Poverty

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Edited by Margot Young, Susan B. Boyd, Gwen Brodsky, and Shelagh Day

Poverty: Rights, Social Citizenship, and Legal Activism

UBCPress · Vancouver · Toronto

15 14 13 12 11 10 09 08 07 5 4 3 2 1

Printed in Canada on ancient-forest-free paper (100% post-consumer recycled) that is processed chlorine- and acid-free, with vegetable-based inks.

Library and Archives Canada Cataloguing in Publication

Poverty : rights, social citizenship, and legal activism / edited by Margot Young [et al.].

(Law and Society, ISSN 1496-4953)
Includes bibliographical references and index.
ISBN 978-0-7748-1287-0

1. Public welfare – Law and legislation – Canada. 2. Poverty – Canada. 3. Social rights – Canada. 4. Human rights – Canada. 5. Canada. Canadian Charter of Rights and Freedoms. I. Young, Margot II. Series: Law and society series (Vancouver, B.C.)

KE4382.P69 2007 344.7103'25 C2007-901664-2

Canada

UBC Press gratefully acknowledges the financial support for our publishing program of the Government of Canada through the Book Publishing Industry Development Program (BPIDP), and of the Canada Council for the Arts, and the British Columbia Arts Council.

This book has been published with the help of a grant from the Canadian Federation for the Humanities and Social Sciences, through the Aid to Scholarly Publications Programme, using funds provided by the Social Sciences and Humanities Research Council of Canada, and with the help of the K.D. Srivastava Fund.

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Vancouver, BC V6T 1Z2
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www.ubcpress.ca

To Louise Gosselin, in admiration and appreciation

Contents

Preface

Increasingly, Canadians are framing their concerns about poverty – including access to food, housing, health, education, social assistance, and decent employment – as issues of human rights. Perhaps not surprisingly, a human rights-based approach to understanding and combating poverty is gaining purchase at the same time that governments are eroding social programs, embracing neo-liberal ideas of self-reliance and private responsibility, and reducing opportunities for democratic political engagement about social policy issues.

Although, historically, poverty has been thought of as a matter to be dealt with privately, through charity or the family, during important decades in Canada, principally between the 1950s and the 1980s, protection from poverty was also regarded as a critical subject matter for legislation and redistributive measures. Lately, however, governments have been allowing poverty to disappear from the social policy agenda, apparently content to permit poverty and extreme disparities in income and wealth to flourish. These legislative and policy choices are at odds with a human rights framework that treats freedom from want as a fundamental interest of every human being and a precondition for genuine democracy.

The diverse contributors to this book think about human rights – statutory, constitutional, and treaty rights – not only as legal instruments that can be used as a basis for adjudication in a court of law but also as articulations of fundamental values and as understandings of what it means to be a "citizen" in a democratic society. The idea that all human beings are equal in worth is the foundation of the rule of law and of democracy, positing that every person is entitled to be treated with equal concern and respect by governments and to have an equal voice in political decision making. The poverty and economic inequality of some, disproportionately of those who are already disadvantaged because of their female sex, non-white race, or disability, stands in marked contrast to these commitments to equality.

A Colloquium on Social and Economic Rights was convened by the Poverty and Human Rights Centre and held in Vancouver on 16-17 May 2003. The centre brought together twenty scholars and legal advocates to discuss social and economic rights in Canada, Ireland, and South Africa. The engaged dialogue that this conference generated provided the catalyst for this volume and its treatment of poverty as an issue of human rights and democracy. This collection includes some of the papers – albeit all significantly reworked – from that conference, along with chapters contributed by other authors not part of the original gathering.

The colloquium and the publication of this book were supported through a major grant from the Law Foundation of British Columbia. The development of the book was also fortunate to receive additional support from the Centre for Feminist Legal Studies in the Faculty of Law at the University of British Columbia and from the Social Sciences and Humanities Research Council through a Community University Research Alliance grant to the Social Rights Accountability Project. Three of the editors – Margot Young, Shelagh Day, and Gwen Brodsky – and five other writers in the volume – Barbara Cameron, Martha Jackman, Lucie Lamarche, Bruce Porter, and David Wiseman – are participants in this project, the objective of which is to examine the mechanisms available for holding governments accountable for their commitments to social and economic rights.

Given the widening interest among non-governmental organizations and legal advocates in the use of human rights instruments to influence governments' decisions about poverty and the redistribution of wealth, it seemed important to document some of these efforts and to examine the obstacles encountered. We hope that the passion, intelligence, and thoughtfulness of the writing collected in this book will encourage and support efforts to end poverty.

We wish to thank Kristine All, Angela Cameron, Kathy Grant, Kat Kinch, Shauna Labman, Lisa Phillips, Amber Prince, Joanna Roberts, Sally Rudolf, and Anila Srivastava – all invaluable research and editorial assistants. Thanks are also due to Randy Schmidt for shepherding us through the initial submission process and to Darcy Cullen for her gratefully received editorial assistance.

Introduction

Margot Young

This volume comes at a timely moment. Recent years have seen the retrenchment of Canadian social programs and the restructuring of the Canadian post-war welfare state along neo-liberal lines. The public agenda, which has never adequately engaged with questions of guaranteeing human well-being for all people in Canada, has now turned away from many of the most pressing issues of social and economic justice. Social programs at both the federal and provincial levels have been cut back, eliminated, and recast in exclusionary and punitive forms. Poor-bashing is not only acceptable rhetoric in political stump speeches, in media editorials, and in lead articles, but it also has emerged as a dominant ideological framework for legislative, policy, and administrative actions.[1] Governments act in denial of poverty politically, while they "stigmatize it socially."[2] The most vulnerable individuals and groups face a political environment that dismisses the injustice in their lives as personal failings, as inconsequential, and as of no public concern or collective responsibility.

