Social Assistance and the *Charter*:

Is there a Right to Welfare in Canada?

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> The idea of entitlement is simply that when individuals have insufficient resources to live under conditions of health and decency, society has obligations to provide support, and the individual is entitled to that support as of right.
>
> Charles Reich[1]

Introduction

Over the past several decades, the question of whether people have a right to welfare has been vigorously debated. After the Great Depression and World War II, a widespread consensus emerged that people had the right, as citizens, to receive assistance when they needed it. Governments accepted the idea that there were economic and structural causes of poverty. If poverty is caused by forces that the individual cannot control, "welfare entitlements are conceived as rights, not favours – a fulfilment of the ideal that each person is entitled to his/her due as citizen."[2] In recent years, however, this "citizenship" perspective has come under attack. The rise of neo-liberalism in the 1980s and 1990s led to the virtual erosion of the Keynesian Welfare State.[3] Poverty became known as an individualized problem and it was not long before the principle of universality was abandoned in favor of the needs test. Today, governments are eager to reduce social expenditures and reluctant to acknowledge that individuals may be entitled to a level of social assistance that is sufficient to meet their basic needs. In the present paper, I examine the issue of whether there is a right to welfare. S. 7 of the *Canadian Charter of Rights and Freedoms*[4] provides the focus for my analysis. I will show that while a strong case can be made that s. 7 protects welfare rights, the arguments in favor of a constitutional right to welfare may be of limited practical value.

Current Trends: Low Rates and Strict Eligibility Requirements

The issue of whether people have a right to a minimum level of social assistance is one of growing concern for poverty law advocates and

[1] C. Reich, "Individual Rights and Social Welfare: The Emerging Legal Issues" (1965) 74 Yale L.J. 1245 at 1256.

[2] I. Johnstone, "Section 7 of the *Charter* and Constitutionally Protected Welfare" (1988) 46 U.T. Fac. L. Rev. 1 at 9.

[3] See J. Brodie, "Restructuring and the New Citizenship" in I. Bakker, ed., *Rethinking Restructuring: Gender and Change in Canada* (Toronto: University of Toronto Press, 1996), 126-140 for an interesting discussion about how the rise of neo-liberalism has disproportionately affected women.

[4] *Canadian Charter of Rights and Freedoms*, s. 7, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c.11.

their clients. Current provincial welfare rates are so low that it is unrealistic to think that they are adequate to cover an individual's basic expenses.[5] Nevertheless, politicians continue to express the view that poverty is not a significant problem in Canada. When economist Christopher Sarlo argued that relative measures of poverty (e.g. Low Income Cut-off) should be replaced with absolute measures, several Conservative MPs embraced the idea.[6] According to Sarlo, poverty exists when people cannot fulfill needs that are fundamental to survival.[7] He focuses on the actual costs of such things as food and shelter rather than on average Canadian income levels. Sarlo's new analysis suggests that people can get by with much less than previously thought. Although critics have identified flaws in Sarlo's methodology,[8] the approach continues to garner widespread support. Under the strict approach, fewer people will be classified as poor. If there are fewer poor people, reductions in social expenditures can be more easily justified. Unfortunately, it seems that several provinces have taken this line of reasoning to the extreme. Over the past few years, social assistance rates have been reduced to such an extent that, by any measure, recipients live in poverty.[9]

The case of *Finlay v. Canada (Minister of Finance)*[10] shows that in some instances social assistance rates may even be reduced below the level of basic requirements. Finlay was a social assistance recipient from Manitoba. In an attempt to recover overpayments that had previously been made to Finlay, the government reduced his monthly allowance to the point where it was no longer adequate to meet his basic needs. Finlay argued that Manitoba's social welfare legislation,[11] which permitted this kind of reduction, violated the *Canada Assistance Plan*[12] (CAP). Under CAP, the provinces had to comply with certain conditions in order to receive federal transfer payments. One such condition, set out in s. 6(2)(a) of CAP, required a province to provide

[5] In British Columbia, for example, the maximum monthly allowance as of December 1997 for a single employable individual was $500.

[6] G. York, "MPs try to move the poverty line" *The Globe and Mail* (23 February 1993).

