canada's international social-welfare commitments constitute an additional, invaluable, point of reference in the search for meaning in the ambiguous language of the section 7 right to life, liberty and security of the person.

4. *Welfare Rights and the Due Process Clause of the American Bill of Rights*

As suggested earlier in the paper, Canada and the United States share a common liberal heritage. Because of the presence in Canadian political culture of competing ideological strains, Canada has adhered less faithfully to traditional liberal ideals. Nevertheless, American liberalism, and the United States generally, exercise a continuing influence in many areas of Canadian social and political thought. In particular, the American civil rights tradition, as expressed in the United States Bill of Rights, has been an important source of inspiration for the *Charter*. It is therefore worth considering the United States Supreme Court's stance on welfare rights under the due process clause of the American Bill of Rights, for the guidance which this jurisprudence might offer Canadian courts in their efforts to interpret section 7.

The Fifth Amendment of the U.S. Constitution declares that: "No person shall. . .be deprived of life, liberty, or property, without due process of law".[173] The Supreme Court first considered the impact of the

---

[172] It is also worthy of note that the *Final Act of the 1975 Helsinki Conference on Security and Co-operation in Europe* (1975), 14 INT. L. MAT. 1292, in which Canada was a full participant, contains a formal re-affirmation of the principles contained in the *Universal Declaration*. Part VII of the *Helsinki Accord* provides, in relevant parts, that: "The participating States . . . will promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development"; and that: "In the field of human rights and fundamental freedoms, the participating States will act in conformity with. . .the Universal Declaration of Human Rights. They will also fulfil their obligations as set forth in the international declarations and agreements in this field, including *inter alia* the International Covenants on Human Rights, by which they may be bound." (at 1295).

[173] The Fourteenth Amendment prohibits the States from infringing the same interests in the following terms: "No State shall . . . deprive any person of life, liberty, or property, without due process of law".

due process guarantee in the welfare rights context in the 1970 case of *Goldberg* v. *Kelly*,[174] in which it held that the Fourteenth Amendment requires an evidentiary hearing before an individual's public assistance benefits can be terminated.[175] Speaking for the Court, Mr. Justice Brennan rejected the traditional argument that public assistance benefits are a "privilege" and not a "right", as a basis for denying the recipients' due process claim.[176] He pointed out that such benefits are "a matter of statutory entitlement for persons qualified to receive them"[177] and noted that: "It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity'. Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property".[178] Mr. Justice Brennan included a quote from Charles Reich's discussion of individual rights in the social welfare context, in support of this conclusion.[179] Building upon ideas first developed in "The New Property",[180] the excerpt from Reich's later article highlighted the importance of government benefits as a source of wealth and independence in modern American society. Subsidies to farmers and businessmen, airline routes, broadcast frequencies, defence contracts, and social security pensions were, according to Reich, but a few examples of the government benefits upon which individual status and security in the United States were increasingly based. Such forms of public largesse were no longer viewed as gratuities, but as essentials, and were surrounded by legal safeguards once reserved for traditional forms of property. "It is only the poor", Reich claimed, "whose entitlements, although recognized by public policy, have not been effectively enforced".[181]

Mr. Justice Brennan went on to hold that the question of whether a given benefit fell within the meaning of "property", so as to create a due process right, hinged on the extent of the loss which the recipient would suffer as a result of a termination of the benefit, and on whether the recipient's interest in avoiding that loss outweighed the government's

---

[174] 397 U.S. 254 (1970).

[175] The public assistance programs in question in *Goldberg* v. *Kelly* were the federally assisted Aid to Families with Dependent Children program, and the New York State Home Relief program, both administered by the New York State and City governments; *ibid.* at note 1.

[176] *Ibid.* at 262. In dismissing the right/privilege distinction, Mr. Justice Brennan cited the earlier case of *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), in which the Court held that a one-year waiting period imposed by some States on new residents, before they could obtain public assistance benefits, infringed the fundamental right to interstate travel, thereby denying the Fourteenth Amendment guarantee of equal protection before the laws.

[177] *Ibid.*

[178] *Ibid.* at note 8.

[179] C. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues* (1965) 74 YALE L.J. 1245.

[180] C. Reich, *The New Property*, (1964) 73 YALE L.J. 733.

[181] Reich, *supra*, note 179 at 1255; cited in *Goldberg* v. *Kelly*, *supra*, note 171 at 262, note 8.

interest in summary adjudication of the claim.[182] Mr. Justice Brennan found that:

> Welfare provides the means to obtain essential food, clothing, housing, and medical care . . . . Thus . . . termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.[183]

In Mr. Justice Brennan's view, the provision of a pre-termination hearing also furthered important governmental objectives:

> Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity".[184]

Mr. Justice Brennan rejected the government's contention that the countervailing governmental interest in conserving fiscal and administrative resources outweighed the considerations in favour of a pre-termination hearing in the welfare situation. He pointed to the government's ability to minimize increased costs by prompt pre-termination hearings and by efficient use of personnel and administrative facilities.[185] Mr. Justice Brennan held, however, that the pre-termination hearing need not be a full-fledged judicial or quasi-judicial trial. A process which allowed for timely and adequate notice of the reasons for the proposed government action; an effective opportunity to confront adverse witnesses, to present oral arguments and evidence, and to be represented by counsel; an impartial decision maker; a decision resting solely on the legal rules and evidence adduced at the hearing; and a statement of reasons for the decision and the evidence relied on, would, in Mr. Justice Brennan's opinion, satisfy the Fourteenth Amendment due process requirements.[186]

Faced a similar issue six years later in *Mathews* v. *Eldridge*[187] however, the Court held that although an individual's interest in continued receipt of social security disability payments was a statutorily created property interest protected by the Fifth Amendment, a recipient was not entitled to a hearing prior to termination of benefits.[188] Speaking for the

---

[182] *Goldberg* v. *Kelly*, *supra*, note 174 at 262-63.
[183] *Ibid.* at 264.
[184] *Ibid.* at 265.
[185] *Ibid.* at 266.
[186] *Ibid.* at 266-71.
[187] 424 U.S. 319 (1976).
[188] *Ibid.* at 349.

Court, Mr. Justice Powell identified three factors to be taken into account in deciding what procedural protections a particular situation demands:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[189]

After considering these criteria in the disability context, Mr. Justice Powell came to the conclusion that a hearing was not necessary before an individual's benefits could be terminated.[190] Looking to the private interest, as opposed to the public interest, he distinguished the decision in *Goldberg* v. *Kelly* on the grounds that eligibility for disability benefits is wholly unrelated to the worker's income: "the disabled worker's need is likely to be less than that of a welfare recipient",[191] the latter being "on the very margin of existence".[192] In his view, unlike the welfare situation, the disability claimant's sole interest was in the uninterrupted receipt of benefits pending the outcome of an appeal.[193] As to the adequacy of existing procedures, and the potential value of further procedural safeguards, Mr. Justice Powell maintained that the decision to terminate disability benefits was "a more sharply focused and easily documented decision than the typical determination of welfare entitlement",[194] and that an opportunity to present oral evidence was less crucial than in the welfare situation:

> [T]he decision whether to discontinue disability benefits will turn, in most cases, upon "routine, standard, and unbiased medical reports by physician specialists" . . . . To be sure, credibility and veracity may be a factor in the ultimate disability assessment in some cases. But procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions. The potential value of an evidentiary hearing, or even oral presentation to the decision-maker, is substantially less in this context than in *Goldberg*.[195]

Finally, looking to the public interest, Mr. Justice Powell found that while financial cost was not a controlling factor, the government's interest in

---

[189] *Ibid.* at 335.
[190] *Ibid.* at 340.
[191] *Ibid.* at 342.
[192] *Ibid.* at 340.
[193] As Mr. Justice Brennan points out in his dissenting opinion, Mr. Justice Powell's distinction between the situation of the welfare and disability claimant was hardly tenable in the *Eldridge* case, where "because disability payments were terminated there was a foreclosure upon the Eldridge home and the family's furniture was repossessed, forcing Mr. and Mrs. Eldridge and their children to sleep in one bed"; *ibid.* at 350.
[194] *Ibid.* at 343.
[195] *Ibid.* at 344-45.

conserving scarce fiscal and administrative resources had to be taken into account:

> At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost. Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited.[196]

In the late seventies, commentators such as Lawrence Tribe expressed dismay at this and other decisions signalling a retreat by the Court from its earlier willingness to intervene on behalf of the poor under the Fifth and Fourteenth Amendments. In 1977 Tribe affirmed his conviction that, "eventually the period through which we are passing will be marked not as the end of an era of misguided activism but as an unhappy pause in our progress toward a just society".[197] While Frank Michelman asserted that cases such as *Shapiro* v. *Thompson*[198] and *Goldberg* v. *Kelly*,[199] were evidence of the Supreme Court's recognition of a constitutional right to subsistence,[200] others sought to explain the Burger Court's unwillingness to extend Warren Court precedents in economic and ideological terms. Robert Bork, for example, argued that Michelman's thesis that welfare rights were protected by the U.S. Constitution was unconnected with the constitutional text or its history, lacked adequate guidelines, and thus required political decision-making by the judiciary.[201] The absence of a clear pattern in the case law, Bork claimed, "is less suggestive of an emerging constitutional right to basic needs than it is of a politically divided Court that has wandered so far from constitutional moorings that some of its members are engaging in free votes".[202] Even if a constitutional right to basic needs emerged clearly from the cases, Bork concluded, their constitutional legitimacy would remain in question.[203] Bork's critique echoed Mr. Justice Black's dissenting opinion in *Goldberg* v. *Kelly*,[204] where he characterized the majority's decision in the case as a reflection of the view that the due process clause forbade

---

[196] *Ibid.* at 348.

[197] L.H. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, (1977) 90 HARVARD L.R. 1065.

[198] *Supra*, note 176.

[199] *Supra*, note 174.

[200] F.I. Michelman, *Welfare Rights in a Constitutional Democracy*, (1979) WASH.U.L.Q. 659; *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.

[201] R.H. Bork, *Commentary: The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH.U.L.Q. 695.

[202] *Ibid.* at 698.

[203] *Ibid.*

[204] *Supra*, note 174.

any conduct viewed as "unfair", "indecent", or "shocking". Such language, he declared, did not appear in the due process clause, and if it did, would give judges "such ambulatory power to declare laws unconstitutional" that "the chief value of a written constitution, as the Founders saw it, would have been lost".[205] A similar concern was implicit in the Court's decision, in *Harris* v. *McRae*,[206] that the Fourteenth Amendment did not guarantee the right to Medicaid funding for medically necessary abortions. Speaking for the Court Mr. Justice Stewart declared:

> Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our understanding of the Constitution.[207]

In the earlier case of *Maher* v. *Roe*,[208] which came to the same conclusion with respect to non-therapeutic abortions, the Court stressed the fact that where sensitive policy choices are involved, "the appropriate forum for their resolution in a democracy is the legislature".[209]

As Gerald Frug noted approvingly in an article written in 1978,[210] the post *Goldberg* cases could also be seen to reflect a growing judicial preoccupation with the potential cost to governments of new constitutional entitlements. This factor figured heavily in Mr. Justice Powell's elaboration and application, in *Mathews* v. *Eldridge*, of an interest balancing test for determining the scope of the due process protection called for in a given situation. In response to the parties' varying estimates of the probable cost of requiring pre-termination hearings in the disability context, he stated: "We only need say that experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial".[211] In his dissenting opinion in *Harris* v. *McRae*, Mr. Justice Marshall criticized the majority judgment on the grounds that: "Ultimately, the result . . . may be traced to the Court's unwillingness to apply the constraints of the Constitution to decisions involving the expenditure of governmental funds".[212]

A more recent analysis by William Simon suggests that the failure of the due process concept of "entitlement" to secure lasting gains for welfare beneficiaries, and for the poor in general, can be attributed to

---

[205] *Ibid.* at 276-77.
[206] 448 U.S. 297 (1980).
[207] *Ibid.* at 317-18.
[208] 432 U.S. 464 (1977).
[209] *Ibid.* at 479.
[210] G.E. Frug, *The Judicial Power of the Purse*, (1978) 126 U.PA.L.REV. 715; with respect to the procedural due process cases in particular, *see* 773-77.
[211] *Supra*, note 187 at 347.
[212] *Harris* v. *McRae*, *supra*, note 206 at 347.

the inherent infirmity of its "new property" foundation.[213] Simon contends that, like the conservative legal thinkers of the *Lochner* era, Reich saw the threat posed to individual independence by the power of the state as the basic problem in American society, and the concept of rights as the ultimate solution.[214] Thus, Simon argues, Reich "used the term property to connote the zone of immunity or non-accountability of the classical notion of right".[215] Where Reich departed from classical legalism was in his expansion of the concept of rights to include, along with traditional forms of property, interests in economic "status", such as occupational interests and welfare rights.

Simon contends however, that Reich's recategorization suffers from a fundamental weakness because of his failure to supplement the distributive principles of effort and exchange, which mediated between the notion of independence and the classical private rights scheme, with a new distributive premise based on need.[216] Simon also faults Reich for his adherence to the traditional view that individual rights and state power are distinct and opposing entities. In fact, rights enhance one person's independence only at the expense of the independence of others; and the enforcement of rights against the state really involves a coercive transfer of wealth from one group of right-holders to another.[217] Thus:

> The paradox of the proposal simply to legalize "economic status" can only be resolved by some criteria for assigning priorities to different types of status to indicate which would warrant enforcement at the expense of others. Similarly, the paradox of the proposal to limit power through rights creation can only be resolved through criteria for distinguishing legitimate from illegitimate power, and this distinction in turn requires judgments about the relative justice of the ends for which different types of power might be used.[218]

With the unprecedented American economic growth and Keynesian economic policies of the sixties, these paradoxes were not problematic. By financing welfare expansion with newly created wealth, new property rights could be expanded without unduly burdening traditional property holdings. However, with the end of economic growth in the late seventies, Simon argues, the difficulty of the new property vision became clear:

> In the "zero sum society", the New Property rights of welfare recipients were perceived to conflict with the old property rights of investors and taxpayers, and the latter were considered better grounded in distributive

---

[213] W.H. Simon, *The Invention and Reinvention of Welfare Rights*, (1985) 44 MD. L.R. 1.

[214] *Ibid.* at 23-24.

[215] *Ibid.* at 23.

[216] *Ibid.* at 25-26.

[217] *Ibid.* at 29-30.

[218] *Ibid.* at 32.

considerations. The New Property provided no basis to challenge such notions.[219]

The American welfare rights experience does offer some important insights to Canadians searching for meaning in the life, liberty and security of the person guarantee under the *Charter*. Bork's critique of Michelman's welfare rights thesis, and Mr. Justice Black's dissenting opinion in *Goldberg* v. *Kelly*, demonstrate that a rights analysis which is perceived as unconnected to the text and history of a constitution will be susceptible to challenge from those who reject an overtly political concept of the role of law in society. It is also unrealistic, as Frug points out, to expect courts to be insensitive to the issue of costs when they interpret and apply constitutional guarantees. This was a dominant preoccupation in *Mathews* v. *Eldridge*, and will undoubtably be a factor in Canadian decisions in this area as well. However, Simon's analysis of the weakness in the American "new property" conception of constitutional welfare rights highlights the fundamental limits of the American due process jurisprudence as a source of guidance in interpreting the *Charter*.