So, as the twenty-first century begins, Canadian society is marked by the continuing presence of poverty in the midst of tremendous affluence and privilege. The statistics, recited any number of times in our newspapers, academic journals, and government reports, bear repeating, for they point to a fundamental failing in the country that Canada has become. In 2004, 11.2 percent of Canadians had an after-tax income below Statistics Canada low-income cut-off indicators.[3] When this general rate is disaggregated, we see that a number of groups – women, people with disabilities, recent immigrants, Aboriginal peoples, single mothers, racialized minorities – disproportionately bear this burden.[4] The advantages and opportunities for which Canada is known around the world are discriminatorily and incompletely available to the people who inhabit Canada. Conjoined with great prosperity and a high standard of living that is often cited among the best in the world is a degree of suffering, deprivation, and social isolation that is truly shocking.[5]

Yet, at the same time, the struggle in Canadian civil society against social and economic injustice is vibrant and active. Equality-seeking groups, spurred by the relatively recent arrival of the *Canadian Charter of Rights and Freedoms* on the scene, have initiated ambitious and strategic campaigns to secure recognition of social and economic rights under the *Charter*.[6] Canadian non-governmental organizations (NGOs) have led the way in opening up the review processes by United Nations treaty bodies to NGO involvement, transforming what were once little known human rights compliance reviews into contested and politically relevant appraisals of Canada's domestic human rights record. These same groups, along with academics and political activists, have also focused on monitoring federal-provincial negotiations over the character of Canada's social union. A wide range of groups and individuals participates in government consultations and hearings to pressure and lobby for a state that is more interventionist and redistributive in shared economic and social life. And, across the country, individuals and groups have initiated a range of political protests and demonstrations that operate outside traditional governmental processes. All of these strategies have implications for each other, and, together, they present an exciting and challenging set of aspirations for a just and equitable society.[7]

The essays in this book have been chosen to illustrate and to examine critically the current picture of this social, political, and legal anti-poverty activism. Many of the contributors are actively involved in the struggle for social justice in Canada. Some have litigated social and economic rights issues before the Supreme Court of Canada and before human rights tribunals, while others have worked with NGOs to present alternative accounts of Canada's human rights compliance at the United Nations. Yet others have been regular witnesses before parliamentary committees or participants in government commissions and inquiries. All are engaged in the task of addressing the current deep injustices that belie the social and economic promise the country holds for all those who live here. The chapters in this volume challenge prevailing assumptions about the role of governments, social and economic entitlement, and methods of accountability for the achievement of social and economic justice.

Gosselin v. Québec (Attorney General)

The context out of which this collection arose is a specific one. Work on this volume began shortly after the release by the Supreme Court of Canada of its 2002 decision in *Gosselin v. Québec (Attorney General)*.[8] This case is a bellweather for our times. The appeal was heard against a backdrop of dramatic reductions in social assistance programs across Canada – the Québec legislation at issue in the case is not exceptional but typical. And the result of the case represents well both the disappointment that constitutional social rights litigation has held for anti-poverty activists and the

continued lure of sections 7 and 15(1) of the *Charter*, in particular, for the same activists. Indeed, Louise Gosselin's loss at the Supreme Court of Canada was a significant moment in the struggle to have social and economic rights recognized and enforced in Canada. Thus, many of the chapters in this volume use the case as a springboard for broader thoughts on constitutional doctrine, judicial competence, legal activism, and government responsibility.

The *Gosselin* case was the first poverty case under the *Charter* to reach the Supreme Court of Canada. In it, Louise Gosselin, heading a class action suit, challenged a 1984 regulation under the Québec *Regulation Respecting Social Aid*.[9] Section 29(a), the challenged regulatory provision, reduced the base amount of welfare payable to persons under thirty years of age to approximately one-third of the base benefit payable to recipients who were thirty and over. In 1987, for example, individuals under thirty received as their base benefit $170 per month, while older recipients had a base benefit level of $466. The base benefit level for the over thirty recipients itself represented only 55 percent of the poverty level for a single person.

While the under-thirty amount could be increased by participation in one of three education or employment programs[10] (to an amount either equal to or $100 less a month than the base amount for those thirty and over), only an initial 30,000 places in these three programs were made available. Yet, 85,000 welfare recipients were under thirty, and the programs were also open to welfare recipients over thirty. The record before the Court indicated that the percentage of eligible under-thirty recipients who actually participated in the programs averaged around one-third. More specifically, there was evidence that a mere 11 percent of social assistance recipients under the age of thirty were in fact enrolled in the employment programs that allowed them to receive the base amount allocated to beneficiaries thirty years of age and over. Consequently, at least two-thirds of the under-thirty recipients at times received only $170 a month in benefits. As one of the dissenting judgments points out, clearly the programs were not available to all applicants at all times. Louise Gosselin's challenge had three elements. She claimed that the 1984 regulation constituted age discrimination under section 15(1) of the *Charter*.[11] She also argued that it was an infringement of security of the person under section 7 of the *Charter*.[12] And, finally, Gosselin claimed that the regulation violated the anti-discrimination guarantee under section 45 of the Québec *Charter of Human Rights and Freedoms*.[13] By way of remedy, Gosselin sought a declaration of invalidity and an order that the government of Québec reimburse all affected welfare recipients for benefits lost due to the age-based distinction, a total of roughly $389 million, plus interest.

The Supreme Court of Canada split five to four against Gosselin's section 15(1) claim. Chief Justice Beverley McLachlin, joined by Justices Charles

Gonthier, Frank Iacobucci, John Major, and Ian Binnie, wrote the majority judgment on section 15(1) and found no violation of equality rights under the Canadian *Charter.* Justices Claire L'Heureux-Dubé, Michel Bastarache, and Louis LeBel each wrote in dissent on section 15, while Justice Louise Arbour concurred in the judgment of Bastarache J. on the section 15 issue.

The section 7 argument met a similar fate in that the majority of the Court found no violation. Again, McLachlin C.J. wrote the majority opinion, on behalf of herself, Gonthier, Iacobucci, Major, and Binnie JJ., and held that the factual record was insufficient to support a section 7 claim. Bastarache and LeBel JJ., in separate judgments dealing somewhat differently with law under section 7, also both rejected the section 7 argument. Arbour and L'Heureux-Dubé JJ., however, did find a violation of section 7. Arbour J.'s dissent included a more elaborate set of reasons supporting the section 7 claim, while L'Heureux-Dubé J. provided supplementary reasons in support of Arbour J.'s dissent.