[7] See C. Sarlo, *Poverty in Canada* (Vancouver: Fraser Institute, 1992).

[8] See *e.g.* J. Murphy, "Analyzing the poverty of Christopher Sarlo" 17 Perception 19.

[9] M. Young, "Starving in the Shadow of Law: A Comment on *Finlay v. Canada (Minister of Finance)*" (1994) 5 Constitutional Forum 31 at 31.

[10] [1993] 1 S.C.R. 1080 [hereinafter *Finlay*].

[11] *Social Allowances Act*, R.S.M. 1987, c. s160.

[12] R.S.C. 1985, c. C-1.

financial assistance to a person in need "in an amount or manner that takes into account the basic requirements of that person." Nevertheless, a majority in the Supreme Court of Canada held that s. 6(2)(a) of CAP did not require provincial social assistance to fulfill or equal a recipient's basic needs.

Even more problematic than the low levels of assistance are the strict eligibility requirements under provincial welfare legislation. Many needy individuals simply do not qualify for assistance. Under the *B.C. Benefits (Income Assistance) Act*,[13] eligibility for income assistance is determined by an asset test, an income test and a social test. The asset test, even with exemptions, is particularly strict. Consider, for instance, that a single person under the age of 55 with no dependents is ineligible if he has assets in excess of $500.[14] One cannot help but suspect that government statistics showing a drop in the percentage of people on welfare over the past few years are simply a reflection of stricter eligibility requirements.[15]

An individual who does manage to qualify for assistance under provincial welfare legislation still cannot be said to have a right to welfare because the ministry often retains a broad discretion to reduce or terminate assistance. In Ontario, for example, a person who refuses to participate in a workfare program can be cut off welfare for up to six months.[16] Similarly, in British Columbia, the minister can reduce the level of a person's assistance if she fails to search for or accept suitable employment.[17] Furthermore, a person who fails to disclose relevant information to the minister may be rendered ineligible for a period of three months.[18] An outstanding warrant is yet another factor that will render a person ineligible for income assistance under the B.C. legislation.[19] Although it may not be immediately apparent, these seemingly reasonable restrictions often do more harm than good. Disqualifying a person on the basis that a warrant has been issued for that person's arrest may appear justified. However, it is important to keep in mind that the individual may feel compelled to plead guilty because of his need to become eligible for social assistance as soon as possible.

Whether or not we agree with a given requirement, the fact remains that it is difficult to speak in terms of a statutory entitlement to welfare when so many terms and conditions apply to the receipt of assistance. Indeed, the combination of low rates, strict eligibility requirements and ministerial discretion suggests that there is no right to a minimum level of social assistance under provincial welfare legislation. The concept of a statutory right to welfare is likely to become even more illusory now that the *Canada Health and Social Transfer* (CHST) has replaced CAP. In her comment on the *Finlay* decision, Young notes, "[E]ven though the Court did not regard CAP as holding provinces to payments which are exact fits with basic requirements, the Court did make one useful finding. Provincial income assistance rates, to be part of programmes eligible for federal funding, cannot

[13] R.S.B.C. 1996, c. 27 [hereinafter *IA Act*].

[14] *Income Assistance Regulation*, B.C. Reg. 75/97, s. 9 [hereinafter *IA Regulation*].

[15] The B.C. government reports that in January 2000, 6.47 per cent of the B.C. population was on welfare compared to 9.68 per cent in December 1995. Online: Ministry of Social Development and Economic Security Homepage <http://www.sdes.gov.bc.ca/research/keyfacts.htm> (last modified: 14 March 2000).

[16] B. Trumpener, "A Dance with the Devil" *This Magazine* (May/June 1998) 13 at 13.

[17] *IA Act*, *supra* note 13, s. 9.

[18] *IA Regulation*, *supra* note 14, s. 21.

[19] *Ibid.* at s. 12.

be completely freely set."[20] Basically, the court in *Finlay* found that social assistance levels had to be "consistent" with the recipient's basic needs. While "consistency" is a vague standard, it is a standard nonetheless.