The American Constitution was founded on a belief that the interests of the individual and of the state were fundamentally at odds. The structure of American government was designed to minimize opportunities for abusive exercises of collective power through state action. Rights were perceived as zones of immunity surrounding the individual, and protecting him or her from unwanted intrusions by the community and/or the state. "Property" stood as a bulwark between the individual and the state, and "liberty" was, until well into the twentieth century, largely a means of preventing state interference with private property in the name of collective welfare. The progressive attack against classical legalism did not entirely repudiate this view. Rather, it recognized that private power possessed many of the traditional attributes of government, and argued that the individual had to be protected from both. Against this background, the modern welfare conception of the interdependence between the individual and the collective has had great difficulty taking root. As Simon points out, the relationship between rights and needs has not been fully accepted in American society. The perception of welfare rights as simply a newer form of property rendered them vulnerable once they came into conflict with conventional rights, which were more compatible with traditional American distributive notions of effort and exchange.[220]

As I argued at the outset of the paper, however, an interpretation of section 7 of the *Charter* as a source of constitutional protection for welfare rights falls into a well-established tradition in Canada of positive

---

[219] *Ibid.* at 35.

[220] *Ibid.* at 32-35. *See also* R.E. Rosenblatt, *Legal Entitlement and Welfare Benefits*, in D. Kairys, ed., THE POLITICS OF LAW — A PROGRESSIVE CRITIQUE (New York: Pantheon Books, 1982) at 262.

rights and acceptance of community and state responsibility for individual security and welfare. Instead of being conceptualized as a property-like zone of immunity surrounding the individual, welfare rights in the Canadian tradition would be grounded in a concept of mutual aid and reciprocal need. In other words, welfare rights would derive their meaning from a recognition of the fundamental interdependence between the community and the individual. In this view welfare rights would not be defended in strictly individualistic terms. Rather they would be valorized for what they brought to the community as a whole, as well as to the individual, and that value would be taken into account when welfare rights were balanced against competing state, community, or other individual, interests. To the extent that it represents a tentative acceptance of this perspective, the American Supreme Court's decision in *Goldberg* v. *Kelly* is the most pertinent to a Canadian analysis of welfare rights. Although Mr. Justice Brennan characterized welfare benefits in new property terms, he underscored the primacy of need in recognizing their constitutional status. The retreat from the view that constitutional welfare entitlements should be analysed primarily in terms of needs severely limits the relevance of the Supreme Court's subsequent decision in *Mathews* v. *Eldridge*, for the purposes of section 7 analysis.

It is also important to bear in mind that section 7 of the *Charter* is not only a rights protecting, but also a rights creating provision. Thus while the Fifth and Fourteenth Amendments of the Bill of Rights ensure only against deprivations of life, liberty or property without due process of law, section 7 of the *Charter* contains two separate guarantees. First, the affirmative right to life, liberty and security of the person; and second, the corresponding negative guarantee against deprivation of those rights except in accordance with principles of fundamental justice. This is a crucial difference between the language of the Bill of Rights and of the *Charter*. It is a distinction which, like the total omission of traditional forms of property from protection under section 7, reflects significant dissimilarities in the rights traditions in which the two constitutions were conceived. Both in terms of traditional principles of statutory interpretation, and in terms of the heightened requirement that *Charter* language be interpreted in context, it would be a serious error to limit the scope of section 7 through a restrictive use of American due process jurisprudence.[221]

---

[221] For a discussion of factors limiting the utility of American precedents for Charter analysis more generally, *see* Christian, *supra*, note 146 at 105-106 (The presence of a general limitation clause in the Charter eliminates the need, which exists under the American Bill of Rights, to build internal restraints or balancing mechanisms into individual clauses); P.W. Hogg, *Legislative History in Constitutional Cases*, in Sharpe, ed., *supra*, note 5, 131 at 150-152 (Lack of support in Canada for "originalism" as a theory of constitutional interpretation).

II. The Political Purposes of Constitutional Reform

As a final step in the effort to gain a proper understanding of the meaning of section 7, it is necessary to consider the larger objects which the *Charter*, along with the other elements of the 1982 package of constitutional reforms, was intended to promote. The first and most obvious object of the *Charter* is to protect and enhance the rights of individual Canadians *vis-à-vis* the state. As Mr. Justice Estey declared, in *Skapinker* v. *Law Society of Upper Canada*, the *Charter* provides "a new yardstick of reconciliation between the individual and the community and their respective rights".[222] As early as 1968, however, when, as federal Minister of Justice, he launched the Pearson government's campaign for patriation of the constitution and an entrenched bill of rights, former Prime Minister Pierre Trudeau articulated a parallel object of a charter of rights, that is, a nation-building one. It was in these terms that Trudeau discussed Canadian constitutional reform at the February 1968 First Ministers Conference:

> I ask you to consider . . . an approach which deals first and foremost with the people of Canada . . . one which is strong because its backbone is composed of human beings secure in their individual liberty and confident of the protection of their fundamental values. Knowing, whether they be Manitobans, Quebecers or Prince Edward Islanders, that they have common values; that they are united in these respects as Canadians — not divided provincially by differences. This is the strength of Canada.[223]

Ten years later, in *A Time for Action*, the white paper supporting the Constitutional Amendment Bill[224] which launched the federal government's renewed effort for constitutional reform, Trudeau spoke in essentially the same terms: "the Constitution through its protection of rights and freedoms must serve [as] the ultimate basis of national unity".[225] Trudeau was not alone in noting the utility of charters and bills of rights as a means of attaching citizens to the state, and of generating loyalty to the national community.[226] In particular, the Canadian Bar Association

---

[222] *Supra*, note 10 at 180.

[223] Trudeau, *supra*, note 15 at 6. See also: P.E. Trudeau, *A Constitutional Declaration of Rights*, in Federalism and the French Canadians (Toronto: Macmillan of Canada, 1968) 52 at 54-55.

[224] Canada, The Constitutional Amendment Bill — Text and Explanatory Notes (Ottawa: Queen's Printer, 1978).

[225] Trudeau, *supra*, note 20 at 8. For a discussion of the constitutional reform process which culminated in the adoption of the *Constitution Act, 1982* see: R. Romanow, J. Whyte & H. Leeson, Canada. . . Notwithstanding — The Making of the Constitution 1976-1982 (Toronto: Carswell/Methuen, 1984); E. McWhinney, Quebec and the Constitution, 1960-1978 (Toronto: University of Toronto Press, 1979); E. McWhinney, Canada and the Constitution 1979-1982: Patriation and the Charter of Rights (Toronto: University of Toronto Press, 1982); Milne, *supra*, note 61.

[226] *See* Cairns, *supra*, note 13 at 113.

Committee on the Constitution, in recommending the adoption of a constitutional bill of rights, commented on the fact that, "The existing Constitution is woefully weak in any symbolism that helps to tie a people together by identifying what their country means to them and what they can expect of its institutions"[227] and suggested that "[a] clear statement in the Constitution of the fundamental values all Canadians share would, we think, have an important unifying effect".[228] In 1979, the Pepin-Robarts Task Force on Canadian Unity also recommended the constitutional entrenchment of key individual and collective rights on the grounds, "[a]bove all", that "a sense of individual and collective confidence in the security of their rights would contribute to a positive attitude [in Canadians] to Canadian unity."[229]

The nation-building purposes of the federal reform proposals, including the *Charter*, were at the forefront of the debate which culminated in the adoption of the November 1981 Constitutional accord.[230] Ontario Premier William Davis' comments at the close of the federal-provincial conference at which the accord was signed, reflect the importance which was attached to this aspect of the constitutional reform process:

> [W]hile this [agreement] does not represent perfection . . . it does represent something that — not only in terms of the symbolism, in terms of what is actually going to be written — it represents a feeling among the people around this table that there is something to this nation, there is something to being a Canadian that is fundamental to the future well-being of this country.[231]

Peter Russell has argued that the "political purposes" of the *Charter* not only inspired Canadian politicians to propose it, but also induced many Canadians to support it.[232] Public opinion polls during the period leading up to the adoption of the *Charter* showed a consistently high level of support for the federal government's proposals, owing in large part to a belief that they would strengthen national unity.[233] Following its enactment, a number of commentators suggested that the *Charter's* nation-

---

[227] The Canadian Bar Association Committee on the Constitution, TOWARDS A NEW CANADA (Montreal: Canadian Bar Foundation, 1978) at 2.

[228] *Ibid.* at 15.

[229] Task Force on Canadian Unity, *supra*, note 136 at 108.

[230] *See* Milne, *supra*, note 61 at 17; K. Banting & R. Simeon, *Federalism, Democracy and the Constitution*, in K. Banting & R. Simeon, eds, AND NO ONE CHEERED — FEDERALISM, DEMOCRACY AND THE CONSTITUTION ACT (Toronto: Methuen, 1983) 2 at 14-17.

[231] Quoted in the *(Toronto) Globe & Mail* (6 November 1981) 12.

[232] P.H. Russell, *The Political Purposes of the Canadian Charter of Rights and Freedoms* (1983) 61 CAN. BAR REV. 30 at 31.

[233] *See* Editorial, "Canadians Want Rights Charter" *Toronto Star* (23 October 1981) A8.

building potential might prove to be the more profound, if the least recognized, of its purposes.[234]

An interpretation of section 7 to protect welfare rights clearly promotes the first, individual rights-enhancing, object of the *Charter*. Not only is security from basic want the most fundamental of human rights, it is also pre-supposed by many of the *Charter's* other guarantees. As a witness from the National Anti-Poverty Organization declared during the hearings of the Special Joint Committee of the Senate and House of Commons on the federal government's Proposed Resolution on the Constitution[235]: "While the rights enumerated [in the *Charter*]would be of value to Canadians with means, many are valueless to those without means".[236] However, an interpretation of section 7 to protect welfare rights goes equally, if not more, to the *Charter's* second, nation-building, purpose. In a general sense, as Ian Taylor suggests, a feeling of community exists "when the forms of social relationships that people are asked to live, and the kinds of relationships which govern their material livelihood (their working relationships *and* the relationships of economic distribution) are experienced as fair and legitimate", and that for such a community to exist in Canada, Canadian governments must structure their public spending to fulfill universal needs and interests.[237] Social security, then, fosters a sense of national community by mitigating the class tensions to which the inequalities of the existing Canadian economic system would otherwise give rise.[238]

In a more particular sense, however, social security also contributes to the sense of community in Canada, by functioning as "an instrument of cultural and political integration".[239] As Alan Cairns and Cynthia Williams maintain: "In Canada, the welfare state has not only had the task of preserving stability in the face of potential class tensions, but also the task of fostering national integration in a regionalized society of continental extent".[240] In a working paper presented by Prime Minister

---

[234] Milne, *supra*, note 61 at 177; Russell, *supra*, note 232 at 31-41; D. Smiley, THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS, 1981 (Toronto: Ontario Economic Council, 1981) at 56-61; Romanow, Whyte & Leeson, *supra*, note 225 at 9; Cheffins & Johnson, *supra*, note 43 at 9; Hogg, *supra*, note 22 at 651-52.

[235] Canada, THE CANADIAN CONSTITUTION 1980 — PROPOSED RESOLUTION RESPECTING THE CONSTITUTION OF CANADA (Ottawa: Supply and Services Canada, 1981).

[236] *Minutes*, *supra*, note 14, Issue no. 29 at 21 (18 December 1980). *See also* C.M. MacMillan, *Social versus Political Rights* (1986) 19 CAN. J. POL. SCI. 283 at 285-86.

[237] Taylor, *supra*, note 99 at 145. See also: R. Penner, *Constraints on the Political Will* (1984) WINDSOR Y.B. ACCESS JUST. 355 at 362-363.

[238] As Alan Cairns and Cynthia Williams point out, the failure of near-Depression levels of recent unemployment to generate any serious challenge to the existing social order in Canada underscores the role of social security in this respect; *Constitutionalism, Citizenship and Society in Canada — An Overview* in Cairns & Williams, Research Coordinators, *supra*, note 42 at 17.

[239] Banting, *supra*, note 99 at 119.

[240] Cairns & Williams, "Constitutionalism, Citizenship and Society in Canada", *supra*, note 238.

Trudeau to the June 1969 Federal-Provincial Constitutional Conference, this was articulated as follows:

> The "sense of a Canadian community" is at once the source of income redistribution between people and regions in Canada and the result of such measures. It is the sense of community which makes it possible for Parliament to tax residents of higher income regions for the purpose of making payments to persons in lower income regions. And it is the willingness of people in higher income regions to pay these taxes which gives additional meaning in the minds of those who receive the payments to the concept of a Canadian community.[241]

This extract, the essence of which appears again in A TIME FOR ACTION,[242] confirms the argument that social welfare transfers not only reflect, but contribute, to the sense of community in Canada. It also highlights the interregional dimension of the exchange. Since the second world war, the federal government has relied both on direct transfers to individuals, and on equalization payments to the provinces, to ensure that Canadians in all parts of the country enjoy a minimum and uniform level of income security and social services, as "the manifestation of a sense of national community".[243] B.S. Keirstead wrote in his 1944 proposals for post-war Canadian national policy:

> [C]ommon language, common culture, or a sympathy of cultures. . .are not enough to give a common national interest if there is a division of economic interest. If economic policies are being pursued, for example, which enrich one region . . . to the impoverishment of others, no community of interest can emerge. Thus, though the economic concept does not exhaust the notion of community of interest, a common sharing of material welfare is one condition of national purpose, just as economic security in employment at good wages is one condition of a full and happy individual life.[244]

Twenty-five years later, William Lederman described the reduction of inter-provincial economic disparities, "so that a decent basic minimum of income level, social services and welfare is available in all provinces and regions", as one of the economic objectives of Confederation.[245] This argument, that an equitable division of income across Canada is one of the objects of the Canadian federal union, also appears in federal constitutional discussion papers since the late sixties.[246] In the 1978

---

[241] P.E. Trudeau, *Income Security and Social Services: Working Paper on the Constitution* (Ottawa: Queen's Printer, 1969) at 68.

[242] Trudeau, *supra*, note 20 at 10.

[243] Smiley, *supra*, note 129 at 171.

[244] Keirstead, *supra*, note 79 at 6.

[245] W.R. Lederman, *Comments on Co-operative Federalism and Financial Responsibility in Canada* in W.R. Lederman, CONTINUING CANADIAN CONSTITUTIONAL DILEMMAS — ESSAYS ON THE CONSTITUTIONAL HISTORY, PUBLIC LAW AND FEDERAL SYSTEM OF CANADA (Toronto: Butterworths, 1981) 359 at 361.