The Court divided slightly differently in response to the challenge under the Québec *Charter*. McLachlin C.J.'s judgment found no infringement under the Québec *Charter*, a conclusion again supported by Gonthier, Iacobucci, Major, and Binnie JJ. This result garnered the additional support of LeBel J. in a concurring opinion. Of the remaining three judges, two – Bastarache and Arbour JJ. – held that consideration of section 45 was unnecessary given their support of the claim under section 15. L'Heureux-Dubé J., alone, found a violation of that section.

Social and Economic Rights

Several background discussions inform this volume. First, many of the contributors would claim that the linkage of questions of human rights to concerns about poverty is an important one – that is, concerns about poverty are usefully recast as claims of social and economic rights. Social and economic rights, sometimes referred to as second generation rights, owe their formulation within liberal thought to the recognition that first generation rights – classical liberalism's rights to life, liberty, property, religion, and speech – are meaningless absent adequate standards of material and social well-being. Thus, rights to such things as an adequate standard of living, education, health care, work, and housing have become standard elements in any meaningful and complete human rights agenda, as necessary correctives within liberal rights theory. At the international level, the presence of the *International Covenant on Economic, Social and Cultural Rights,* to which Canada and 154 other countries are parties, attests to a recognition of the importance of these rights.[14] Governments, however, have been slow to grant equal status and observance to second generation rights, despite the logic of such rights' indivisibility from more mainstream first generation rights. To a large extent, the cause of such reluctance lies in the degree

of economic redistribution required by full recognition of social and economic rights and the consequent state re-ordering that challenges the ideological framework of classical liberal (or neo-liberal) politics.

In any case, the notion of social and economic rights is widely used in the struggle against poverty. And it is used, within the struggles discussed in this volume, in at least two ways. First, appeal to these rights is a claim about what various different rights protections and guarantees already enacted into law – say sections 7 and 15(1) in the *Charter* or various human rights legislation or codes – can and ought to mean. So understood, claims about social and economic rights develop argument about existing constitutional and legislative government obligations to attend to and ensure the welfare – broadly understood – of members of society. Karrisha Pillay's chapter in this volume proceeds from this perspective when she discusses the success of South Africa's constitutionalization of such rights. David Wiseman's argument that Canadian courts ought not to be as reluctant as they are currently to adjudicate matters of social and economic justice similarly references concrete and specific entrenched rights in the Canadian context.

Legislatively enacted rights – such as those in human rights codes – although not of constitutional force, are equally relevant to this discussion. Legislative provisions can sometimes be useful to restrain or order government options in favour of anti-poverty objectives. Moreover, legislated human rights have significantly wider application beyond government actors (the target of *Charter* review) and consequently can be important tools for addressing economic justice concerns in the social and economic world. While Canadian governments, apart from the Québec government, have primarily used human rights codes to provide only anti-discrimination measures, the protections so provided could be more widely cast, as Lucie Lamarche points out in this collection and as the Québec *Charter* potentially illustrates.[15]

Second, the notion of social and economic rights is also used to signal a set of entitlements and obligations that *ought* to be observed by the state, independent of actual constitutional guarantees or legislative provisions. In this regard, some of the chapters address the shortcomings in the Canadian welfare state, for example, as a breach of individual Canadians' social and economic rights, regardless of whether such rights have distinct constitutional or legislative recognition. Claims to social and economic rights in these instances serve as a stipulation of the evaluative standards or benchmarks for state action, without necessarily referencing any actual legal enactment. Apart from being an effective political strategy – that is, a way to harness for progressive politics the cachet and currency that rights possess in liberal democracies – this invocation of social and economic rights norms is used to capture powerfully the aspirations of social and economic justice for all individuals.

Social Citizenship

Many of the chapters in this collection also deal, at least implicitly, with the notion of social citizenship. By social citizenship, the editors of this volume intend to reference particular aspects of the relationship between individuals in political community with each other. Citizenship, generally, comprises the interconnection between individuals, government, and society – the rights, obligations, and roles conferred on members of Canadian society.[16] Social citizenship, as Barbara Cameron writes in this volume, "connotes a relationship of members of society to each other through the state that recognizes a positive obligation of the state to ensure the conditions exist for the realization of the shared dignity of all human beings."[17]

The political history of citizenship is a disturbing one. Much of it involves the invocation of privilege along class-based, racist, patriarchal, and other equally offensive lines. As Michael Ignatieff has written, "[f]rom its inception ... citizenship was an exclusionary category, justifying the coercive rule of the included over the excluded."[18] This collection does not engage with this history nor, of course, do we wish the concept to function in this negative manner. Indeed, it is our hope, perhaps naively, to skirt this history. We want to reinvigorate a more inclusive idea of citizenship, which, while leaving aside more specific questions of legal status for others to debate, insists upon a social and economic equality that bespeaks the granting of meaningful membership in Canadian political, social, and economic life to all present on Canadian soil. The term social citizenship is an effective, although admittedly not untroubled, way of capturing these aspirations in many of the chapters that follow.

Notions of social citizenship operate in contra-distinction to more dominant understandings of citizenship, understandings occupied solely with political guarantees and entitlements. T.H. Marshall, widely cited and credited with articulation of the notion of social citizenship, distinguished social citizenship as concerned with the provision of equality to all social classes to enable full participation in social life.[19] More specifically, the social element of citizenship he asserts encompasses a range of social rights: "[F]rom the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society."[20] Social citizenship thus speaks to the provision of social and economic entitlements as necessary components of an individual's membership in a political community. It recognizes that one of the bases of community is the recognition and fulfilment of basic human needs.[21]

While Canada may have had a somewhat later development of its social welfare state than other industrialized nations, this aspect of the Canadian state did become one of its central features in the period following the

Second World War. Canada's social union included such programs as a national health care system, shared federal/provincial funding of social assistance, and a nationwide pension and unemployment insurance provision. Indeed, some of these programs – most notably universal, publicly funded health care – have become defining features of Canadians' national identity. Now, however, the current political landscape renders concern and questions about the social aspects of Canadian citizenship relevant and radical. After all, the last decades have seen a concerted and deep attack on the basis for a universal social citizenship provision at the levels of both federal and provincial governments.[22] As Janet Mosher discusses in this volume, nowhere is this more apparent than in relation to those individuals reliant upon the social assistance or welfare system. Thus, the *Gosselin* decision sets the stage for the struggle for social and economic justice in the current age.