Unfortunately, any optimism that might have remained after *Finlay* was dashed when CAP was replaced by the CHST in 1996. Under the CHST, the federal government provides a block grant to the provinces for health care, post-secondary education and social assistance and services.[21] Provinces are basically free to spend the money as they see fit. Although they must continue to adhere to national standards for health care, the same cannot be said about the area of social assistance. In fact, only the no-residency requirement survived the shift from CAP to the CHST. There is no longer any standard that requires social assistance rates to be "consistent" with basic needs.

Section 7 and the Right to Welfare

It has become increasingly apparent that Canadian governments are not committed to ensuring that everyone has an adequate standard of living. The question of whether there is a constitutionally protected right to welfare has therefore taken on special significance for many poverty law advocates. Any answer will depend on the scope of the protection offered by s. 7 of the *Canadian Charter of Rights and Freedoms*. S. 7 provides:

> 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.

Since the *Charter* came into force in 1982, courts have grappled with the issue of whether social welfare interests fall within the ambit of s. 7. It is generally agreed that s. 7 does not protect purely economic interests. Many courts have been reluctant to import social welfare interests into s. 7 because they are perceived as economic interests. For example, in *Gosselin v. Quebec (Procureur general)*,[22] the plaintiff argued unsuccessfully that a reduction in the amount of social assistance she received infringed her s. 7 right to security of the person. The Quebec Court of Appeal affirmed the Quebec Supreme Court's finding that s. 7 does not protect a right to social assistance because it does not protect economic rights.

Similarly, in *Masse v. Ontario (Ministry of Community and Social Services)*,[23] the Ontario Divisional Court held that a 21.6 per cent reduction in social assistance benefits did not violate s. 7 of the *Charter*. The court found that s. 7 did not provide a right to a minimum level of social assistance because the *Charter* did not impose positive obligations on government.

Few would dispute that social assistance claims can be easily characterized in economic terms. Upon examination of the facts in *Masse*,

[20] Young, *supra* note 9 at 34.

[21] See A. Moscovitch, "The Canada Health and Social Transfer" in R.B. Blake & J.F. Strain, eds., *The Welfare State in Canada: Past, Present and Future* (Concord: Irwin Publishing, 1997), 105-120 for an overview of some of the implications of the new federal funding scheme.

[22] [1999] R.J.Q. 1033 (C.A.) [hereinafter *Gosselin*].

[23] (1996), 134 D.L.R. (4th) 20 (Ont. Div. Ct.) [hereinafter *Masse*].

Keene observes, "Undoubtedly, a disabled welfare recipient who is left with $3.00 per month for all essentials but rent can be described as being concerned with economics."[24] It is important not to lose sight of the fact that what is at stake in these social assistance claims extends beyond economics. In *Wilson v. British Columbia (Medical Services Commission)*,[25] the British Columbia Court of Appeal considered the scope of the liberty interest in s. 7: "The trial judge has characterized the issue as 'right to work' [a purely economic question], when he should have directed his attention to a more important aspect of liberty, the right to pursue a livelihood or profession [a matter concerning one's dignity and sense of self worth]." The court in *Wilson* acknowledges that work is a fundamental aspect of an individual's life because it provides not only a means of financial support, but because it also serves certain psychological needs. If the right to pursue a profession is protected under s. 7 because employment relates to the individual's identity, dignity, and self-respect, one could argue *a fortiori* that this protection applies to social welfare interests.[26]

Johnstone identifies four characteristics typically associated with welfare recipients.[27] Each characteristic relates directly to the concept of psychological integrity that s. 7 was designed to protect. First, Johnstone points out that poor people are economically and psychologically vulnerable. Second, welfare recipients are often disengaged from mainstream society. Third, poor people often have low self-esteem. Indeed, in today's society, being poor means feeling like a second-class citizen. Finally, Johnstone notes that poor people experience feelings of dependency. These harmful feelings are exacerbated when a person is forced to rely on charity.