[246] *See e.g.*, Trudeau, *supra*, note 54 at 8; Trudeau, *supra*, note 241 at 66; Trudeau, *supra*, note 20 at 10; Canada, THE CONSTITUTION AND YOU (Ottawa: Supply and Services Canada, 1982) at 20.

Constitutional Amendment Bill, the following was included, in section 4, as one of the "stated aims of the Canadian federation":

> — to pursue social justice and economic opportunity for all Canadians through the equitable sharing of the benefits and burdens of living in the vast land that is their common inheritance . . . through their commitment to overcome unacceptable disparities among Canadians in every region including disparities in the basic public services available to them;[247]

In keeping with the explicit nation-building focus of the 1982 reforms, this commitment to equalization and the reduction of regional disparities was formally entrenched in section 36 of the *Constitution Act, 1982*, which provides:

> 36.(1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to
>
> (a) promoting equal opportunities for the well-being of Canadians;
> (b) furthering economic development to reduce disparity in opportunities; and
> (c) providing essential public services of reasonable quality to all Canadians.
>
> (2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

Section 36 constitutes a constitutional commitment on the part of the federal and provincial governments to the promotion of equal opportunities for the welfare of Canadians, and to the provision of basic public services of reasonable and comparable quality to all Canadians. Section 36 recognizes equalization payments as an important means of attaining the latter objective. However the former objective, the reduction of interprovincial disparities in welfare and opportunity, will arguably be achieved most effectively by direct transfers to individuals. Income security payments have become, as Keith Banting points out, a critical part of the standard of living, and the general economy, in poorer regions of Canada.[248] The fact that residents of these regions look to interpersonal transfers over interregional equalization programs as a means of enhancing their individual welfare is one indication of this:

> People in deprived regions who look to redistributive instruments in order to raise their incomes, or those of people in their community, do not look solely — or even primarily — to DREE and equalization grants. They also look to interpersonal redistribution through income security . . . . [S]upport

---

[247] Canada, *supra*, note 224 at 2.
[248] Banting, *supra*, note 99 at 176.

> for welfare and income redistribution between income classes is somewhat higher in low-income regions, such as Quebec and Atlantic Canada, than elsewhere; and, more revealing, Atlantic Canadians and Quebecers give greater support to proposals to expand help for the poor and the elderly than they give to expanded efforts to reduce regional inequality.[249]

Although federal equalization programs gained increasing importance from the Diefenbaker era onwards,[250] cogent evidence exists that "[e]qualization [in Canada] has not . . . done anything to make the distribution of personal income in Canada more equitable".[251] Any reduction in interregional income disparities which has occurred in Canada since the late fifties has not been the result of equalization programs, but rather is attributable almost entirely to direct transfer payments, such as unemployment insurance.[252] The importance of direct income transfers to individuals as a means of reducing interregional disparities was explicitly recognized by the federal government itself, when it declared in a 1969 working paper on the Constitution:

> [I]t is highly unlikely that an equitable distribution of income across Canada will be achieved — that disparities in the incomes of individuals and families will be alleviated — unless Parliament has the power to support the incomes of the poor. This we take to be one of the objectives of Confederation and hence one of guiding principles in reviewing the Constitution.[253]

As a witness from the United Church of Canada reminded the Special Joint Committee during the hearings on the Constitution:

> While it is important to provide a balance between regions through equalization grants, the fundamental concern is to ensure that individuals and families across the country are brought up to a basic physical standard of living and are assured of basic services related to health, education and old age.[254]

If it is indeed accurate that interregional redistribution through direct social security transfers is equal to, or greater than that achieved through

---

[249] *Ibid.* at 88-89.

[250] For a discussion of the evolution of Canadian interregional equalization policy since the second world war *see* N.H. Lithwick, *Federal Government Regional Economic Development Policies: An Evaluative Survey*, in K. Norrie, Research Coordinator, DISPARITIES AND INTERREGIONAL ADJUSTMENT (Toronto: University of Toronto Press, 1986) 109; P. Davenport, *The Constitution and the Sharing of Wealth in Canada*, (1982) 45:4 L. AND CONTEMP. PROBS. 109.

[251] G. Stevenson, UNFULFILLED UNION — CANADIAN FEDERALISM AND NATIONAL UNITY, rev'd ed. (Toronto: Gage, 1982) at 147.

[252] *See* Doern & Phidd, *supra*, note 27 at 366; H. Lithwick, *Regional Policy: The Embodiment of Contradictions* in G.B. Doern, ed., HOW OTTAWA SPENDS YOUR TAX DOLLARS 1982 (Toronto: James Lorimer, 1982) 131 at 134-35.

[253] Trudeau, *supra*, note 241 at 66.

[254] United Church of Canada, *Brief to the Special Joint Committee on the Constitution of Canada, Minutes, supra*, note 14, Issue no. 29 at A17 (December 18, 1980).

inter-provincial equalization programs, then an interpretation of section 7 to protect welfare rights is clearly consistent with, and even indispensible to, the fulfilment of the nation-building objectives of the *Charter*, and of the entire package of 1982 constitutional reforms.

III. The Scope of Section 7 Protection

Until now I have focussed on the basic argument that the context within which section 7 of the *Charter* was adopted strongly suggests that it should be read to protect what I have characterized, in general terms, as welfare rights. I claimed that the longstanding Canadian commitment to the ideal of community responsibility for individual well-being through affirmative state action constitutes an important source of meaning for the section 7 right to "life, liberty and security of the person". I argued that the emergence and expansion of the Canadian welfare state since the first world war reflects that meaning, and the social welfare system is in fact a source of security for millions of Canadians. I suggested that popular support for the principle of social security remains high throughout Canada, and that the dramatic shift in government attitudes towards social welfare since the late seventies is in no way reflective of public sentiment on the need for social security as a general matter, and on the legitimacy of specific social welfare programs which are already in place. I maintained that recent Canadian international undertakings in the area of social and economic rights support an interpretation of section 7 which guarantees welfare rights. Finally, I asserted that the nation-building purposes of the 1982 constitutional reforms as a whole also point to this conclusion.

It remains to consider, in light of this discussion, what specific welfare entitlements are protected by section 7, and in what way. In my view, section 7 should be interpreted to further two legitimate sets of expectations, expectations which, I would argue, are shared by individual welfare claimants and by the general public alike. First, that established programs will be administered fairly; and second, that an irreducible core of welfare entitlements will be guaranteed absolutely. The former objective can be met to some extent through the application of traditional notions of natural justice and fairness. However, both the expectation that existing programs will be administered fairly, and that certain welfare interests will be guaranteed absolutely, look to the section 7 right not to be deprived of life, liberty or security of the person "except in accordance with the principles of fundamental justice" as a source of substantive protection as well. For the sake of clarity I will examine these issues separately.

1. *Procedural Fairness in the Administration of Existing Social Welfare Programs*

A potential beneficiary of an established social welfare program in Canada has two principal concerns. First, he or she wants an assurance

that his or her eligibility for benefits under the program will be fairly and properly determined. Once in receipt of benefits under a program, he or she also wants an assurance that those benefits will not be unfairly or improperly terminated. As suggested above, an interpretation of the phrase "principles of fundamental justice" which is consistent with administrative law concepts of natural justice and fairness will go some way towards addressing these concerns.[255] Traditionally, the threshold for judicial review of administrative action was determined by means of a classification of the decision-making function. Where it was deemed to be of a judicial or quasi-judicial nature, the decision-making process had to conform to the rules of natural justice: the individual subject to a decision had a right to be advised of, and to respond to, the case against him or her (*audi alteram partem*), and a right to be heard by an impartial and unbiased decision-maker (*nemo judex in sua causa*). Where, on the other hand, the function was judged to be of a purely administrative character no procedural safeguards were required.[256]

In the 1978 case of *Re Nicholson and Haldimand-Norfolk Regional Bd. of Comm'rs of Police*[257] the Supreme Court of Canada recognized for the first time a duty in administrative and executive decision-makers to act fairly. While "involving something less than the procedural protection of traditional natural justice",[258] the duty of fairness reflected, in Chief Justice Laskin's view, a realization that a denial of procedural protection based on a classification of the decision-making function, and without regard to the consequences for the person adversely affected, was unjust.[259]

Two months later, in *Re Webb and Ontario Housing Corporation*,[260] the Ontario Court of Appeal addressed the fairness issue in the context of a decision by the Ontario Housing Corporation (O.H.C.) to evict a tenant from a subsidized housing unit because of complaints about her children's behaviour. Mrs. Webb charged that the O.H.C. breached the duty of fairness by failing to afford her an opportunity to be heard before terminating her tenancy. Speaking for the Court, Mr. Justice MacKinnon

---

[255] For a discussion of the concepts of fairness and natural justice generally, and as they relate to the *Charter*, *see* Garant, *supra*, note 22; P. Garant & C. Dussault, *L'équité procédurale et la révolution tranquille du droit administratif* (1986) 16 R.D.S.U. 495; A.W. MacKay, *Fairness and the Charter: A Rose by any Other Name?* (1985) 10 QUEEN'S L.J. 263; D. Mullan, *Natural Justice—The Challenges of Nicholson, Deference Theory and the Charter*, in N.R. Finkelstein & B. MacLeod Rogers, eds, RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW (Toronto: Carswell and the Law Society of Upper Canada, 1987) at 1.

[256] The high water mark of this view in Canada is represented by the Supreme Court decision in *Calgary Power Ltd.* v. *Copithorne* [1959] S.C.R. 24, 16 D.L.R. (2d) 241. *See* D.P. Jones & A.S. de Villars, PRINCIPLES OF ADMINISTRATIVE LAW (Toronto: Carswell, 1985) at 155-56.

[257] (1978), [1979] S.C.R. 311, 88 D.L.R. (3d) 671 [hereinafter *Nicholson*].

[258] *Ibid.* at 324, 88 D.L.R. (3d) at 680.

[259] *Ibid.* at 325, 88 D.L.R. (3d) at 681.

[260] (1978), 22 O.R. (2d) 257, 93 D.L.R. (3d) 187 (C.A.) [hereinafter *Re Webb*].

held that while the O.H.C. was not under a duty of fairness with respect to the initial decision to grant Mrs. Webb an apartment, "once she became a tenant, and thus 'qualified' for and received the very real benefit of a reduced and subsidized rent, the situation changed".[261] Mr. Justice MacKinnon went on to refer with approval to the balancing test, set out by Mr. Justice Le Dain in the Federal Court of Appeal decision in *Inuit Tapirisat of Canada* v. *Governor in Council*,[262] for determining what procedural protections fairness demands in a given case:

> [W]hat is in issue in these cases is what is appropriate to require of a particular authority in the way of procedure, given the nature of the authority, the nature of its power and the consequences of the exercise of that power to the individuals affected, and, I would add, the nature of the relationship between the authority and the individuals affected.[263]

In exercising its power to terminate her tenancy the O.H.C. was obliged, in Mr. Justice MacKinnon's view, to treat Mrs. Webb fairly, by informing her of the case against her, and by giving her an opportunity to reply.[264] Since the O.H.C. had met these requirements, however, Mr. Justice MacKinnon dismissed Mrs. Webb's appeal from the decision.[265]

While the judgments in *Nicholson* and *Webb* both reflect the view that fairness is a less demanding procedural standard than traditional natural justice, in *Martineau* v. *Matsqui Institution Disciplinary Board (No. 2)*[266] Mr. Justice Dickson, as he then was, suggested that, in general, courts ought not to distinguish between the two concepts, since to do so creates an unwieldy conceptual framework.[267] "It is wrong", he argued, "to regard natural justice and fairness as distinct and separate standards and to seek to define the procedural content of each".[268] Rather, he maintained, the content of the principles of natural justice and fairness will vary according to the circumstances of each individual case.[269] This will probably be equally true of the procedural guarantees contained in section 7. The expression "principles of fundamental justice" as it appears in section 7 does not yet have a well-defined meaning in Canadian law. The phrase was previously used in section 2(e) of the *Canadian Bill of Rights* in connection with the right to a fair hearing.[270] In that context it

---

[261] *Ibid.* at 265, 93 D.L.R. (3d) at 195.
[262] (1978), [1979] F.C. 711, 24 N.R. 361 (A.D).
[263] *Re Webb*, *supra*, note 260 at 265, 93 D.L.R. (3d) at 195.
[264] *Ibid.*
[265] *Ibid.* at 268, 93 D.L.R. (3d) at 198.
[266] (1979), [1980] 1 S.C.R. 602, 106 D.L.R. (3d) 385.
[267] *Ibid.* at 629, 106 D.L.R. (3d) at 411.
[268] *Ibid.* at 630, 106 D.L.R. (3d) at 411.
[269] *Ibid.*
[270] Section 2(e) provides in relevant part: "2. . . . no law of Canada shall be construed or applied so as to . . . (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations . . .".

was read by Chief Justice Fauteux in *Duke* v. *The Queen* to require that a "tribunal which adjudicates upon [a person's] rights must act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case".[271] It is probable that the procedural aspect of the right to be treated in conformity with principles of fundamental justice, once section 7 interests are affected, will import notions of both traditional natural justice and fairness. As Mr. Justice Dickson suggests, natural justice and fairness represent a continuum of procedural rights. Thus, in giving effect to section 7, the courts are likely to decide what safeguards should apply on a case by case basis, given the nature of the individual interest affected, and of the decision-making body in question.

Before attempting such a balancing exercise, it is important to understand the interests which underpin these process-based guarantees.[272] First, and most obvious, is the interest in accurate decision-making. This interest becomes of paramount importance where an individual will be affected by a decision in a fundamental way. In Mr. Justice Brennan's words in *Golberg* v. *Kelly*: "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss' ".[273] Second, procedural safeguards enable individuals to participate in decisions which affect them. The interest in participation, which procedural safeguards promote, has both objective and subjective dimensions. Philippe Nonet explains the value of procedure and participation largely in political terms: "Procedure is not primarily a way of confining government within the limits of rules. Instead, it is seen as a structure of opportunities for participation and criticism, allowing affected persons to challenge and influence official policy".[274] In Michelman's conception, this participatory objective is of a more subjective kind:

> [T]he individual may have various reasons for wanting an opportunity to discuss the decision with the agent. Some pertain to external consequences: the individual might succeed in persuading the agent away from the harmful action. But again a participatory opportunity may also be psychologically important to the individual: to have played a part in, to have made one's apt contribution to, decisions which are about oneself may be counted important even though the decision, as it turns out, is the most unfavorable one imaginable and one's efforts have not proved influential.[275]

---

[271] [1972] S.C.R. 917 at 923, 18 C.R.N.S. 302 at 307.

[272] *See generally* J.M. Evans, *et al.*, ADMINISTRATIVE LAW CASES, TEXT AND MATERIALS, 2d ed. (Toronto: Emond Montgomery, 1984) at 30-31.

[273] *Supra*, note 174 at 263.