Again, the offering of the notion of social citizenship as a useful concept in thinking about the problems of poverty is not uncontroversial. Janet Mosher highlights the difficulties of this choice of frameworks to capture entitlement to state-provided guarantees of material well-being and social participation. Reliance on citizenship risks rendering invisible those who lack legal citizenship status. Moreover, the use of the term not only leaves in place the border between citizen and non- or partial citizen but also risks perpetuating and strengthening it. Additionally, other borders are set up and maintained by uncritical invocation of the concept of citizenship. For instance, T.H. Marshall's work has been criticized for its failure to account for the social and economic circumstances of women generally, as well as both men and women in immigrant and indigenous populations.[23] So, at minimum, care must be taken in the deployment of the idea of social citizenship.

The Neo-Liberal Turn

Additionally relevant as background to this volume is the late twentieth-century turn to neo-liberalism across the Canadian state and the world. As Sylvia Bashevkin has written, "set in motion [is] a series of changes that could, over time, replace the embattled social citizenship and entitlement groundings of Anglo-American welfare states with a more rigid, obligations-based orientation."[24] The market citizen – the legally equal and self-reliant, self-interested seller and buyer of classical liberalism – stands in place of the social citizen – the socially and economically equal civic participant of social democracies.[25] The result in Canada is a move in the direction of the more mean-spirited public programs of the United States. Changes ushered in by this new era involve such things as the narrowing of benefits eligibility and its dismantling effect on universality, a focus on and glorification of paid work by self-reliant individuals, the increased regulatory and coercive

presence of either public or private service providers in the lives of individuals who rely on state assistance of any form, and the privatization and "rescaling"[26] of state services and benefits.[27] The principles of social equity that anchor progressive and redistributive social programs are understood to threaten both efficiency and moral precepts central to neo-liberalism.[28]

Canada has seen the establishment of a new mode of governance under the neo-liberal state. Canadians do not enjoy the active, interventionist state in matters of social justice and individual well-being that a fully developed social union or social welfare state might require. Instead, the state, in its most straightforward neo-liberal incarnation, claims to be simply the creator of the optimal conditions under which individuals can govern themselves. Non-state actors – the market, the family, civil society groupings – become the infrastructure within which the self-governing neo-liberal actor moves.

In a federal state such as Canada, constitutional decentralization is the counterpart to state privatization. As the federal government has backed away from its post-war role in setting national standards for social program content and delivery, this role has devolved to the provinces. Provinces, in turn, have increasingly turned control over social welfare provision to market actors, community organizations, and individuals.[29] Lost, or actively ignored, in this shuffle of politics are concerns over national and international guarantees of social citizenship for the full range of diverse and marginalized groups in Canada. The varied impact of neo-liberalism, decentralization, and privatization on social and economic justice issues in Canada is thus a theme constant to a number of the chapters.

Organization of the Book

This volume is divided into five main sections. Part 1, "Reading *Gosselin*," looks most immediately at questions of constitutional rights protection as such questions speak to litigating claims for social and economic redistribution. The part's three chapters focus directly on the *Gosselin* decision. Part 2, "Social Citizenship and the State," contains five chapters that examine how issues of social citizenship are played out in various forums: adjudicative, legislative, and administrative. Part 3, "Social Citizenship and International Contexts," has similar preoccupations but focuses on insights from other national jurisdictions or the international context. Some of these essays offer comparative perspectives while others demonstrate the relevance of international human rights or trade regimes for Canadian domestic issues. Part 4, "Legal Theory after *Gosselin*," argues for an enriched constitutional practice, one that better accounts for the salience and primacy of social and economic interests, and Part 5, "Legal Activism Revived" returns to the general question of constitutional rights litigation, referencing both specific issues or concerns and general strategic cautions.

Reading *Gosselin*

The collection begins with chapters by Martha Jackman, Dianne Pothier, and David Schneiderman, which present disussion specific to the *Gosselin* decision. Chapter 1, "Reality Checks: Presuming Innocence and Proving Guilt in *Charter* Welfare Cases," by Martha Jackman provides an account of the *Gosselin* litigation at all three court levels. Against this backdrop, Jackman sets out prevailing stereotypes about young welfare recipients, many of which, she argues, are central to the lower and upper court judgments. In her call for courts to challenge these discriminatory attitudes, Jackman urges judges to engage in "reality checks": to test common presumptions against the real experience of claimants. Absent judicial adoption of this methodology, Jackman is pessimistic about the future of social and economic rights claims in Canadian courts.

The call to challenge assumptions about what is "normal" or "common sense" is also taken up by Dianne Pothier in Chapter 2, "But It's for Your Own Good." Pothier argues that the Supreme Court of Canada, in *Gosselin*, falls captive to community prejudices in precisely the manner that legal doctrine under the equality provision claims to avoid. Pothier also relies upon the disability rights case *Eaton v. Brant County of Education*[30] to illustrate her point that, by failing to "get" the context of the individuals involved, the Court engages in reductionist argument about the benefits of the challenged state action. Both Pothier and Jackman, in different ways, then, call for an "enlargement of mind" that is necessary to register the realities of claimants.