In 1991, End Legislated Poverty (ELP) did a study to find out how people felt about using charity.[28] Participants explained that they often had to put up with insulting and humiliating treatment when they went to food banks. They also pointed out that even waiting in line at a soup kitchen could be an intensely degrading experience. Nevertheless, low welfare rates meant that the vast majority of these individuals had no other choice but to rely on charity. As one participant put it, "Most people, if not all, are on welfare. If people had less rent to pay or a bigger cheque, they might not have to line up for a bag of groceries."[29]

Obviously, a Ministry decision to reduce or terminate social assistance has tremendous psychological implications for the individual. While s. 7 may not protect purely economic interests, the Supreme Court of Canada seems to have left open the possibility that it may protect against the stigmatization and stress that so many welfare claimants experience. For example, in *Rodriguez v. British Columbia (Attorney General)*,[30] the Supreme Court of Canada affirmed the notion that security of the person encompasses physical and psychological integrity as well as basic human dignity. In *Irwin*

[24] J. Keene, "Claiming the Protection of the Court: *Charter* Litigation Arising from Government 'Restraint'" (1998) 9 N.J.C.L. 97 at 110.

[25] (1988), 53 D.L.R. (4th) 171 at 187 (B.C.C.A.) [hereinafter *Wilson*].

[26] See I. Morrison, "Security of the Person and the Person in Need: Section Seven of the *Charter* and the Right to Welfare" (1988) 4 J.L. & Social Pol'y 1 at 12 for a brief discussion about how *Wilson* might be applied in the welfare context.

[27] Johnstone, *supra* note 2 at 8.

[28] See K. Hobbs et al., "Waste of a Nation: Poor People Speak Out about Charity" (1993) 31 Can. Rev. of Social Pol'y 94.

[29] *Ibid*. at 102.

[30] [1993] 3 S.C.R. 519 [hereinafter *Rodriguez*].

Toy Ltd. v. Quebec (A.G.), the Court contemplates the possibility that social welfare interests may fall within the ambit of s. 7:

> The intentional exclusion of property from s. 7, and the substitution therefor of 'security of the person'…leads to a general inference that economic rights as generally encompassed by the term 'property' are not within the perimeters of the s. 7 guarantee. This is not to declare, however, that no right with an economic component can fall within 'security of the person'…We do not, at this moment choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights.[31]

The Supreme Court of Canada's most recent discussion of the scope of protection encompassed in "security of the person" came in *New Brunswick (Minister of Health and Community Services) v. G.(J.) [J.G.]*.[32] The issue in that case was whether the New Brunswick government had a constitutional obligation to provide state-funded counsel in child protection proceedings. The Court found that in the circumstances of the case, s. 7 protected a right to state-funded counsel. Speaking for the Court, Lamer C.J. explained, "For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person's psychological integrity."[33] Ordinary stresses are not sufficient to trigger s. 7 protection. Rather, there must be serious state interference with the individual's psychological integrity.

Canada's International Commitments

It is generally agreed that the *Charter* should, as far as possible, be interpreted in light of Canada's international obligations. Jackman advances two main justifications for using international agreements as guides to *Charter* interpretation. First, she points out that Canada, as a member of the United Nations, has participated actively in the human rights movement that has taken place throughout the world since World War II.[34] Much of the language of the *Charter* can be traced to the international agreements that Canada has endorsed over the years. Second, Jackman maintains that there is a presumption that Parliament does not intend to violate Canada's international commitments.[35] It follows that the *Charter* should be read consistently with these obligations.

For the purposes of interpreting s. 7, two major documents are relevant. The first is the *Universal Declaration of Human Rights*.[36] Article 25 reads:

> Every one has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in

[31] [1989] 1 S.C.R. 927 at 1003-4 [hereinafter *Irwin Toy*].

[32] (1999) 177 D.L.R. (4th) 124 (S.C.C.) [hereinafter *New Brunswick*].

[33] *Ibid.* at 147.

[34] M. Jackman, "The Protection of Welfare Rights Under the *Charter*" (1988) 20 Ottawa L. Rev. 257 at 288.

[35] *Ibid.*

[36] *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).

> the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control.