[274] P. Nonet, ADMINISTRATIVE JUSTICE (New York: Russell Sage Foundation, 1969) at 7.

[275] F.I. Michelman, *Formal and Associational Aims in Procedural Due Process*, in J.R. Pennock & J.W. Chapman, eds, DUE PROCESS, NOMOS XVIII (New York: New York University Press, 1977) 126 at 127.

At both levels, this interest in participation in decision-making is tied to basic notions about human dignity and individual self-determination: "being heard is part of what it means to be a person".[276] As Jennifer Nedelsky argues:

> The opportunity to be heard by those deciding one's fate, to participate in the decision at least to the point of telling one's side of the story, presumably means not only that the administrators will have a better basis for determining what the law provides in a given case, but that the recipients will experience their relation to the agency in a different way. The right to a hearing declares their views to be significant, their contribution to be relevant. In principle, a hearing designates recipients as part of the process of collective decision making, rather than as passive, external objects of judgment. Inclusion in the process offers the potential for providing subjects of bureaucratic power with some effective control as well as a sense of dignity, competence, and power.[277]

Third, procedural guarantees perform an important legitimation function. As another American commentator puts it: "The requirement of due process is one of the conditions of moral acceptability of those institutions that give some people power to control or intervene in the lives of others".[278] Finally, procedural guarantees promote administrative accountability, not only to the affected party, but to the courts, to the legislature and to informal institutions, such as the media, religious organizations, and other special interest groups.[279] Therefore, quite apart from the benefits which they afford the individual directly affected by a decision, procedural safeguards can be seen as essential to a well-functioning democratic system.

Procedural guarantees do of course, also entail costs, primarily because they require more time to be spent reaching decisions in individual cases. In addition to increased personnel and other administrative expense, they may also cause delay in the decision-making process itself. The effort to determine what procedure is due in a given situation therefore essentially involves a balancing of the interests outlined above against the corresponding costs. Clearly the outcome of the balancing exercise

---

[276] L.H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories* (1980) 89 YALE L.J. 1063 at 1070.

[277] J. Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, Paper Prepared for the Yale Legal Theory Workshop, March 10, 1988 [unpublished] at 28 (forthcoming, YALE J. OF L. AND FEMINISM). *See also* R.B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection* (1978) 127 U.PA.L.REV. 111 at 117-125; J.L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Matthews v. Eldridge: Three Factors in Search of A Theory of Value* (1976) 44 U.CHICAGO L.REV. 28 at 49-50; W. Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State* (1977) 62 CORNELL L.R. 445; L. Tribe, AMERICAN CONSTITUTIONAL LAW, 2nd ed. (Mineola, New York: The Foundation Press, 1988) at 712-714.

[278] T.M. Scanlon, *Due Process*, in Pennock & Chapman, eds, *supra*, note 275, 93 at 94.

[279] *See* Evans et al., *supra*, note 272 at 31.

will vary considerably depending on how the costs and benefits are perceived and measured. This is illustrated by the differing results in the United States Supreme Court decisions in *Goldberg* v. *Kelly*[280] and *Mathews* v. *Eldridge*,[281] as discussed earlier.[282] In *Goldberg* v. *Kelly* Mr. Justice Brennan emphasized the benefit side of the equation in considering whether a welfare claimant was entitled to a hearing before his or her welfare payments could be terminated. He highlighted the crucial nature of the termination decision for the individual involved, and the interest of society as a whole in the uninterrupted provision of welfare benefits to those eligible to receive them.[283] Against that background he found the need for accuracy in eligibility determinations and hence for individual participation in the decision-making process outweighed the expense of requiring pre-termination hearings.[284] Mr. Justice Brennan also took the view that an increase in administrative costs was not inevitable, but rather was something which was within the government's control. [285]

In contrast to Mr. Justice Brennan's opinion in *Goldberg* v. *Kelly*, Mr. Justice Powell measured the individual and government interests involved in *Mathews* v. *Eldridge* largely in monetary terms. Thus he held that the disability claimant's sole interest in requesting a pre-termination hearing was in the uninterrupted receipt of benefits pending the outcome of an appeal.[286] He maintained that the decision whether to discontinue disability benefits turns, in most cases upon "routine, standard, and unbiased medical reports by physican specialists", and hence that there was little value in requiring an evidentiary hearing, or even oral presentation to the decision maker.[287] Finally, he took as a given that a substantial increase in costs would follow from a requirement of pre-termination hearings, both in terms of the higher number of hearings, and of providing benefits to ineligible recipients pending a decision[288]; and he argued that "substantial weight" must be given to good-faith judgments of welfare administrators "that the procedures they have provided assure fair consideration of the entitlement claims of individuals".[289] Frank Easterbrook provides an accurate summary of Mr. Justice Powell's reasoning in the case:

> The formula [from the *Eldridge* decision] exalts instrumental objectives. The goal of due process is to hold as low as possible the sum of two costs: the costs created by erroneous decisions, including false positives and false

---

[280] *Supra*, note 174.
[281] *Supra*, note 187.
[282] *Supra*, Part I, section 4.
[283] *Supra*, note 174 at 264-65.
[284] *Ibid.* at 266.
[285] *Ibid.*
[286] *Supra*, note 187 at 340.
[287] *Ibid.* at 344-45.
[288] *Ibid.* at 347.
[289] *Ibid.* at 349.

> negatives, and the costs of administering the procedures. Holding this sum to a minimum maximizes society's wealth, and the gains may be shared among all affected persons.[290]

Unlike Mr. Justice Brennan, Mr. Justice Powell also failed to perceive any significant overlapping public and private interests, beyond the interest of existing beneficiaries in not having the value of their benefits reduced by the cost of providing procedural protections for the undeserving. As Jerry Mashaw points out in a critique of the case, this approach is an unsatisfactory one: "As applied by the *Eldridge* Court the utilitarian calculus tends, as cost-benefit analyses typically do, to 'dwarf soft variables' and to ignore complexities and ambiguities".[291] By ignoring the non-pecuniary public and private interests which procedural safeguards are intended to promote, the result in *Mathews* v. *Eldridge* was skewed in favour of one set of objectives, namely that of minimizing fiscal and administrative burdens. If it is decided that interest balancing is an appropriate way to determine what process is called for by "principles of fundamental justice" in a given case, it is important to ensure that all of the costs and benefits involved are adequately identified and taken into account. An inquiry which is insensitive to the entire range of interests which procedural safeguards are intended to promote will, like the one in *Mathews* v. *Eldridge*, be radically incomplete.

With this in mind it is possible to return to the concrete situations which I identified at the outset: that of a person applying for benefits under an existing social welfare program, and of a person whose benefits are being terminated. The question is whether the right not to be denied a section 7 interest "except in accordance with the principles of fundamental justice" will protect each person's reasonable expectations regarding the resolution of his or her claim. On the termination issue, considerable guidance can be found in pre-*Charter* Canadian, and American due process, case law. At a minimum, fundamental justice should guarantee the right to contest or to appeal a termination of a welfare benefit, be it income assistance or a social service. This right is already largely recognized in Canadian social welfare legislation.[292] However, in most welfare cases, fundamental justice should also require an opportunity

---

[290] F.H. Easterbrook, *Substance and Due Process* [1982] SUP.CT.REV. 85 at 110.

[291] Mashaw, *supra*, note 277, at 48. Mashaw contends that Mr. Justice Powell's inquiry is incomplete because it is unresponsive to the full range of concerns embodied in the American due process clause, including, among others, individual dignity, equality and tradition.

[292] *See e.g.*, section 6(2)(e) of the *Canada Assistance Plan* R.S.C. 1970, c. C-1, requires that all provincial social welfare programs which are co-financed by the federal government provide for a right to appeal adverse decisions; *see* the text accompanying note 87, *supra*. Many of the other procedural safeguards discussed below are also provided for in general provincial legislation dealing with administrative procedures, such as the Alberta *Administrative Procedures Act*, R.S.A. 1980, c. A-2, and the Ontario *Statutory Procedures Act*, R.S.O. 1980, c. 484. *See generally* Evans *et al.*, *supra*, note 272 at 117-27.

to be heard before a decision to terminate a benefit is actually taken. This was the essence of the Ontario Court of Appeal's decision in *Re Webb and Ontario Housing Corporation*, when it held that the O.H.C. was obliged to advise Mrs. Webb of the complaints giving rise to the proposed termination of her tenancy, and an opportunity to respond to them prior to evicting her. In *Golberg* v. *Kelly*, Mr. Justice Brennan explained the importance of a pre-termination hearing in the welfare context in terms of the welfare beneficiary's absolute reliance on the payments, and corresponding inability to adequately pursue the appellate rights ultimately available, when all of his or her energy had to be concentrated on securing the very means for daily subsistence.[293] Mr. Justice Brennan approved the District Court's conclusion that:

> [t]he stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great, to allow termination of aid without giving the recipient a chance, if he so desires, to be fully informed of the case against him so that he may contest its basis and produce evidence in rebuttal.[294]

This reasoning is in sharp contrast to the decision in *Rafuse* v. *Hambling*, where the Trial Division of the Supreme Court of Nova Scotia held that fairness did not require welfare officials to provide a beneficiary with a notice of termination of her welfare benefits where the relevant legislation provided for an eventual right of appeal.[295] Mrs. Rafuse received a visit from a social worker on the morning of September 27, 1979, while her husband, from whom she was legally separated, was in her apartment. Mr. Rafuse had arrived at the apartment that morning to take their four children for an outing, but finding everyone ill with what was later diagnosed as whooping cough, he stayed on to help out. Upon discovering Mr. Rafuse in the apartment, the social worker left without giving Mrs. Rafuse an opportunity to explain her husband's presence. That same day he recommended to his supervisor that Mrs. Rafuse's welfare benefits be terminated, on the grounds that she was cohabiting with her spouse, contrary to the applicable regulations. Although Mrs. Rafuse didn't receive her October welfare cheque, she wasn't officially advised of the termination until October 10.[296] When a community development worker attempted to intervene on September 29, he was told that there was no possibility of making further representations on Mrs. Rafuse's behalf before the termination decision was implemented, since the decision had already been taken, and the Director was unwilling to make any change.[297]

---

[293] *Supra*, note 174 at 264.
[294] *Ibid.* at 266.
[295] (1979), 39 N.S.R. (2d) 349, 107 D.L.R. (3d) 349 (T.D.).
[296] *Ibid.* at 372, 107 D.L.R. (3d) at 354.
[297] *Ibid.* at 382, 107 D.L.R. (3d) at 364.

At trial Mrs. Rafuse argued that to require her to go through the official appeal process would place an undue burden on her, since she had no financial resources to fall back on to support herself and her children pending the outcome of the appeal, which would not be disposed of for three or four weeks following the filing of a notice of appeal.[298] Chief Justice Cowan distinguished *Re Webb and Ontario Housing Corporation* on the grounds that Mrs. Webb did not have a statutory right to appeal her eviction, and dismissed Mrs. Rafuse's application to quash the decision to terminate her benefits because she did have an eventual right of appeal.[299] It is difficult to imagine that the decision-making process involved in this case would withstand challenge under section 7. This is exactly an example of the case of "irritable misjudgment" referred to by Mr. Justice Brennan, in which the administrative costs of providing a pre-termination hearing are clearly outweighed by the private and public interests served by making such an additional procedural safeguard available to the welfare beneficiary.

Fundamental justice should also require that notice of a decision or complaint be in such a form as to enable the affected party to prepare a full response. Where in-depth disclosure is necessary for the affected party to adequately prepare his or her case, fundamental justice should require that conditions be established for this to occur. A failure to do this was deemed to be a breach of natural justice by the British Columbia Court of Appeal in *Napoli* v. *Workers' Compensation Board*.[300] In that case the B.C. Workers' Compensation Board had refused to allow an injured worker, appealing a decision on his claim for compensation, to examine the full contents of his file. Instead of granting direct access to the claims file, which contained some 30 medical and other expert reports and opinions, the Board provided the injured worker with a four page summary of the contents of the file.[301] The Board justified its unwillingness to disclose the entire file on the basis that doctors would be less accurate and frank in their medical reports if they knew that these would be made available to the claimant, and that, as a consequence, additional reports, and higher administrative costs would be entailed.[302] Speaking for the Court, Chief Justice Nemetz rejected the Board's argument in the following terms:

> In my respectful opinion . . . this reasoning glosses over the valid contrary view that persons preparing reports which they know will be amenable to

---

[298] *Ibid.*

[299] *Ibid.*

[300] (1981), 29 B.C.L.R. 371, 126 D.L.R. (3d) 179 (C.A.).

[301] Chief Justice Nemetz quoted the following example of the information contained in the summary: "It was also requested that his tolerance for standing, bending and lifting be observed as his statement that he did not work more than 15 minutes in the garden after which he was forced to lie down was not borne out by the outstanding upkeep of his home and garden", *ibid.* at 377, 126 D.L.R. (3d) at 185.

[302] *Ibid.* at 378, 126 D.L.R. (3d) at 186.

> scrutiny will prepare them with greater care and diligence, and, more important, that fairness requires that the original reports be disclosed in order that the claimant can effectively answer the case against him.[303]

In most cases fundamental justice should require the decision-maker to give the affected party an opportunity to be heard in person and to cross-examine witnesses whose evidence is of significant importance in the decision-making process. In *Goldberg* v. *Kelly* Mr. Justice Brennan held that the unavailability of an oral hearing was fatal to the constitutional validity of the termination procedures in question in that case. He argued that written submissions are an unrealistic option for most welfare recipients, "who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance",[304] that written submissions do not afford the flexibility of oral presentations, since they do no permit the recipient to mold his or her argument to the issues the decision-maker regards as important; and that "particularly when credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for a decision".[305] The importance of an opportunity to confront and cross-examine adverse witnesses was also stressed by Mr. Justice Brennan in *Goldberg* v. *Kelly*,[306] as well as by Mr. Justice Nemetz, in *Re Napoli and Workers' Compensation Board*, who required the production of the medical reports on which the Board relied, so that Napoli's counsel could cross-examine their authors on the serious allegations which these contained.[307]

Fundamental justice should also demand that adequate reasons for a decision be given.[308] A failure to comply with this requirement would seriously compromise the objectives which safeguards at preceding stages in the decision-making process were intended to further. A person cannot be said to enjoy genuine participatory rights in a decision-making process if in the end he or she isn't fully informed of the reasons for an outcome. Similarly, a decision will hardly be viewed as legitimate by the affected party if adequate reasons for it aren't given. Furthermore, the ability to seek judicial or other review of an administrative decision will be hampered if the actual basis for the decision is unknown. Reason-giving is a necessary last step in an acceptable decision-making process, as a guarantee that "the issues, evidence, and processes were in fact mean-

---

[303] *Ibid.*

[304] *Supra*, note 174 at 269.

[305] *Ibid.*

[306] *Ibid.* at 270.

[307] *Supra*, note 300 at 377, 126 D.L.R. (3d) at 185.