In Chapter 3, "Social Rights and 'Common Sense': *Gosselin* through a Media Lens," David Schneiderman also expresses concern about the prejudices and stereotypes that inform the Supreme Court of Canada's decision in *Gosselin*. Unlike the first two authors, however, he focuses on the extent to which the attitudes displayed by the majority judgment resonate with discriminatory mythologies of poverty that are dominant in mainstream thought. Through examining media coverage of the *Gosselin* decision, Schneiderman reveals the close connection between constitutional culture and the central political beliefs of Canadian culture. Without political leadership on the issue of social and economic entitlements, courts are unlikely, Schneiderman argues, to reach the correct decisions in these cases. This article raises interesting issues about the role that rights litigation can play in catalyzing political change and about the interconnections between law and politics.

Social Citizenship and the State

Bruce Porter leads off the next section with "Claiming Adjudicative Space: Social Rights, Equality, and Citizenship," where he explores concerns about the social exclusion and denial of citizenship entitlements of the poor,

particularly those on social assistance. Porter argues that the creation of "adjudicative space" for social rights claims provides an important counterpoint to this exclusion. While creating these openings is an uphill struggle for low-income Canadians, such adjudicative space has opened up, for now anyway, at the level of United Nations human rights treaty bodies with the appearance before them of Canadian non-governmental equality rights and anti-poverty groups. Adjudicative space remains under construction in relation to *Charter* rights and Canadian courts. Yet Porter is optimistic that such a space will open up. He notes that the substantive social rights claim did receive a hearing in *Gosselin,* and, although Gosselin herself was unsuccessful, the jurisprudence of this case on sections 7 and 15 opens possibilities for future social and economic rights hearings.

Sharon Donna McIvor, in Chapter 5, "Aboriginal Women Unmasked: Using Equality Litigation to Advance Women's Rights," tells an equally compelling story about the importance of rights claims and the space they create for the voices of marginalized individuals and groups. This chapter reminds us of the leverage that constitutional rights – particularly section 15 of the *Charter* – have given Aboriginal women in their struggle for social and economic justice and equality – a struggle, McIvor tells us, for "the most basic incidents of citizenship." The article focuses on litigation and strategies around Aboriginal women's sex equality, fuelled by concerns about economic well-being and full social citizenship. McIvor traces Aboriginal women's equality cases from the pre-*Charter* case of Jeanette Corbière-Lavell under the *Canadian Bill of Rights*,[31] to the *Native Women's Association of Canada v. Canada* decision at the Supreme Court of Canada,[32] and to ongoing litigation challenges to continuing discrimination against Aboriginal women. McIvor's article is a story personal to the women who undertook this struggle, including McIvor herself. Captured, then, within her chapter is an important but under-documented piece of Canadian history. While rights litigation is, McIvor asserts, but one piece of a broader set of actions, it is, nonetheless, an important beginning and catalyst for wider change.

In Chapter 6, "Welfare Reform and the Re-making of the Model Citizen," Janet Mosher discusses the demise of the post-war social welfare state in Canada and details some of the changes brought about by the shift to forms of governance strongly influenced by neo-liberalism. Like McIvor, Mosher deals with a marginalized group of people and their exclusion from effective forms of social and economic participation. Mosher's contribution makes the important point that the notion of citizenship status not only marks exclusion across national borders but also sets up divisions within the nation state – divisions that lie, not along the various demarcations of the citizenship and immigration regime, but across dimensions of social and economic participation and well-being. Mosher focuses in particular on the

lines drawn by social assistance or welfare that constitute the welfare recipient as outsider. Mosher concludes by suggesting a number of strategies for altering the excluded status of welfare recipients, specifically coalition building or strategic alliances with other "non-citizens," for instance, immigrants. As well, Mosher argues, as she has in other places, that we need to create the spaces to talk about and to listen to the concrete and individual stories of those who live in poverty.[33]

Lucie Lamarche, in Chapter 7, "The 'Made in Québec' Act to Combat Poverty and Social Exclusion," is an important reflection on recent politics and coalition building among anti-poverty groups in Québec. Lamarche discusses Québec's *Act to Combat Poverty and Social Exclusion*, a legislative response to poverty that stands independent of specific human rights protections.[34] Lamarche's chapter documents in detail the character of the civil society mobilization that resulted in the Québec legislation. Her discussion of the legislation focuses on the interplay between different ways of framing the question of material deprivation and inequality – poverty versus social and economic rights. While Lamarche applauds the involvement of Québec civil society in the process leading up to the act, she expresses deep concern about the failure of the act, and its surrounding politics, to live up to the human rights obligations of the Québec government. She notes that the act represents a liberal, rather than a social, justice approach to the anti-poverty struggle and, thus, represents containment rather than realization of progressive politics and expansive social citizenship. Lamarche's argument ties interestingly into concerns detailed in other chapters, such as those by Janet Mosher and Margot Young, about how resilient liberalism's notions of individual responsibility and self-reliance are in the face of poverty and in the quest for broader social citizenship. Liberal values emphasizing individual responsibility, privatization, small government, and minimal social assistance are used to defeat more radical anti-poverty politics.

In Chapter 8, "Accounting for Rights and Money in the Canadian Social Union," Barbara Cameron places social citizenship concerns squarely within a discussion about the Canadian social union. The chapter plots a shift in social policy implementation and the mechanisms of government accountability for federal spending on social rights. Cameron begins by detailing arrangements under the *Canada Assistance Plan Act* (*CAP*) that ensured both that federal funds were spent as intended by the federal Parliament, thus preserving accountability of the executive to the legislature, and that the federal Parliament took responsibility for basic minimum social entitlements for all Canadians.[35] This model was abandoned after 1995 with the elimination of the *CAP* and the adoption of what Cameron styles the international model, where intergovernmental agreements dictate executive branch policy and action. In each regime, the ongoing tension between central principles

of federalism and responsible government is resolved in different ways, and different levels of attention are paid to social rights. Cameron argues that the second model minimizes both executive accountability and social citizenship guarantees. In the process of this discussion, Cameron also provides an account of the various intergovernmental agreements that have supplanted appropriate legislative orchestration of the social union and of a social rights provision.