The *Declaration* clearly lends support to the notion that people have a right to the basic necessities of life. Johnstone notes that there is a similarity between "security" in Article 25 of the Declaration and "security" in s. 7 of the *Charter*.[37]

The second important international agreement in the area of social welfare is the *International Covenant on Economic, Social and Cultural Rights*.[38] The *Covenant* was ratified by Canada in 1976. Among other things, it speaks of "freedom from want" and, like the *Declaration*, the *Covenant* refers to the individual's right to an adequate standard of living. Thus, it is apparent that the language of both documents supports a generous interpretation of s. 7.[39]

The American Experience

Because the *Charter* reflects many of the ideals contained in the American Bill of Rights, American law serves as a useful guide to the interpretation of s. 7. It is particularly important to examine the landmark case of *Goldberg v. Kelly*,[40] a 1970 decision of the United States Supreme Court. In that case, the Court found that a hearing was required before a person's public assistance benefits could be terminated. The Court characterized welfare as a kind of property right. Since the 14th Amendment explicitly protects the right to property, the recipients' due process claim succeeded. Thus, in *Goldberg v. Kelly*, welfare was afforded some measure of constitutional protection. The decision has implications for welfare in the Canadian context. One fairly obvious inference is that if welfare is merely a property right, it is not protected by s. 7, a provision which, unlike its American counterpart, does not mention property.

While it is important to note that the Court in *Goldberg v. Kelly* found that welfare fell under the heading of property rights, the significance of the classification should not be overstated. According to Morrison, welfare rights were protected in *Goldberg v. Kelly* for reasons that went beyond the fact that they could be characterized as property rights.[41] Indeed, Brennan J., speaking for the Court, emphasized the idea that welfare serves important purposes: "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 community."[42] Brennan J. accepted the theories of Charles Reich, an influential author who viewed welfare as a right that needed to be more effectively enforced.[43]

The line of reasoning that emerged from *Goldberg v. Kelly* has been used by those who maintain that the *Charter* protects welfare rights. For example, Jackman argues that the right to life, liberty and security of the person is virtually meaningless if an individual cannot fulfill his or her basic

[37] Johnstone, *supra* note 2 at 10.

[38] *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).

[39] See also *R. v. Big M Drug Mart Ltd.* (1985), 18 D.L.R. (4th) 321 at 360 where the Supreme Court of Canada states that s. 7 should be interpreted generously.

[40] (1970), 397 U.S. § 254.

[41] Morrison, *supra* note 26 at 14-15.

[42] *Goldberg v. Kelly*, *supra* note 40 at 265.

[43] See Reich, *supra* note 1.

needs.[44] Thus, it appears that the reasons for protecting welfare under s. 7 of the *Charter* would be very similar to those that have already been articulated by the U.S. Supreme Court. In other words, the absence of the term "property" in s. 7 does not necessarily undermine the case for welfare rights in the Canadian context. According to Morrison, "It may be argued that the purposes for protection of welfare rights in American law are equally compelling under the *Charter*."[45]

Nevertheless, some of the more fundamental limitations of *Goldberg v. Kelly* must be considered before any proper conclusions can be drawn about the status of welfare rights in the United States and Canada. Hasson notes that a hearing requirement at the termination stage does not protect people who are denied benefits at the outset.[46] This raises the complex issue of whether governments are under any obligation to provide welfare in the first place.[47] In the Canadian context, some commentators have advanced the position that s. 7 does not create a right to welfare that exists independently from state action.[48] Rather, as Morrison explains, "having undertaken to do these things which closely implicate fundamental interests, the state may be constitutionally constrained in how it treats the interests so created."[49] In other words, if the government is going to provide social assistance to people, it must do so in a manner that is consistent with s. 7 of the *Charter*. This implies, among other things, that rates must be adequate to cover basic needs. Unfortunately, this does not provide a complete answer to Hasson's concerns about those individuals who are initially denied welfare. Cases like *Goldberg v. Kelly* involve individuals who are already receiving benefits. Questions remain about whether those who apply for assistance and are rejected can argue that they have a right to welfare.

According to Hasson, another limitation of *Goldberg v. Kelly* is that the level of benefits at stake in that case was so low that it is difficult to imagine how any welfare recipient could have survived on the amounts provided.[50] As mentioned previously, a meaningful right to welfare requires that the level of assistance be adequate to fulfill a person's basic needs.