[308] Unlike the procedural safeguards imposed at preceding stages in the decision-making process, natural justice and fairness have not traditionally required post-decisional reasons. One exception to this may be where a statutory right of appeal will be frustrated by the failure to give reasons. *See* Evans *et al.*, *supra*, note 272 at 369.

ingful to the outcome".[309] Unless reasons for a decision are required, all of the interests underlying procedural safeguards will suffer.

In addition to establishing a framework for the decision-making process, natural justice also provides a fundamental safeguard with respect to the decision-maker or decision-making body itself, in the *nemo judex in sua causa* rule. Decisions made in a situation where there is a conflict of interest; where the decision-maker is hearing an appeal from his or her own decision; where the decision-maker is acting both as prosecutor and as judge; and where the decision-maker's prior or actual behaviour indicates a likelihood of bias, will all be subject to challenge under this rule.[310] The guarantee against bias is perhaps more crucial even than the duty to give reasons. The idea that a person affected by a decision should have a fair opportunity to participate in the decision-making process, to attempt to change the outcome in a material way, and for the psychological satisfaction which participation affords, presumes a decision-maker who is open to communication: "[I]t is obvious that the ability to persuade presupposes a persuadable decision maker."[311] Fundamental justice should thus guarantee right to a decision-making context which is free from any reasonable apprehension in the person affected, that the decision-maker is biased against him or her, whether for personal or for institutional reasons.

The foregoing discussion was directed to the situation of a person whose welfare benefits are being cut off. Judges in Canada and the United States have had more difficulty with the notion that a welfare claimant is entitled to equivalent fairness, or due process, protection when he or she first applies for a welfare benefit.[312] In *Re Webb and Ontario Housing Corporation* Mr. Justice MacKinnon suggested that while Mrs. Webb was entitled to be treated fairly when the Ontario Housing Corporation decided to terminate her tenancy, she enjoyed no such right when she first applied for subsidized housing.[313] As a matter of logic, there is little reason to distinguish between the situations. Each welfare applicant is a potential beneficiary, and provided he or she meets the eligibility requirements of the program, will be entitled to benefits. Termination of a benefit occurs for the same reason as an initial denial of a benefit, that is, because the claimant is deemed to be ineligible. Until the issue of eligibility is finally determined, both the applicant and the person whose benefits are being terminated are therefore in a similar position. Even if

---

[309] *See* J.L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory* (1981) 61 BOSTON U.LAW REV. 885 at 901.

[310] Garant, *supra*, note 22 at 281-82; Jones & de Villars, *supra*, note 256 at 243-72.

[311] M.H. Redish & L.C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process* (1986) 95 YALE L.J. 455 at 488.

[312] For the American position *see Bd. of Regents* v. *Roth*, 408 U.S. 564 (1972) at 576; *but see* Mr. Justice O'Connor's dissenting opinion in *Gregory* v. *Pittsfield*, 470 U.S. 1018 (1985) at 1381-1382. *See also* Tribe, *supra*, note 277 at 690.

[313] *Re Webb*, *supra*, note 260 at 265, 93 D.L.R. (3d) at 195.

the distinction between applicants and beneficiaries were valid when benefits under welfare programs are viewed as ordinary statutory entitlements, it loses its force altogether once welfare rights are recognized as constitutionally protected interests. At that point, there is little reason to consider an expectation interest on the part of an applicant for a benefit to be of lesser significance than the reliance interest of a beneficiary threatened with termination of benefits which he or she already enjoys. The right to be treated in accordance with fundamental justice should apply to the initial decision whether or not to grant a benefit as much as it does to the decision to terminate an existing benefit.

The individual and societal interest in the accuracy of an initial determination of eligibility might in some senses even be greater than in the case of a termination. A person threatened with the loss of an existing benefit, which he or she has come to rely on, has a considerable incentive to challenge this decision if it is felt to be wrong or unfair. As a factual matter however, a claimant who is turned down when he or she initially applies for a benefit will not necessarily appeal this decision. Thus while the hearing rights outlined above are relevant, fundamental justice might require additional assurances of accuracy at the initial determination stage. In short, if claimants for benefits do not avail themselves of rights to appeal when their claims are initially turned down, expanding procedural guarantees at the hearing level, without more, will not adequately ensure the fairness or accuracy of the decision-making process.

This situation was analysed in the American context by Jerry Mashaw who found, with respect to social welfare claims in the United States, that: "The initial level of adjudication is by far the most important decisional level. That decision is final in well over ninety percent of the social welfare claims filed".[314] Because such low rates of appeal make it impossible to conclude that review or appellate rights are an effective check on the accuracy or fairness of claims adjudication at the application stage, Mashaw argues that an additional management-type system is needed for assuring the quality of initial claims processing:

> Due process should require . . . the application of systematic management techniques which will discover errors, identify their causes and implement corrective action. This is suggested, not only by the inadequacies of the hearing process, but also by the protective purposes of AFDC and other social welfare programs.[315]

As Mashaw points out, a number of disincentives exist which may prevent a welfare applicant from taking advantage of the hearing rights which

---

[314] J. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims* (1974) 59 CORNELL L.R. 772 at 785.

[315] *Ibid.* at 815-16. Mashaw points to the quality control mechanisms in the American social security and veterans' benefits programs as examples of how such a system would work. *Ibid.* at 791-804.

are available under a given program.[316] In particular, the socio-demographic make-up of the claimant population[317] and the complexity of the programs themselves may together function as a strong deterrent. Thus, even if the hearing process is responsive to all of the procedural concerns outlined earlier, it may still be inadequate for these reasons.[318] If this is so, a plausible argument can be made that, under principles of fundamental justice, individual welfare applicants should not bear the entire burden of ensuring that the claims determination process is accurate. A welfare determination process which is fraught with error, inconsistency and unfairness should not be immune from attack for fundamental injustice simply because individual claimants do not vindicate their rights to have adverse initial determinations reviewed. Rather the court should find that a decision-making process offends section 7 where it is not subject to any internal control mechanism designed to monitor and promote the quality of individual claims adjudication.[319]

The fact remains, however, that even the most sophisticated procedural guarantees will not address all the concerns which a welfare claimant might have. For instance, unreasonable or unjustified inconsistency in decision-making, standing alone, may not be subject to review under conventional principles of natural justice or fairness. For inconsistency in decision-making to be challenged in and of itself, section 7 must also be perceived as a source of substantive protection. In other words, an unjustified failure by a decision-maker to treat like welfare cases alike must be viewed as inconsistent with principles of fundamental justice. This proposition finds considerable strength in David Mullan's analysis of a recent, if largely British, trend toward expanded substantive review under the guise of fairness, including review for unreasonable

---

[316] *Ibid.* at 811.

[317] For instance, in 1979, the head of household of 42% of poor Canadian families, and 41% of poor Canadian unattached individuals, had elementary school education or less; *see* Gunderson, *supra*, note 101 at 63. *See also* the statistics on the relation between low income and education in F. Vaillancourt, *Income Distribution and Economic Security in Canada: An Overview*, in F. Vaillancourt, Research Coordinator, INCOME DISTRIBUTION AND ECONOMIC SECURITY IN CANADA (Toronto: University of Toronto Press, 1985) 1 at 19, 22, 26, and in National Council of Welfare, *supra*, note 104 at 49-52.

[318] Mashaw suggests that the claimant may not understand or respond to the notice of hearing, particularly if it is only in writing; that he or she may not understand what is to transpire at the hearing; what evidence is relevant; and what information in the agency's possession is most important for the eventual decision, *supra*, note 314 at 813. *See also* Rosenblatt, *supra*, note 220 at 273-74.

[319] As Mashaw points out, such a requirement would not be met by a system designed only to reduce the overall costs of the welfare program, by minimizing the number of decisions incorrectly granting benefits, and not the incidence of decisions incorrectly denying benefits. *Ibid.* at 808-09.

inconsistency.[320] Mullan cites Lord Denning's holding, in *H.T.V. Ltd* v. *Price Commission*,[321] that where a public authority regularly interprets or applies a provision in a particular way, it should not depart from that interpretation unless there is good reason for doing so. To act otherwise would be to "act unfairly and unjustly towards a private citizen when there is no overriding public interest to warrant it."[322] While Mullan does not support a general expansion of review for substantive unfairness, he does contend that a strong case can be made for judicial review of those cases where statutory authorities inexplicably fail to act consistently.[323] He suggests that the justifications for review for inconsistency "transcend national legal systems and have a universality of the kind claimed by natural law theory, namely that the justice of any system depends upon like cases being treated alike",[324] and that to act "without reason or without thinking would seem to be the height of arbitrary behaviour."[325] Mullan points out that:

> [J]udicial review of administrative action has from its earliest days been concerned with the appearance of the proper administration of justice. If the law is prepared to countenance a rule to the effect that a reasonable apprehension of bias will affect the validity of a decision in order to safeguard the reputation of the law, there is also clearly room for condemning unexplained or inexplicable inconsistencies in the administration of statutory discretions from which the law's reputation will suffer as much.[326]

The danger that administrative decision-makers will be deterred from their implied statutory mandate to continually reassess the principles upon

---

[320] D.J. Mullan, *Natural Justice and Fairness — Substantive and Procedural Standards for the Review of Administrative Decision-Making?* (1982) 27 McGILL L.J. 250. The other substantive grounds for natural justice or fairness review which Mullan identifies are: excessive penalty (*R.* v. *Barnsley Metropolitan Borough Council, Ex parte Hook* [1976] 1 W.L.R. 1052 (C.A.)); misunderstanding or ignorance of an established and relevant fact (*Secretary of State for Educ. and Science* v. *Tameside Borough Council* [1977] A.C. 1014 (C.A.), *aff'd* [1977] A.C. 1036 (H.L.)); and no evidence (*R.* v. *Deputy Indus. Injuries Comm'r, Ex parte Moore* [1965] 1 Q.B. 456 (C.A.)). Mullan also refers to an Ontario Court of Appeal decision in which a characterization of no evidence as analogous to a denial of natural justice was also accepted (*Re Keeprite Workers' Indep. Union and Keeprite Prods. Ltd.* (1980), 29 O.R. (2d) 513, 114 D.L.R. (3d) 162 (C.A.)).

[321] *H.T.V. Ltd* v. *Price Comm'n*, [1976] I.C.R. 170 (C.A.).

[322] *Ibid.* at 185.

[323] Mullan, *supra*, note 320 at 251-52.

[324] *Ibid.* at 281.

[325] *Ibid.* at 285-86.

[326] *Ibid.* at 286.

which they decide particular cases,[327] will be averted, Mullan suggests, so long as the courts are sensitive to the various legitimate reasons for which a decision-maker might act inconsistently and change its policies.[328] These arguments, in support of a duty of reasonably consistent decision-making under fairness principles, provide strong justification for a similar requirement under section 7.[329]

Section 15 of the *Charter* also lends strength to an argument that fundamental justice requires like cases to be treated alike. Section 15 provides:

> 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 . . . .

By its clear language, section 15 indicates that equal treatment is a fundamental constitutional value in Canada. It seems reasonable to argue that a decision-making process which offends basic constitutional principles, such as those contained in section 15, should not be accepted as one which conforms to principles of fundamental justice. Thus a welfare claimant whose claim has been dealt with in an unreasonably inconsistent or arbitrary way should be able to challenge the decision as a denial of a welfare interest which offends principles of fundamental justice, and which is therefore unconstitutional.

Principles of fundamental justice should also provide a basis for challenging unequal treatment in decision-making which is related to

---

[327] This concern relates to the administrative law principle that a statutory authority may not "fetter" its discretion, to deprive an individual of the full benefit of discretion provided for in a statute by applying administratively created limitations, not contained in the legislation. In *British Oxygen Co. Ltd.* v. *Minister of Technology*, [1971] A.C. 610 at 625 (H.L.) the English House of Lords provides one possible test for distinguishing between a permissible structuring and an impermissible fettering of decision-making authority in a mass-adjudication situation: "[A] ministry or large authority may have had to deal already with a multitude of similar applications and they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided the authority is always willing to listen to anyone with something new to say . . .". *See* Evans *et al.*, *supra*, note 272 at 680-81.

[328] *Ibid.* at 686. *But see* H.W. MacLauchlan, *Some Problems with Judicial Review of Administrative Inconsistency* (1984) 8 DALHOUSIE L.J. 435. MacLauchlan, at 471, opts for resolving the "tension between the need for individual consideration and the danger of unprincipled decision-making" in favour of administrative discretion, unless the Court finds that the decision-maker "fail[ed] to genuinely consider the matter in question".

[329] *See also* L. Tremblay, *Section 7 of the Charter: Substantive Due Process?* (1984) 18 U.B.C.L.REV. 201 at 247-51.

other specifically enumerated forms of unconstitutional discrimination.[330] Thus section 15 would provide support for a section 7 challenge of the so-called "man in the house" rule, which authorizes the termination of a woman's welfare benefits once she begins living with a man, whether or not he is shown to be supporting her.[331] This is in effect what the welfare authorities in *Rafuse* v. *Hambling* proposed to do when they cut off Mrs. Hambling's welfare benefits simply because they believed that Mr. Hambling was living in her apartment.[332] Such a denial of welfare rights can be said to offend the principles of fundamental justice to the extent that it is based on outmoded sexual stereotypes, rather than on a factual determination of the welfare claimant's real and continuing need for the benefit in question. Similarly, the Federal Court of Appeal's decision in *Re Attorney-General of Canada and Bertrand*[333] might also be open to challenge under section 7 for violation of the anti-discrimination principles contained in section 15. In that case Ms. Bertrand's unemployment insurance benefits were terminated because she was deemed to be unavailable for work. In fact, due to the difficulty which she had finding reliable day care for her 17 month old child, Ms. Bertrand indicated to the Unemployment Insurance Commission that she was only available for work from 4:00 p.m. until midnight, when her common-law spouse was home to take care of their child. The Federal Court of Appeal upheld the Unemployment Insurance Commission's ruling that, since Ms. Bertrand had placed limits on the times which she was willing to work, she was not "available for work" for the purposes of the Act, and hence was no longer eligible for benefits.[334] Speaking for the Court, Mr. Justice LeDain held that:

> The question of availability is an objective one — whether a claimant is sufficiently available for suitable employment to [be entitled to] unemployment insurance benefits — and it cannot depend upon the particular reasons for the restrictions on availability, however these may evoke sym-

---

[330] The impermissible grounds for discrimination which are specifically included in section 15 are: race, national or ethnic origin, colour, religion, sex, age, and mental or physical disability. A great deal of scholarly commentary exists on the scope and meaning of section 15; *see e.g.*, A.F. Bayefsky, *Defining Equality Rights* in A.F. Bayefsky & M. Eberts, eds, EQUALITY RIGHTS AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS (Toronto: Carswell, 1986) 1; M. Eberts, *The Equality Provisions of the Canadian Charter of Rights and Freedoms and Government Institutions*, in C.F. Beckton & A.W. MacKay, Research Directors, THE COURTS AND THE CHARTER (Toronto: University of Toronto Press, 1985) 133; Gold, *supra*, note 41 at 131.