Social Citizenship and International Contexts

In the first chapter of this part, "Collective Economic Rights and International Trade Agreements," Marjorie Griffin Cohen engages with the challenges that globalization poses for economic justice. In the politics of globalization, little space is left for social citizenship and for the vision of the citizen as an equal participant in the social life of the nation, with full access to guarantees of social and economic well-being. Indeed, there is, Cohen argues, little room for governance by the state since no specific government exists that is responsible or accountable for the trade rules. Governance has been created but without government. The international democratic deficit is profound and the impact on social and economic rights dire. Cohen's primary focus is on the possibilities for pursuing collective economic rights through international law. She also discusses the constraints placed on nation states by the new power of international commercial law, how corporate economic rights established at the international level trump collective social and economic rights achieved within nations. Thus, the nature and delivery of social and public services are undermined by international commercial law such as the World Trade Organization's *General Agreement on Trade in Services* and the fact that these trade agreements, by their very nature, can offer only weak and inadequate provision of social services.[36] As a result, Cohen cautions against a strategy calling for inclusion of social clauses in trade agreements and urges the creation of an international society that looks beyond the needs of corporations and imperialist governments and that, itself, constrains trade agreements.

Shelagh Day, in Chapter 10, "Minding the Gap: Human Rights Commitments and Compliance," takes a different piece of the international context and looks at the role that Canada's international human rights obligations could and, indeed, should play in Canada's domestic governance. International treaties ratified by the federal executive (and even approved by provincial governments) have no direct domestic legal application. Thus, it is important to consider how Canadian governments can be held accountable to the rights contained in these agreements. Using the review process of the *Convention on the Elimination of All Forms of Discrimination against Women*, Day discusses the role that NGOs – specifically women's equality-

seeking groups – have taken in intervening in the review itself and in prompting governmental response to the committee's recommendations.[37] Day also provides critical coverage of Canada's participation in these review processes, noting particularly the absence of any follow-up mechanisms for government response to the recommendations of treaty bodies – at any government level or at the intergovernmental level. As Ken Norman has written in another context, this approach amounts to little more than "taking rights lightly."[38] Day also documents the actions of Canadian women's NGOs in holding governments accountable to the treaty review process and pressuring government to put appropriate response mechanisms in place. The treaty review process highlights the need for Canadian governments to put in place an ongoing process for measuring and increasing compliance with Canada's international human rights obligations.

In Chapter 11, "Enforcing Social and Economic Rights at the Domestic Level," Gráinne McKeever and Fionnuala ni Aoláin take up the concern about the effective enforcement of social and economic rights identified by Shelagh Day. McKeever and ni Aoláin argue that the key to successful implementation of international human social and economic rights lies at the level of national enforcement mechanisms. More specifically, they propose a tripartite model that enlists legislatures, public bodies, and the judiciary. This "programmatic model," unlike other possible models of enforcement, does not depend upon judicial enforcement, although it is certainly enhanced by it. The authors' illustration of the model focuses on Northern Ireland, where the recent *Agreement Reached in the Multi-Party Negotiations* resulted in a statutory framework containing, among other things, a set of legal and political objectives requiring appropriate government policies, programs, agencies, and measures to address economic deprivation linked to the country's history of religious discrimination.[39] The authors offer this discussion as an example of rights operationalization at the domestic level.

Karrisha Pillay, in Chapter 12, "Litigating Socio-Economic Rights in South Africa" closes this section with a discussion of the success of social and economic rights litigation under South Africa's Constitution, one of the first bills of rights to provide explicitly for such rights. This chapter thus provides useful insight into the constitutionalization of the rights of social citizenship. The discussion is an interesting counterpart to the Canadian contributions, particularly Melina Buckley's article that follows in the next part. Pillay's chapter provides an important overview of South African social and economic rights cases to date and discusses a number of issues relevant to such jurisprudence. Her conclusion is interesting. South African jurisprudence on social and economic rights, despite the constitutional presence of explicit social rights guarantees, suffers the same problems as Canadian efforts to use sections 7 and 15 of the Canadian *Charter*. By way of

positive developments in South African jurisprudence, Pillay notes the evolution towards a focus on reasonable measures, not merely rationality, and a focus on particularly vulnerable groups and people.

Legal Theory after *Gosselin*

David Wiseman, in Chapter 13, "Taking Competence Seriously," leads off with important critical commentary on traditional notions of judicial competence as barriers to social and economic rights adjudication. Wiseman focuses not on issues of interpretation of the *Charter*'s protections but rather on the judiciary as a branch of government and what institutionally it is equipped to do. Limitation of the courts' willingness to adjudicate social and economic rights restricts methods of governance available in aid of realizing these rights. Yet, current misconceptions about social and economic rights throw up a series of false cautions about such things as judicial competence, positive rights, remedy, and government responsibility. At all stages of social rights review, courts have been characterized as ill-suited and under-resourced for the tasks at hand. Wiseman argues that court-based adjudication has both advantages and disadvantages as a mechanism for achieving particular policy objectives. Competence, he reminds us, is an issue that is relevant to all institutions and processes of law and governance. Fears of incompetence, then, particularly those raised in social rights cases, may be an overreaction to issues endemic to all forms of governance. Non-justiciability and deference – as responses to these fears – are inappropriate refusals to deal with important issues.

In Chapter 14, "Dignity, Equality, and Second Generation Rights," Denise Réaume focuses on the concept of dignity and the central role it plays in section 15 doctrine. Through this focus, she engages the task of reimagining a more responsive and substantive conception of equality. Réaume argues that a commitment to substantive equality can be anchored through adoption of a concept of human dignity that comprehends the threat represented by denial of participation in social institutions, practices, and opportunities. Réaume's chapter thus begins by reviewing the philosophical foundations of the notion of dignity and proceeds from this review to argue that the concept of dignity can help address a central challenge for equality rights – the framing of a potential unending array of specific goods and services as equality harms. To this purpose, Réaume identifies three conceptions of equality. The more "robust" of these will, she argues, result in better recognition of social and economic claims, extending the reach of equality law through a focus on dignity-enhancing benefits and institutions. And, while this fuller concept of dignity has limitations, it will nonetheless provide a meaningful argument for much richer and more substantive equality rights.