Administrative Agencies and the *Charter*

Even if convincing arguments can be made to show that s. 7 does protect welfare rights, questions remain about the practical significance of such arguments. A large number of cases in the welfare context are heard and ultimately disposed of by administrative tribunals. A claimant seeking to challenge an initial decision to reduce or terminate assistance will probably never go to court. This is true despite the fact that decisions made by administrative tribunals can always be reviewed in accordance with the principles of administrative law. Even when the statute itself provides for a right of appeal to the courts, only a handful of cases ever make it that far.

[44] M. Jackman, "Poor Rights: Using the *Charter* to Support Social Welfare Claims" (1993) 19 Queen's L.J. 65 at 79.

[45] Morrison, *supra* note 26 at 15.

[46] R. Hasson, "What's Your Favourite Right? The *Charter* and Income Maintenance Legislation" (1989) 5 J.L. & Social Pol'y 1 at 26. To support his position, Hasson relies on the work of Professor O'Neil. See O'Neil "Justice Delayed and Justice Denied: The Welfare Prior Hearing Cases" [1970] Supreme Court Review 161.

[47] See e.g. Morrison, *supra* note 26 at 15 and Johnstone, *supra* note 2 at 15-18. Both authors address the argument that constitutional protection should not be afforded to something that may be characterized as a mere privilege.

[48] See e.g. Morrison, *supra* note 26.

[49] *Ibid.* at 18.

[50] Hasson, *supra* note 46 at 26-27.

Litigation requires time and money. These are luxuries that social assistance recipients simply do not have. Thus, the administrative tribunal hearing stage is crucially important in the sense that it provides claimants with what will very likely be their final opportunity to challenge an unfavourable decision.

With this background in mind, two questions must be examined. First, do administrative tribunals have the jurisdiction to apply the *Charter*? Second, even if they do have the jurisdiction to apply it, to what extent are they likely to do so? With respect to the first issue, Morrison explains that "[t]here is a growing judicial consensus that most administrative tribunals have a limited jurisdiction to apply the *Charter*."[51] Indeed, the Supreme Court of Canada in *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*[52] confirmed the idea that a tribunal with the power to decide questions of law also has the power to decide whether a law violates the *Charter*. Thus, an administrative body like the B.C. Benefits Appeal Board, which has the authority to review a decision considered to be an error in law, is also capable of deciding *Charter* issues.

Commentators like Morrison predict that if administrative bodies have the jurisdiction to consider *Charter* arguments, poverty law advocates will be encouraged to advance such arguments.[53] However, there is good reason to believe that administrative agencies are even less likely to be persuaded by *Charter* arguments than the courts. Members often have little or no legal training or expertise. Currently, only the vice-chair and four members of the 11 person B.C. Benefits Appeal Board have law degrees.[54] Thus, a decision of the Board will probably not be the product of legal reasoning. Rather, it may be based almost entirely on the facts of a particular case. *Charter* arguments are not going to advance a claimant's cause when the real task is to generate as much sympathy as possible on the facts of the case.

Practical Implications

If we accept the broad proposition that s. 7 protects welfare rights, a number of practical difficulties arise that must be addressed. For example, Johnstone asks, "What kinds, levels, and shares of goods should be available to each person? What level of well-being is fundamental to human dignity?"[55] Johnstone suggests that courts may not be in the best position to deal with these types of issues.[56] Arguably, socio-economic questions should be left to the legislatures. Hasson warns about the difficulties that arise when courts become involved: "[O]ne cannot turn an intensely political question such as the level of welfare benefits into a legal question simply by deeming it so."[57] Commentators like Hasson believe that instead of opting for litigation, poverty law advocates would be wise to spend their time lobbying for political change. Indeed, it is difficult to deny the fact that *Charter* challenges

51 I. Morrison, "Poverty Law and the *Charter*: The Year in Review" (1990) 6 J.L. & Social Pol'y 1 at 13.

52 [1991] 2 S.C.R. 5.