[331] *See* L. Lowenberger, C. Wilkie & B. Abner, *Welfare: Women, Poverty and the Charter* (1985) 1 J.L. & SOCIAL POL'Y 42 at 45-46.

[332] *Supra*, note 295.

[333] (1982), 136 D.L.R. (3d) 710, 46 N.R. 527 (F.C.A.D.).

[334] *Ibid.* at 716. The relevant section of the *Unemployment Insurance Act*, S.C. 1970-71-72, c.48, s. 25(a) provides simply that: "A claimant is not entitled to be paid initial benefit for any working day in a benefit period for which he fails to prove that he was . . . a) capable of and available for work and unable to find suitable employment on that day. . .".

> pathetic concerns. If the contrary were true, availability would be a completely varying requirement depending on the view taken of the particular reasons in each case for the relative lack of it.[335]

What this decision fails to take into account is the fact that women still bear primary responsibility for early child care, and that a definition of "availability for work" which is unresponsive to this fact will have a disproportionately adverse impact on women.[336] In Ms. Bertrand's case there was no question of her willingness to work a normal shift. If she were being denied unemployment insurance benefits because she refused to accept an evening position for which she was qualified, the decision might well be justified. However, the Commission's ruling that Ms. Bertrand's unemployment benefits should be terminated because she was not available for work arguably offends section 15, and so would constitute a denial of welfare rights in violation of section 7.

Additional examples of this intermediate class of cases, in which welfare benefits under existing programs are denied for substantively unacceptable reasons, might also be found.[337] The more difficult question remains however, whether certain denials of welfare rights will be found to offend principles of fundamental justice even when they conform to the standards of procedural fairness and substantive regularity outlined above. More precisely, might a denial of welfare rights by the legislature itself for overt policy reasons, such as an unwillingness to expend public funds, be deemed unconstitutional under section 7?

Three specific kinds of policy-based denials of welfare rights come to mind. First, where the government fails altogether to provide for a welfare benefit or program which is necessary to preserve individual life, liberty, or security of the person. The lack of a coherent program of government funding for battered women shelters is one possible example of this situation. It is difficult to imagine a condition more threatening to section 7 interests than that of a woman who is financially unable to remove herself, and in many cases her children, from the environment in which she is battered, and who is denied access to a shelter because these are non-existent in the area where she resides, or are over-crowded and under-staffed, due to a lack of public funding.[338] A second situation

---

[335] *Ibid.*

[336] For a discussion of this concept, *see* W.W. Black, *Intent or Effects: Section 15 of the Charter of Rights and Freedoms* in J.M. Weiler & R.M. Elliot, eds, LITIGATING THE VALUES OF A NATION: THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS (Toronto: Carswell, 1986) 120.

[337] *See e.g., Re A.G. British Columbia and Winter* (1982), 136 D.L.R. (3d) 189 (B.C.S.C.), in which the Court rejected the finding of an Income Assistance Tribunal that a reduction of provincial G.A.I.N. benefits, in an amount equal to the Canada Pension Plan benefits which a claimant also received, constituted unfair discrimination against widows and widowers.

[338] *See* M. Duckworth, *Social Services and Women* in Doerr & Carrier, eds, *supra*, note 105, 172 at 173-75. *See also Statement of the National Action Committee on the Status of Women*, *ibid.*, 149 at 151-55.

is where a welfare benefit or program is granted or provided for, but at such low levels of funding, or in such limited quantities, that it does not meet the need in question. Examples of this situation are the sub-poverty line levels of social assistance in many provinces,[339] and the shortage of low-income housing in most parts of Canada.[340] A third situation is where a welfare program or benefit which is necessary to life, liberty, or security of the person is terminated because of a change in legislative spending or other priorities.

When speaking of the most basic human welfare needs, the need for decent food, for decent clothing, for adequate and safe housing, for medical care, for educational opportunity, and for a minimum level of income, does the notion of fundamental justice as it appears in section 7 require "more than a fair opportunity to realize an income which can cover these needs or insure against them" — does is require instead an "absolute assurance that they will be met"?[341]

2. *An Absolute Right to a Minimum of Welfare Protection*

As was pointed out earlier,[342] it is important to bear in mind that, unlike the Fifth and Fourteenth amendments of the American Bill of Rights, section 7 of the *Charter* contains both a positive and a negative guarantee: a positive right to life, liberty, and security of the person, and a negative right not to be deprived of them except in accordance with principles of fundamental justice. A plausible argument can be made that these are two separate and independent rights and, therefore, that any denial of an interest related to the first right to life, liberty and security of the person, is unconstitutional *per se* unless it can be justified under the section 1 limitation clause.[343] This reading is consistent with the importance which Canadians attach to the values which section 7 contains. It is difficult to accept that the state might be allowed to deny constitutionally protected welfare rights completely and irrespective of individual need, so long as it does so with procedural regularity and in a manner which does not offend other *Charter* guarantees. An unqualified right to life, liberty and security of the person would have the obvious advantage that where the state wished to infringe a welfare interest, the onus would automatically shift, so that it would bear the entire burden of justifying that infringement under section 1.

While this reading of section 7 is attractive, I believe that an absolute right to the level of welfare protection which is necessary for "subsistence

---

[339] *See supra*, note 112.

[340] Public housing units represent less than three percent of the total Canadian housing stock; *see* MacKay & Holgate, *supra*, note 3 at 386.

[341] Michelman, *supra*, note 200 at 14.

[342] *See* the discussion accompanying note 221, *supra*.

[343] *See* Green, *supra*, note 3 at 42; Hogg, *supra*, note 22 at 743-44; MacKay, *supra*, note 255 at 300-01.

at a minimum social standard of decency"[344] can be found even if section 7 is read as a unified whole, and if any deprivation of life, liberty or security of the person is permissible so long as it conforms to principles of fundamental justice.[345] The argument that the section 7 fundamental justice standard affords absolute protection for a basic core of welfare rights is based on two premises: first, that, in the welfare context at least, the difference between procedural and substantive guarantees is one of degree and not of kind; and second, that any meaningful concept of justice must take underlying Canadian socio-political reality into account.

Like welfare rights themselves, procedural justice clearly entails a positive right to call on the financial resources of the state. The right of a welfare beneficiary to insist on procedural protection against an unjustified termination of his or her benefits is a right to demand that the state expend whatever resources are necessary to make the requisite procedural guarantees available. As Thomas Grey contends: "The difference is one of degree rather than kind — enforcement of formal procedures does cost public money. . .".[346] The real question is the extent to which such procedural rights differ from the right not to be denied the welfare benefit at all, and whether such differences justify an interpretation of the section 7 "principles of fundamental justice" which discriminates between the two. To answer this question it is necessary to look again to the concerns which underlie the imposition by the courts of procedural constraints on administrative decision-making. As discussed earlier, the right to procedural justice furthers important individual and societal interests in accuracy, participation, legitimation and accountability.[347] A decision-making process which affects a welfare interest will be deemed to offend principles of fundamental justice where it is insufficiently responsive to one or all of these concerns.

On closer examination, however, these interests provide an equal, or better justification for the existence of constitutionally protected welfare rights themselves. Mr. Justice Brennan makes this point in *Goldberg* v. *Kelly* when he declares that:

> Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not

---

[344] Michelman, *supra*, note 200 at 681.

[345] It should be noted that this interpretation is more consistent with the French version of section 7, which provides: "Chacun a droit à la vie, à la liberté et à la securité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale".

[346] T.C. Grey, *Procedural Fairness and Substantive Rights* in Pennock & Chapman, eds, *supra*, note 272, 182 at 201. *See also* F.H. Easterbrook, *Substance and Due Process* [1982] SUP. CT L. REV. 85.

[347] *See* text accompanying notes 272-279, *supra*.

> mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity".[348]

Thus, as Mr. Justice Brennan goes on to point out, society has an interest in accuracy in decision-making in the welfare context precisely because it has an interest in extending welfare to all those who are eligible to receive it.[349] The second concern, to ensure the ability of individuals to participate in decisions which affect them, was described earlier as having both a political and an individual dimension.[350] It is difficult to deny that welfare rights are an indispensible means of ensuring equal access of the poor to effective participation in the political system. This is clearly the institutional forum in which most important decisions affecting individuals are made. Michelman argues convincingly that unmitigated poverty is a tremendous obstacle to an individual's ability to participate in the political process: "[L]ife itself, health and vigour, presentable attire, [and] shelter, not only from the elements but from the physical and psychological onslaughts of social debilitation", he contends, are the "universal, rock-bottom prerequisites of effective participation in democratic representation", and should be recognized and defended by the courts as such.[351] Michael MacMillan makes a similar point in discussing the relationship between social and political rights:

> It is virtually a commonplace observation that the traditional political rights are chimerical in the absence of a minimum level of socioeconomic subsistence: that some minimal level of education is a prerequisite to the effective enjoyment of freedom of speech, or that an adequate supply of food or shelter is necessary for political liberty to be meaningful. If the political rights are of paramount importance, then so too are the major social rights simply because they are necessary prerequisites to the exercise of the political rights.[352]

At a more individualised level, the interest in participation in decision-making is linked to fundamental notions about human dignity and self-respect. The ability to participate in a decision which affects one is part of what is essential to being a person. In this sense, procedural guarantees are clearly instrumental. What is being valued is not the ability to participate *per se*, but what that ability says about a person, to him or herself, and to society as a whole. Again, this is as, or more, true of welfare rights themselves. As discussed at length at the beginning of the paper, a person who lacks access to adequate food, clothing, shelter, medical care, and educational opportunity, or the means to acquire them, lacks the material prerequisites for the exercise of those capacities which

---

[348] *Supra*, note 174 at 265.

[349] *Ibid.*

[350] *See supra*, notes 274-277.

[351] Michelman, *supra*, note 200 at 677.

[352] MacMillan, *supra*, note 236 at 285-86. *See also* Russell, *supra*, note 39 at 117-18.

are fundamental to personhood, "autonomy, self-direction and social activism".[353] In essence, a person who suffers from those basic needs is human in spite of his or her membership in society, and not because of it.

Process based guarantees also fulfil an important legitimation function. As suggested earlier, a person will have difficulty accepting the legitimacy of a decision bearing significantly on his or her life if he or she has been denied any input in the making of it. As Mr. Justice Brennan notes, welfare rights fulfil a similar role. Welfare rights provide compensation for those members of society who suffer an inordinate share of the social costs of the current economic system. By performing this function, welfare rights contribute to the maintenance of the existing social and political order as well. Welfare rights also help to sustain the legitimacy of representative democratic government in a more direct way:

> That system's appeal and its legitimacy have from the beginning resided in its claim to be a universally fair and unbiased process both for translating the background rights into a defined and ordered scheme of legal rights and for determining which additional interest in what measures should be served through the regulatory and resource-gathering capabilities of the state. It seems to be a condition of the system's own legitimacy and, therefore, a duty of the system and its beneficiaries that it be insured against bias arising out of the existence or distribution of unmet needs.[354]

Again, as Michelman's arguments make clear, welfare rights provide the necessary means for the socially and economically disenfranchised to hold the political system accountable to their needs and demands. Mr. Justice Brennan's description of the inability of a welfare beneficiary whose benefits have been terminated to call the bureaucracy to account, because of his or her preoccupation with the very struggle for existence,[355] holds equally true in the political realm.

Once we accept that procedural guarantees are valuable precisely because they promote interests which we deem to be fundamental, what grounds are there for limiting the conception of justice in section 7 to one which allows all welfare rights to be denied so long as this is done with a modicum of procedural and substantive regularity. If a decision-making process is found to be inconsistent with principles of fundamental justice when it fails to adequately take into account certain interests, why not the decision itself. Should we not go on to say that where a denial of a welfare benefit, or package of benefits, is tantamount to a denial of access to those values which we deem to be indispensible elements of personhood, such a denial is also contrary to fundamental justice. In other words should principles of fundamental justice not ensure that a

---

[353] Whyte, *supra*, note 3 at 40.
[354] Michelman, *supra*, note 200 at 684.
[355] *Goldberg* v. *Kelly*, *supra*, note 174 at 264.

minimum of welfare benefits — those necessary for subsistence, shelter, health care, and education — are beyond attack under section 7.

There is a second way to approach this question. It was touched upon earlier in the discussion of welfare as a prerequisite for effective political participation. John Whyte puts forward a variant of this approach when he posits that fundamental justice in section 7 must be understood in terms of a theory of "just burdens":

> It might be argued that at some point in our political culture the idea of doing justice to persons meant only dealing with their claims in a procedurally fair way. However, the rapid growth of the activist, redistributive state has been accompanied by a language of political justification based on justice . . . The simple fact of the matter is that it has become, (if it was not always so), counter-intuitive to think of the principles of fundamental justice as being procedural standards. It is now commonplace to think of the state's imposition of burdens and benefits (relating to, among other things life, liberty and security of the person) as either promoting social justice or, on the contrary, as being fundamentally unjust.[356]

Whyte proposes that a government policy should be found to offend principles of fundamental justice when it burdens a class of persons for the good of all in a manner which ignores that class' other fundamental rights, or when it places a disproportionate cost on a group which is "not capable of getting its interests attended to appropriately in the political process".[357] A denial by the state of those benefits or services which are necessary for the maintenance of a socially acceptable standard of human welfare would be open to challenge on either branch of this argument.

As the discussion in the first part of the paper attempts to make clear, a person who lacks the basic means of subsistence has a tenuous hold on the most basic of constitutionally guaranteed human rights, the right to life, to liberty, and to personal security. Most, if not all, of the rights and freedoms set out in the *Charter* presuppose a person who has moved beyond the basic struggle for existence. The *Charter* accords rights which can only be fully enjoyed by people who are fed, are clothed, are sheltered, have access to necessary health care, to education, and to a minimum level of income. As the United Church's brief to the Special Joint Committee declared: "Other rights are hollow without these rights".[358]

This access to the basic means of subsistence is implicit in some *Charter* guarantees, including the fundamental freedoms in section 2, and the democratic rights in section 3, and explicit in others. Section 23 of the *Charter* guarantees, for example, the rights of French and English minority language parents to have their children educated in their mother tongue. Section 6 recognizes that the availability of publicly provided

---

[356] Whyte, *supra*, note 3 at 28.

[357] *Ibid.* at 35.

[358] *Brief to the Joint Committee on the Constitution of Canada by the United Church of Canada*, in *Minutes*, *supra*, note 14, Issue No. 29, 29A:12 at 29A:18 (18 December 1980).

social services without unreasonable discrimination on the basis of province of residence is essential to the exercise of interprovincial mobility rights. The importance of national availability of social welfare benefits to the mobility of Canadians was recognized explicitly by the federal government in an early working paper on the Constitution:

> The Canadian people are now so mobile that it is a matter of no small moment as to whether the income support measures in one province are reasonably comparable to those in another . . . . It is important to the people involved that their income security benefits be portable. Moreover, it is important to the economy, and to the taxpayers who pay for income support measures, that people with low incomes (or no incomes) move to places where they can earn a satisfactory income. If there is a danger that these people will lose their entitlement to income support payments if they move to another province, they will be even more inclined to stay where they are. And Canada will be the poorer.[359]

A failure to extend, or a denial of, basic welfare rights amounts to a policy choice by the state which ignores the rights of the poor not only to life, liberty and security of the person, but to many other fundamental guarantees under the *Charter*. Such a policy should thereby be found to offend principles of fundamental justice.