Ken Norman, in Chapter 15, "The *Charter* as an Impediment to Welfare Rollbacks," rounds off this section. Norman develops the Rawlsian notion of "background social institutions" as a "*Charter* tool" to facilitate the recognition of the kind of social and economic claim carried by Louise Gosselin to the courts. Failure to interpret the *Charter* in conformity with John Rawls's notion of "justice as fairness" – that is, failure to interpret the *Charter* so that it speaks against the further social exclusion of the worst-off – is destructive of the liberal democratic project. Norman traces support for justiciability of issues that invoke this concern through recent Supreme Court of Canada jurisprudence, concluding that such an elaboration of the social and economic justice concerns constitutive of Rawls's theory is sound both descriptively and prescriptively for *Charter* jurisprudence. Like Réaume, then, Norman sees great potential, albeit unrealized in *Gosselin*, for recognition of social and economic justice in *Charter* litigation.

Legal Activism Revived

Margot Young's chapter, "Why Rights Now? Law and Desperation," raises a number of questions about the political desirability of rights litigation. Noting the increase in the use of rights litigation by social justice groups – including anti-poverty activists – Young cautions against too quick a rush into the courts to achieve social and economic equality. Like other authors in this volume, Young cites changing political circumstances (the rise of the neo-liberal state) as good reason to look for other avenues for political leverage, but, through a discussion of *Gosselin*, she chronicles the presence in equality jurisprudence of many of the same ideological assumptions and priorities currently dominant in the political arena. The dilemma is clear: the same politics circulate through both the judicial and political contexts. Claims of social and economic justice are difficult in both arenas. Young's conclusion is an ambivalent one. She acknowledges the dilemma that these circumstances present for social activists, yet she proffers no resolution, simply noting the importance of a critical stance.

By contrast, Melina Buckley, in Chapter 17, "The Challenge of Litigating the Rights of Poor People," offers a more positive account of how courts could, and ideally would, respond to a challenge of the sort that Wiseman discusses more generically in his chapter. The issue Buckley takes up is the current inadequacy of publicly funded legal counsel. For a number of reasons detailed in the first part of her chapter, Buckley argues that such a challenge would be a good test run of social and economic rights litigation, not least because of the current crisis in legal aid availability across Canada. Her argument is characterized by what she calls critical theory – the positing of alternative ideals to reveal deficiencies in practice, to create the possibilities for change and to uncover and unleash transformative powers.

Buckley details the different arguments relevant to making a constitutional and a rights-based case for the public provision of legal aid. In particular, Buckley details three critical obstacles to the successful use of section 15 in challenges of this sort: underdevelopment of positive constitutional obligations; evidentiary requirements in systemic discrimination claims; and constraints with respect to constitutional remedies. However, Buckley revisits a number of recent and key section 15 decisions to argue that the groundwork for a more transformative equality jurisprudence is already in place.

Gwen Brodsky's chapter, "The Subversion of Human Rights by Governments in Canada," closes the book and forms an interesting counterpart to Day's and Schneiderman's discussions. Brodsky takes the various levels of Canadian governments to task for their failure to observe social and economic rights obligations as these governments respond to *Charter* litigation, choose to fund (or not fund) particular areas of constitutional litigation and influence understandings of the content and character of *Charter* rights. Governments are "shapers of constitutional rights," as influential in their own ways as the judiciary. And the current impoverished state of *Charter* jurisprudence on social and economic rights owes much to the tenor of government participation in the process of rights enforcement. Persistent efforts by governments to block constitutional recognition of these rights raise issues about the degree to which governments take seriously their obligations under both domestic constitutional and international human rights law. Brodsky outlines how governments have exacerbated and, indeed, relied upon and reinforced tenets of classical liberalism that are antithetical to a recognition of social and economic rights. In so doing, governments bear responsibility for stalling the endeavour to transform constitutional jurisprudence. While Brodsky recognizes and critiques the inadequacies of current jurisprudence dealing with social and economic rights – with *Gosselin* as the prime example – Brodsky is clear about the value of rights litigation and rights language to the struggle against poverty and injustice.

Conclusion

At the heart of the motivation for this book lies a contradiction between, on the one hand, Canada's formal commitments to such things as an adequate standard of living, health care, education, social security, and just and favourable conditions of work for everyone, and, on the other hand, the deliberate erosion of social programs and protections by Canadian governments in the last few decades, with the corresponding persistence of poverty, income insecurity, homelessness, and desperation experienced across Canadian communities. The struggle to make Canada a more just and equitable country is not only for the benefit of those living in poverty. Canada's success or failure to achieve social and economic justice also affects the quality of life for all who live here.

This volume addresses the question of poverty in Canada from a number of perspectives, most notably in terms of struggles for rights recognition and protection, recognition and realization of social citizenship guarantees, and, finally, articulations of legal strategies and activism to influence state organization, public institutions, legislation, and policy. Canadians, in general, are too little engaged with the poverty in our midst. This book is fueled by the hope that this will change and that the work of the authors represented in these chapters will move us closer to realizing Canada's full potential to be a just, fair, and economically viable home for everyone living here.

Notes

1 See, for example, the Ontario *Safe Streets Act,* 1999, S.O. 1999, c. 8, and almost identical British Columbia *Safe Streets Act,* S.B.C. 2004, c. 75.

2 Stuart Scheingold makes this point in relation to the American context, but it is equally true, with one qualification, in Canada as well. Stuart A. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (New Haven, CT: Yale University Press, 1974) at 104. The Canadian exception is the rhetoric of governments, particularly the federal government, about child poverty. Poor children, too young to make the bad personal choices assumed endemic to the poor adults attached to them, have emerged as the last innocents of the social welfare state. They alone are treated as deserving of state help and concern. Conveniently forgotten is the fact that child poverty is a consequence of adult, disproportionately female, poverty. For an excellent discussion of the emergence of the child as the symbol of the "caring" neo-state, see Wanda Wiegers, *The Framing of Poverty as "Child Poverty" and Its Implications for Women* (Ottawa: Status of Women Canada, 2002).