53 Morrison, *supra* note 51 at 16.

54 Online: B.C. Benefits Appeal Board Homepage <http://www.bcbab.gov.bc.ca/history.htm#mems> (last modified: 8 September 1998).

55 Johnstone, *supra* note 2 at 11.

56 *Ibid.* at 12.

57 Hasson, *supra* note 46 at 2.

to income maintenance legislation generally do not succeed. According to Keene, one of the main reasons for the dismal success rate is that lawyers and judges simply cannot identify with welfare claimants.[58] The judiciary is composed of highly educated people who generally come from privileged backgrounds. In contrast, "[t]he claimant in social assistance cases is by definition a member of our most disadvantaged social class, and faces a reality that is light-years away from anything experienced by judges, lawyers, or anyone they are likely to know."[59] Not surprisingly, some have questioned whether courts are competent to determine the substance of welfare rights.

Concerns about legitimacy also arise when courts require governments to take positive action. That is, when courts tell governments how to spend money, they are basically usurping the role of democratically elected legislatures. In response to this line of reasoning, Jackman argues that "[i]t is impossible to seriously maintain that courts do not play a policy-making or legislative, role in Canadian society."[60] But apart from the question of legitimacy is the concern that the imposition of positive obligations on government may produce unintended results. If the government is required to spend more money on social assistance, other social programs may suffer as a result. Johnstone points to *Silano v. British Columbia* [61] as one example of a case that ultimately backfired on welfare recipients.[62] At issue in *Silano* was a $25 discrepancy between the level of social assistance available to those under the age of 26 and to those over the age of 26. When the British Columbia Supreme Court held that this difference infringed s. 15 of the *Charter*, the government proceeded to reduce the older group's benefits.

In theory, the political arena may be the most appropriate forum for the welfare rights debate. In reality, however, provincial governments left to their own devices are unlikely to enforce affirmative welfare rights in a meaningful way. As Jackman observes, "While the poor may not be represented by the courts, neither are they well represented by the legislature."[63] The provinces have already demonstrated a commitment to get tough on welfare and at a time when cutbacks are the norm there is good reason to believe that the situation is only going to get worse for Canadians living in poverty.

Johnstone points out that the international community does not rely on courts to enforce social and economic rights.[64] The threat of negative publicity helps to ensure compliance with international obligations. Again, it is important to consider whether this technique is truly effective. According to a recent report by the National Anti-Poverty Organization (NAPO), Canada has not been living up to its obligations under the *International Covenant on Economic, Social and Cultural Rights*.[65] Specifically, the "loss of the right to income support" is cited as one indication that Canada is not

58 Keene, *supra* note 24 at 99.

59 *Ibid.*

60 Jackman, *supra* note 34 at 336.

61 (1987), 42 D.L.R. (4th) 407 (B.C.S.C.) [hereinafter *Silano*].

62 Johnstone, *supra* note 2 at 12.

63 Jackman, *supra* note 34 at 336.

64 Johnstone, *supra* note 2 at 14.

65 Online: National Anti-Poverty Organization Homepage <http://www.napo-onap.ca/meltdown.htm> (last modified: 9 December 1998).

adequately protecting the rights of its citizens.[66] NAPO Vice-President Jacquie Ackerly notes, "The UN may rank Canada as #1 in the world in overall development, but this report provides clear evidence that the benefits of that development are not shared equally in Canada."[67]

Conclusion

As the preceding discussion illustrates, the question of whether there is a right to welfare is not a straightforward one. It is difficult to speak of entitlement under provincial welfare legislation and there is debate about whether s. 7 of the *Charter* protects the right to a minimum level of social assistance. Although the ambit of "security of the person" seems wide enough to include social welfare interests, it should be kept in mind that this is only the first step in the s. 7 analysis. We must also ask whether the deprivation is in accordance with the principles of fundamental justice. If not, we must inquire as to whether the infringement can be justified as a reasonable limit under s. 1 of the *Charter*. Obviously, a s. 1 analysis and an examination of the principles of fundamental justice are beyond the scope of this paper. Nevertheless, they do represent additional hurdles in what is already an uphill battle for poverty law advocates.

66 *Ibid.*

67 *Ibid.*