The second type of public policy which would be held to be fundamentally unjust, in Whyte's reasoning, is one which places a disproportionate cost on a class or group of persons to which the normal political process is unresponsive. This "representation-reinforcement" model of judicial intervention was initially developed by American constitutional scholar John Hart Ely. Ely contends that the U.S. constitution is primarily concerned, on the one hand, with procedural fairness in the resolution of individual disputes, and on the other hand, with "process writ large — with ensuring broad participation in the processes and distributions of government".[360] On this theory, the key to understanding whether a court should intervene to invalidate a government policy on constitutional grounds is the extent to which the group which is burdened by that policy has had an opportunity to participate in the political process through which it was elaborated. An important parallel concern is the degree to which a given policy reflects, reinforces, or facilitates systematic bias against that ill or unrepresented group in the political process.[361]

This theory is of obvious relevance in the welfare situation. The satisfaction of basic human welfare needs is, as suggested earlier, a basic prerequisite for effective participation in the democratic political system.[362] Furthermore, as Michelman contends, inequalities of resources

---

[359] Trudeau, *supra*, note 241 at 71-72.

[360] J.H. Ely, DEMOCRACY AND DISTRUST — A THEORY OF JUDICIAL REVIEW (Cambridge, Massachussetts: Harvard University Press, 1980) at 87.

[361] *Ibid.* at 101-04.

[362] *See* Russell, *supra*, note 39 at 117-18.

and statuses almost certainly constitute a fundamental condition and cause of systematic bias in the functioning of majoritarian political institutions:

> To be hungry, afflicted, ill-educated, enervated, and demoralized by one's material circumstances of life is not only to be personally disadvantaged in competitive politics, but also, quite possibly, to be identified as a member of a group — call it "the poor" — that has both some characteristic political aims and values and some vulnerability to having its natural force of numbers systematically subordinated in the processes of political influence and majoritarian coalition-building.[363]

A deprivation by the state of those welfare rights which are necessary to guarantee a decent level of subsistence would thus be susceptible to challenge not only because it would reflect a lack of participation by, and representation of, the poor in the Canadian political process, but also because it would facilitate the continued exclusion of the poor from that process. In short, a failure by the state to guarantee the basic necessities of life would be fundamentally unjust because it would amount to an exclusion of the poor from participation in the processes and benefits of modern democratic government. To be legally, and morally, acceptable as a mediating principle, fundamental justice should insist "that the participation of marginalized groups takes priority over the preservation of an order that excludes them", and should reject any attempt "to justify an existing order that denies the participation of marginalized groups when changes in that order can be made to enable such participation".[364]

3. Section 7 and Section 1

If the foregoing represents an accurate understanding of the requirement that any deprivation of a section 7 interest be in conformity with principles of fundamental justice, it is difficult to imagine a situation in which such a deprivation might nevertheless be upheld under section 1 of the *Charter*.[365] Section 1 declares:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[366]

---

[363] Michelman, *supra*, note 200. *See also* Russell, *ibid.* at 114.

[364] *Testimony of the Reverend E.W. Scott* (Primate of the Anglican Church of Canada), *Minutes*, *supra*, note 14, Issue no. 33 at 33:14 (7 January 1981).

[365] Paul Bender has argued that, in any event, Charter rights which, like section 7, contain self-limiting language should not be subject to further limits under section 1; *see* P.A. Bender, *Justifications for Limiting Constitutionally Guaranteed Rights and Freedoms: Some Remarks About the Proper Role of Section One of the Canadian Charter* (1983) 13 MAN. L.J. 669. *But see* D. Gibson, THE LAW OF THE CHARTER: GENERAL PRINCIPLES (Toronto: Carswell, 1986) at 136-41; A. Morel, *La clause limitative de l'article 1 de la Charte canadienne des droits et libertés: une assurance contre le gouvernement des juges* (1983) 61 R. DU B. CAN. 86-87.

[366] For a general discussion of section 1, *see* Christian, *supra*, note 146 at 105; W.E. Conklin, *Interpreting and Applying the Limitations Clause: An Analysis of Section 1* (1982) 4 SUP.CT L.REV. 75; D. Gibson, *ibid.* at 133-61.

The only type of government restrictions on *Charter* rights which the courts can uphold under section 1 are those which are reasonable, prescribed by law[367] and justifiable in a free and democratic society. Given past history, it is fair to assume that in most cases the government's primary motivation in imposing limits, whether procedural or substantive, on welfare rights will be of a fiscal nature. It was acknowledged in the discussion of the procedural demands of section 7 that the financial or administrative cost to government of a given procedural guarantee is one factor which the court will take into account in deciding whether a deprivation of a welfare right is fundamentally just. A procedural guarantee will not be required prior to a government deprivation of a welfare benefit if the government's financial interest outweighs the countervailing individual and societal interests which would be served by insisting upon that guarantee. Conversely, a deprivation of a welfare right will be deemed to offend principles of fundamental justice if it fails adequately to reflect those interests, in accuracy, participation, legitimation and accountability.

A weighing of the interest in accuracy under section 7 also speaks to the section 1 issue of the reasonableness of a government limit. The notion of reasonableness implies a weighing of the means employed by the government against the ends which it seeks to achieve by limiting a protected right or interest. Since procedural safeguards are designed in part to enhance the accuracy of a decision-making process, the government's interest in saving money will often be ill-served by its failure to extend the procedural safeguards which a person affected by a welfare decision claims. The other values which procedural safeguards promote go to the second concern under section 1, namely that a government limitation of a *Charter* right be demonstrably justifiable in a free and democratic society. Under section 7 a deprivation of a welfare right will be deemed to offend principles of fundamental justice if it undermines those values; values which are intimately related to important democratic ideals. Thus it would be difficult for the government to justify, in democratic terms, depriving an individual of a welfare right without affording those procedural guarantees which will enable him or her to participate in the decision, to accept the legitimacy of the decision-making process, and to call the decision-maker to account for an unfair or incorrect result. Such guarantees are essential to human dignity and to a well-functioning political order.

Substantive government deprivations of those benefits or services which are necessary to ensure a socially acceptable level of human welfare are even more difficult to justify under democratic principles. The argument that a deprivation of basic welfare rights, such as a minimum

---

[367] Peter Hogg suggests that the "prescribed by law" requirement will probably exclude departmental policy directives and guidelines from the ambit of section 1. Hogg contends that, for the phrase "prescribed by law" to be satisfied, a law must be adequately accessible to the public, and must be formulated with sufficient precision to enable individual citizens to regulate their conduct by it; *see* Hogg, *supra*, note 22 at 684-85.

level of income, food, clothing, shelter, health care, and education, offends principles of fundamental justice is precisely that it takes away freedom and the ability to participate in democratic society. The considerations which figure in a decision that a deprivation of a welfare interest is fundamentally unjust, also lead to a conclusion that a limitation of that *Charter* right is unjustifiable in a free and democratic society. Either section points to the conclusion that the government's desire, without more, to conserve fiscal resources by limiting basic welfare rights is unconstitutional. Only when the government can demonstrate that a limitation or denial of an individual welfare right will result directly in a substantial increase in the welfare and corresponding democratic opportunity of a much larger number of Canadians, should such a limit be susceptible to justification under section 1.[368]

IV. Implications For The Role of The Judiciary

Many would argue that Canadian courts possess neither the institutional competence, nor the institutional legitimacy to interpret and apply section 7 in the way I have proposed. Welfare rights are a form of social right and, unlike classical civil and political liberties, social rights are often considered an inappropriate matter for constitutional entrenchment.[369] Opposition stems in large part from what are perceived as fundamental differences in the character and content of the two types of rights.[370] Daniel Proulx defines classical rights in the following terms:

> . . . ils sont, au départ, des attributs naturels et intrinsèques de la personne humaine. Ces attributs deviennent des droits proprement dits non pas parce que l'Etat les crée et les confère a l'individu, mais parce qu'il en reconnait l'existence dans des déclarations qui ont pour effet de procurer a l'individu dont une liberté est brimée, la liberté d'expression par exemple, le droit de s'adresser aux tribunaux pour faire cesser cette violation.[371]

---

[368] An agreement by the federal and provincial governments to replace the patchwork of existing income support programs with a comprehensive guaranteed annual income scheme might, for example, be defended under this test.

[369] *See* F. Chevrette & H. Marx, *Uniformité et efficacité des garanties en matière de libertés publiques* (1979) 20 C. De D. 95 at 109; W.S. Tarnopolsky, *The Supreme Court and the Canadian Bill of Rights* (1975) 53 Can. Bar rev. 649 at 651; W.S. Tarnopolsky, "The Equality Rights", in Tarnopolsky & Beaudoin, *supra*, note 22 at 438-39; P. Monahan, Politics and the Constitution — The Charter, Federalism, and the Supreme Court of Canada (Toronto: Carswell/Methuen, 1987) at 126-27.

[370] *See* M. Bossuyt, *La distinction juridique entre les droits civils et politiques et les droits économiques, sociaux et culturels* (1975) 8 R.D.H. 783 at 789-94.

[371] D. Proulx, *La portée de la Charte canadienne des droits et libertés en matière de droits sociaux et collectifs: le cas de l'article 23* in La Charte Canadienne des Droits et Libertés et les Droits Collectifs et Sociaux (18 *Cahiers de l'ACFAS*) (Trois Rivières: Université de Québec a Trois Rivières, 1983) 55 at 57.

In this view, once a classical right is recognized by the state, through the process of constitutional entrenchment, it becomes, in a sense, self-executing. An individual exercises his or her constitutional right to free expression, for example, by speaking. And, in order to conform to the dictates of the constitution, the state need only refrain from interfering with that speech.

Social rights are different in character from such classical rights, in that, "contrairement aux droits classiques, les droits sociaux ne sont pas inhérents a l'être humain. Ils n'existent pas a l'état naturel et l'individu ne peut les exercer de sa seule initiative".[372] Unlike classical rights, the state does not confer social rights simply by recognizing their existence. Rather, it must act affirmatively to create them, or to ensure the conditions necessary for them to exist. A person is not housed in the same way as he or she speaks, assembles or prays. If adequate housing is deemed to be a constitutionally entrenched right, the state must provide it, either for everyone or for those who are deemed to be unable to acquire it for themselves. Thus, while a recognition of classical rights imposes little or no financial burden on the state, a grant of social or welfare rights often involves substantial public expenditures. In addition, where the content of classical rights is relatively universal and unchanging, the content of social rights will vary from one society to another, depending on the level of economic development, and the priority which the society assigns to various social goods. While one country may aspire to ensure universal access to safe drinking water, another may seek to guarantee a right to a minimum income. The specific content of recognized social rights within a country may also be subject to change over time, given parallel changes in national and international social and economic conditions.

These differences in the character and content of classical and social rights have significant implications for the role of the judiciary. To satisfy an individual whose classical rights have been infringed, the court need only invalidate the state action generating the interference and, if necessary, order the state to refrain from further action. To vindicate a claim for social, or welfare rights, however, the court may have to order the state to act in some more or less specific way. An individual in need of housing, for instance, will ask the court to order the state to purchase, build or do some other thing to make the requisite housing available. Where an individual is not contesting a lack of housing *per se*, but of adequate housing, or safe housing, the court's order may need to be even more complex and detailed to ensure an adequate remedy for the constitutional violation. In either case, of course, the court will have to determine what the exact content of the right to housing is, at that point in time, in that particular society.

The content of social rights generates concerns at the level of institutional competence; the character of social rights at the level of in-

---

[372] *Ibid.* at 58.

stitutional legitimacy. The concern that courts lack the institutional competence to interpret and apply social rights turns on the nature of the judicial process. As suggested above, before the courts can apply social rights, they must interpret them. But courts are, it is argued, ill-equipped to determine the scope and content of social rights. In an article written in the mid-seventies, while the advisability of constitutional entrenchment of human rights was still a matter of considerable debate in Canada, Donald Smiley identified a number of factors limiting the ability of courts, as an institution, to intervene effectively in the field of human rights. First, courts do not control their own agenda, but must deal with matters brought before them by litigants in the context of specific disputes. Governments, on the other hand, deal with whatever matters of public policy they choose and can modify those policies at will over time. Unlike governments, which have wide discretion in deciding when and how to act, courts are precluded from devising complex solutions to complex problems. They deal only with specific issues in the context of specific litigation and must limit their intervention to the issues brought forward by the parties. In contrast to governments, courts also have limited enforcement powers. And finally, notwithstanding the recent liberalization of rules relating to judicial notice in constitutional adjudication, courts are far more restricted than governments in the range of factors which they may take into account in resolving disputes.[373] In a commentary written in the early seventies, Douglas Schmeiser summarized the institutional advantages of legislatures over courts in the realm of social policy-making:

> Basic policy decisions should be made by legislatures because of their superior powers with respect to fact-finding, awareness of public needs and opinion, formulation of national goals, compromise, timing and economic resources. The adversary system of judicial proceedings, limited to the facts of a particular case and restricted by rules of evidence and procedure, is ill-equipped to deal with complex social problems.[374]

A second institutional competence based objection to the implementation by courts of social rights goes to the nature of the judiciary itself. Because of the narrow socio-economic background from which they are drawn, their generally close prior ties with the business community and their highly specialized education, training and expertise, judges are viewed

---

[373] D. Smiley, *Courts, Legislatures, and the Protection of Human Rights*, in M.L. Friedland, ed., COURTS AND TRIALS: A MULTI-DISCIPLINARY APPROACH (Toronto: University of Toronto Press, 1975) 89 at 97-98. *See also* REPORT OF THE ONTARIO ROYAL COMMISSION OF INQUIRY INTO CIVIL RIGHTS (Toronto: Queen's Printer, 1969) Report no. 2, Volume 4, Chapter 107, 1577 at 1592-93 [hereinafter *McRuer Commission*].

[374] D.A. Schmeiser, *The Case Against Entrenchment of a Canadian Bill of Rights* (1973) 1 DALHOUSIE L.J. 15 at 19; *see also*, *McRuer Commission*, *ibid.* at 45-46.

as ill-suited and ill-disposed to the task of interpreting and applying social rights.[375] Thus Andrew Petter suggests that "[t]here are few public institutions in this country whose composition more poorly reflects, and whose members have less direct exposure to, the interests of the economically and socially disadvantaged".[376] A further reservation, underscored by Petter, relates to the accessibility of courts. For a number of reasons, including the complexity of judicial procedures, the incomprehensibility of judicial language, the formality and adversarial nature of judicial process, and the prohibitive cost of litigation, courts are almost entirely inaccessible to the poor.[377]

These arguments, that governments are institutionally better equipped than courts to deal with human rights issues, are particularly relevant in relation to social rights, since these must necessarily be defined in a very contextual way. The court must have access to the information necessary for it to assess what the content of a given social or welfare right should be. In remedying a violation, the court will potentially be required to tell the government what benefit or service it must provide, and in what quality and quantity. Such determinations require a thorough grasp of social and economic conditions in the society, as well as of public expectations with respect to basic social goods and services. In other words, for it to properly interpret and apply social rights, the court must understand how society perceives its economic means, and its welfare needs.

If the subjective nature of social rights generates concern about judicial competence, their affirmative character creates even greater consternation with respect to judicial legitimacy. The critique is that, by enforcing social rights, courts are in fact engaged in social policy-making; forcing governments to expend funds in a way they didn't plan or choose to do. As Proulx maintains, in the realm of social rights "les juges n'agiront pas nécéssairement comme censeurs ou controleurs, mais plutôt comme créateurs de la norme et moteurs de sa mise en oeuvre lorsque les gouvernments feront défaut d'agir".[378] To many, this looks very much like "judicial legislation", with all of its attendant evils. The most common critique is that the absence of objective standards in this area will lead judges to substitute their own values for those of the democratically elected, and accountable, representatives of the Canadian people.[379] In addition to eroding public confidence in the independence and integrity of the judiciary,[380] it is feared that this usurpation of policy making by

---

[375] *See* Petter, *supra*, note 5 at 486-88; Hogg, *supra*, note 22 at 97-98; Monahan, *supra*, note 369 at 126-27; P.J. Monahan, *A Critic's Guide to the Charter* in Sharpe, ed., *supra*, note 5, 383 at 400-01.

[376] Petter, *ibid.* at 487.

[377] *Ibid.* at 480-81. See also Smiley, *supra*, note 373 at 96.

[378] Proulx, *supra*, note 371 at 78.

[379] *See* Schmeiser, *supra*, note 374 at 21ff. *See also McRuer Commission*, *supra*, note 373.

[380] Schmeiser, *ibid.* at 31ff.

the courts will lead to an abdication of responsibility by legislatures; and to frustration and eventually to apathy in voters.[381]

Concern has also been expressed that judicial prestige and legitimacy will suffer because of the court's inability to effectively enforce affirmative orders against the legislature and the executive. While legislation denying or depriving an individual of a constitutionally guaranteed social right can be invalidated, how, some commentators ask, can a court force the government to legislate in the first place, to meet the obligations which social rights entail? Given that these rights require a whole series of activities on the part of legislatures and governments for their fulfilment, Walter Tarnopolsky contends that they are rights which can be proclaimed only in aspirational terms: "the enforcement of these rights can be achieved only through the ballot box, and not through a court of law".[382] Proulx makes a similar observation that:

> [S]i le gouvernement se voyait ordonné d'adopter un nouveau réglement et qu'il résistait, on voit mal comment les tribunaux pourraient sanctionner ce refus. On peut très difficilement imaginer que les ministres du gouvernment soient punis d'outrage au tribunal et d'emprisonnement ou encore que les biens du domaine public soient saisis à titre d'amende![383]

To counter the resistance to the idea of judges filling in the content of social or welfare rights and then ordering the expenditure of public funds to meet them, it is necessary to re-examine the entire issue from the point of view of those most likely to appeal to the courts for vindication of those rights, namely, the poor. From this perspective one can dispute both the distinction drawn between classical and social rights, and the idea that judicial legitimacy is threatened by social rights to such an extent that courts should leave their application strictly to the legislature.

Once one moves beyond the most personal of human rights, the right to freedom of conscience, of opinion and of belief, it is difficult to maintain the argument that classical rights reflect natural and inherent traits in human beings; that they are absolute in character; or that their recognition imposes negligible costs on the state.[384] What can one say of the right to freedom of association, for example. Until governments began to regulate relations between employers and employees, one of the most important expressions of the right to freedom of association, the right to organize and to bargain collectively, did not exist. The mere abrogation by the state of legislation prohibiting unionization and gov-

---

[381] *Ibid.* at 27ff; F.L. Morton, *The Political Impact of the Charter of Rights* (Faculty of Social Sciences, University of Calgary, October, 1986) [unpublished]; Russell, *supra*, note 232 at 52.

[382] Tarnopolsky, *supra*, note 22 at 438-39.

[383] Proulx, *supra*, note 371 at 73. *See also* R. Knopff & F.L. Morton, *Judicial Statesmanship and the Charter of Rights and Freedoms* in F.L. Morton, ed., LAW, POLITICS AND THE JUDICIAL SYSTEM IN CANADA (Calgary: University of Calgary Press, 1984) 327 at 331.

[384] *See generally* MacMillan, *supra*, note 236.

ernment recognition of a general right of association, did not mean that an actual right to associate came automatically into existence for workers.[385] Clearly many classical rights are in fact dependent on conditions in the market as much as on the absence of state compulsion or interference. Another classical right, the right to vote, is also of minimal value unless the state acts affirmatively to create conditions for its exercise. A decision by the state to register voters, rather than leave them to register themselves, obviously has a significant impact on the scope of the right; as does the geographic placement of polling booths; the regulation of pre-election advertising by political parties and other private interests; the control of election spending, etc.[386]

It is also incorrect to assume that recognition and respect for classical rights imposes only negligible costs on the state. In most cases the state is attempting to pursue some competing public interest when it violates a constitutional right. Where the court declares that activity invalid, the state must find some alternate means of achieving the same purpose.[387] In addition, those classical rights which, like social rights, require affirmative state action involve corresponding financial costs. The final distinction between classical and social rights, the determinacy of the former and indeterminacy of the latter, is also one of degree rather than of kind. Classical rights undoubtably vary in scope and content from one society to another. The notion that a right is universal surely means no more than that it is recognised in many societies, not that its content is invariable in all places at all times. The right to life, for instance, may prohibit capital punishment in one society while sanctioning it in another; and the right to free expression may extend to commercial forms of speech in one society, while being restricted to individual expression elsewhere. The criticism that courts are institutionally incompetent to interpret and apply social rights extends to most if not all human rights; each must be understood in the context of the particular society in which it exists. If the concern is that the current judicial model is inadequate for the task of interpreting and applying constitutionally entrenched rights, the response should be to improve that process, rather than to arbitrarily restrict the types of rights which the courts are encouraged to recognize.

It is important to realize that the traditional distinction between classical and social rights is one which operates in fact to discriminate against the poor. To be in a position to complain about state interferences with rights, one has to exercise and enjoy them. But, as argued earlier

---

[385] *See* H.W. Arthurs, D.D. Carter & H.J. Glasbeek, LABOUR LAW AND INDUSTRIAL RELATIONS IN CANADA (Toronto: Butterworths, 1981) at 144-49. For a discussion of the recent Supreme Court jurisprudence on the right to freedom of association in the labour context, *see* J. Kilcoyne, *Developments in Employment Law: The 1986-87 Term* (1988) 10 SUP. CT L. REV. 183 at 194-296.

[386] *See* W.R. Lederman, *Democratic Parliaments, Independent Courts, and the Canadian Charter of Rights and Freedoms* (1986) 11 QUEEN'S L.J. 1 at 6-7.

[387] This is one consequence, for example, of the Supreme Court's decision in *Hunter* v. *Southam*, *supra*, note 11.

in the paper, without access to adequate food, clothing, housing, income and medical care, it is impossible to benefit from many of the more traditional human rights guarantees. The observation also bears repeating that there is a significant difference between the judicial intervention called for by the rich and by the poor: "where the wealthy invariably want the courts to strike down actions the other branches have taken, the disadvantaged often ask the courts to take actions the other branches have decided not to take."[388]

From the perspective of the poor, the issue of judicial legitimacy also has a different cast. It is impossible to seriously maintain that courts do not play a policy-making or legislative, role in Canadian society. This was true prior to the enactment of the *Charter* and continues to be so.[389] While the image of judicial power in Canada has not always conformed to the reality, it is unlikely, as Peter Russell suggests, "that as the public become more sophisticated about the realities of the judicial process, judicial power can continue to shelter behind the mask of an ideology which denies the very existence of that power".[390] It is therefore indefensible to single out social or welfare rights, on the grounds that their implementation threatens the dignity, integrity or independence of the courts, any more than does the enforcement of any other constitutionally entrenched right. While the preoccupation that the courts not abuse their power is a valid one, such abuse is theoretically no more likely with respect to social rights than in any other area of judicial decision-making.

The suggestion that social rights should be left by the courts to the legislature ignores the realities of the Canadian political process. The "counter-majoritarian" difficulty[391] rests on the premise that the political process is functioning properly and that the Courts should, therefore, defer to popularly elected governments on matters of fundamental social policy. From the perspective of the poor, however, there is no necessary reason to spurn the intervention of the courts in social policy-making, particularly where that intervention will have the net effect of increasing their ability to influence that process. While the poor may not be represented by the courts, neither are they well represented by the legislature. As argued at length earlier in the paper, the poor have no better access to the legislative and executive branches than they do to the courts.[392] Finally, even if they did, it is hard to understand why they should be

---

[388] D.L. Horowitz, THE COURTS AND SOCIAL POLICY (Washington: The Brookings Institute, 1977) at 11, note 41, *cited in* P.H. Russell, *The effect of a Charter of Rights on the Policy-Making Role of Canadian Courts* (1982) 25 CAN. PUB. ADMIN. 1 at 17.

[389] *See* Russell, *ibid.* at 11-12.

[390] P.H. Russell, *Judicial Power in Canada's Political Culture* in Friedland, ed., *supra*, note 373, 75 at 79.

[391] For the classic American exposition of the "counter-majoritarian difficulty" — the view that judicial review threatens democratic values, *see* A. Bickel, THE LEAST DANGEROUS BRANCH — THE SUPREME COURT AT THE BAR OF POLITICS (New Haven: Yale University Press, 1962).

[392] *See* the discussion accompanying notes 128-141, *supra*.

restricted to one forum over the other, when the economically advantaged in Canada have always had ample access to both.

It must be remembered that the source of social or welfare rights in Canada is the *Charter* itself. To suggest that only the legislature has the institutional competence and legitimacy to implement these rights is to forget that both the courts and the legislature have a duty to comply with the constitution. While the legislature has, by virtue of sections 1 and 33 of the *Charter*, the final word on many of the rights which the *Charter* establishes, the courts cannot legitimately ignore the obligations which sections 24 of the *Charter* and 52 of the *Constitution Act* impose. Whyte has made the point that judicially devised rules of restraint are "more activist than activism . . .", since by resorting to them, judges "decide what values a constitution has constituted before reading it".[393] I would also contend that some forms of judicial restraint are potentially more damaging to judicial legitimacy than any misplaced interventionism, and that, given the text of the *Charter* and the level of public commitment to Canadian social welfare traditions, a failure by the courts to recognize and enforce welfare rights under section 7 would be a costly error.

V. Conclusion

At the outset of the paper I referred to those characteristics of a constitution which make it unique. A constitution is a constitutive document. It establishes the framework for the allocation of rights and responsibilities between various organs of the state, and between the state and its citizens, as individuals and as a collective. However a constitution is also constitutive in a non legal sense. It is, as was suggested earlier, "an expression of our history, our character, our values, as well as our aspirations".[394] In this latter sense, a constitution not only codifies our current legal and political arrangements, but also gives formal expression to our aspirations and provides a structure for their realization.

At the same time, a constitution is a written document. In its literal text at least, therefore, it will reflect its author or authors' own perceptions of the world it constitutes. Clearly, some drafting efforts will be more likely than others to yield a faithful picture — a vision which is a genuinely representative one. In assessing the authenticity of a constitution, a number of questions might be asked. How much freedom did the author have and how many constraints? What sources did he or she consult for inspiration — how thorough was his or her search for context and content? What were his or her priorities, preoccupations and motives? For whom did he or she speak and in what voice?

---

[393] Whyte, *supra*, note 13 at 30.
[394] *Supra*, note 14.

Considered in the light of these questions, there is little to inspire confidence that the *Charter* is an accurate rendering of our national character or of our collective aspirations. In particular, as argued in the first half of the paper, the authors of the *Charter* were out of touch with a fundamental set of Canadian values: the values of mutual help and of community. The *Charter* was written, with little public consultation,[395] by governments that had abandoned their commitment to the welfare state.[396] It is thus hardly surprising that the *Charter* contains no explicit reference to social and economic rights; that, in fact, these rights were never even discussed.[397] Yet while the form and language of the *Charter* may be distorted or cramped by its authors' vision, or lack of it, its spirit need not be. The *Charter* is not an ordinary statute. It is a constitution, a document to which all Canadians have a claim. As Chief Justice Rinfret declared in *A.G. Nova Scotia* v. *A.G. Canada*: "The constitution of Canada does not belong either to Parliament, or to the Legislatures; it belongs to the country."[398] Why then should the intentions of its authors be determinative of its meaning; why should we be content with a document which offers but an imperfect manifestation of our fundamental selves?

Since the *Charter's* adoption, many commentators have warned that constitutional entrenchment alone will not safeguard rights which the community deems not to be important.[399] Yet the converse must also be true. Where a community is firmly committed to a set of values, aspirations or traditions, the constitution, properly interpreted, will surely come to reflect their existence. I have argued that our relations with the state, our relations with the community, our international human rights undertakings and our commitment to interregional equity in Canada, point to an interpretation of the right to life, liberty and security of the person which protects welfare-related interests. I have suggested that, to conform to legitimate expectations of welfare recipients and the public alike, this guarantee must be of a substantive, as well as a procedural nature. In short, I have claimed that an adequate standard of social and economic welfare must be constitutionally recognized under the Canadian *Charter* as a right of social citizenship. A *Charter* interpreted to deny constitutional protection for welfare rights, a *Charter* which therefore fails to take into account this fundamental aspect of our national character, will be a truncated shadow of who we are, an unfaithful reflection of who we wish to be.

---

[395] *See* E. McWhinney, *The Canadian Charter of Rights and Freedoms: The Lessons of Comparative Jurisprudence* (1983) 61 CAN. BAR REV. 55 at 57-59; Banting & Simeon, *supra*, note 230 at 19; Hogg, *supra*, note 22 at 70; S. Rush, *Collective Rights and Collective Process: Missing Ingredients in the Canadian Constitution* (1984) 2 SOCIALIST STUDIES 18.

[396] *See above*, text accompanying note 95ff.

[397] R. Whitaker, *Democracy and the Canadian Constitution*, in Banting & Simeon, eds, *supra*, note 230, 240 at 255.

[398] (1950), [1951] S.C.R. 31 at 34, [1950] 4 D.L.R. 369 at 371.

[399] *See* Schmeiser, *supra*, note 374 at 47-48; Macdonald, *supra*, note 5 at 326.