3 *Income in Canada, 2004*, Statistics Canada Catalogue no. 75-202-XIE (Ottawa: Minister of Industry, 2006) at 93, Table 11-1. Statistics Canada's low income cut-off indicators are commonly used, although neither exclusively or officially, as poverty rate indicators.

4 For example, in 2000, the low income rate averaged across all recent immigrants was 36.8 percent, which is 2.5 times that of the Canadian-born. Statistics Canada, "Low Income Rates among Immigrants," *The Daily*, 19 June 2003. Single mother-led families have a low income rate (again after tax) of 35.6 percent. *Income in Canada, 2004*, Statistics Canada Catalogue no. 75-202-XIE (Ottawa: Minister of Industry, 2006) at 116, Table 13-1. And the poverty rate among Aboriginal peoples is also high. For example, in 2000, among Aboriginal people in metropolitan areas, 41.6 percent were living at a low income, more than double the national average for metropolitan areas. Statistics Canada, "Low Income in Census Metropolitan Areas, 1980-2000," *The Daily*, 2 April 2007. For additional discussion of poverty rates of sub-groups of the Canadian population, see National Council of Welfare, *Poverty Profile, 2001* (Ottawa: Minister of Public Work and Government Services Canada, 2004).

5 For instance, Canada was ranked fifth among the countries of the world in the 2005 United Nations Human Development Index. *International Cooperation at a Crossroads: Aid, Trade and Security in an Unequal World,* Human Development Report 2005, http://hdr.undp.org/default.cfm (22 October 2005).

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

7 This level of NGO and activist activity is under threat as this collection goes to print. Cuts by the Conservative federal government in September 2006 to such programs as the Court Challenges Program and the concurrent narrowing of funding available for women's groups will challenge the ability of social justice groups to continue the struggle for economic equality in all of the arenas set out above.

8 *Gosselin v. Québec (Attorney General)*, [2002] 4 S.C.R. 429 [*Gosselin*].

9 *Regulation Respecting Social Aid*, R.R.Q. 1981, c. A-16, r. 1.
10 These programs were entitled Remedial Education, Community Work, and On-the-Job Training.
11 Section 15 of the *Charter*, *supra* note 6, provides that 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.
12 Section 7 of the *Charter*, *supra* note 6, provides for the right to life, liberty, and security of the person, not to be infringed except in accordance with the principles of fundamental justice.
13 *Charter of Human Rights and Freedoms*, R.S.Q. 1975, c. C-12 [Québec *Charter*]. An additional preliminary issue, of which none of the judgments made much, arose in connection with section 33 – the notwithstanding clause – of the *Charter*. In 1982, by means of *An Act Respecting the Constitution Act*, 1982, R.S.Q., c. L-42, the Québec legislature insulated all Québec laws from *Charter* purview for the first five years of their enactment. The result is that the challenged provision in this case was immune from *Charter* scrutiny from 4 April 1984 to 4 April 1989. Arguably, then, only four months – from 4 April 1989 until 1 August 1989, when the legislation was changed – of potential *Charter* coverage are relevant to consideration of the claim. The majority judgment sidestepped this issue, as it found no *Charter* infringement to begin with.
14 International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976).
15 The Québec *Charter*, *supra* note 13, for example, contains in section 45 the provision that every person in need has a right to "measures of financial assistance and to social measures provided for by law."
16 Martha T. McCluskey, "Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State" (2003) 78 Indiana Law Journal 783 at 786.
17 Barbara Cameron, "Accounting for Rights and Money in the Canadian Social Union," in this volume.
18 Michael Ignatieff, "The Myth of Citizenship" (1987) 94 Queen's Quarterly 966 at 968.
19 T.H. Marshall and Tim Bottomore, *Citizenship and Social Class* (London: Pluto Press, 1992).
20 T.H. Marshall, *Citizenship and Social Class* (Cambridge: Cambridge University Press, 1950) at 10. See also T.H. Marshall, *Social Policy in the Twentieth Century* (London: Hutchinson University Library, 1975).
21 David Schneiderman, "Economic and Social Citizenship in the Era of the Charter," unpublished manuscript [on file with author].
22 Shelagh Day and Gwen Brodsky, *Women and the Equality Deficit: The Impact of Restructuring Canada's Social Programs* (Ottawa: Status of Women Canada, 1998). This has happened in the courts as well. The recent Supreme Court of Canada decision in *Chaouli v. Québec (Attorney General)*, [2005] 1 S.C.R. 791, stands as illustration of the use of rights to undermine legislative regimes premised on universal social citizenship principles.
23 Tom Bottomore, "Citizenship and Social Class, Forty Years On" in Marshall and Bottomore, *supra* note 19 at 67; Hartley Dean and Margaret Melrose, *Poverty, Riches and Social Citizenship* (New York: St Martin's Press, 1999) at 80; and Ann Shola Orloff, "Gender and the Social Rights of Citizenship" (1993) 58 American Sociological Review 303.
24 Sylvia Bashevkin, *Welfare Hot Buttons: Women, Work, and Social Policy Reform* (Toronto: University of Toronto Press: 2002) at 133.
25 Michael Ignatieff writes of this opposition in terms of "man the citizen and economic man." Bourgeois citizenship, marked by formal legal equality but great economic and social inequality, sits in tension with more ancient and classical notions of republican citizenship. See Ignatieff, *supra* note 18 at 967 and 976. See also Lisa Philipps, "Taxing the Market Citizen: Fiscal Policy and Inequality in an Age of Privatization" (2000) 63 Law and Contemporary Problems 111 at 111.
26 Robert Johnson and Rianne Mahon write of this phenomenon, noting that decisions about, and delivery of, social programs have been "rescaled," meaning that decisions made at one level of government have been off-loaded to another level of government, multinational

entities, and to national or provincial non-governmental actors. Robert Johnson and Rianne Mahon, "NAFTA: The Redesign and Rescaling of Canada's Welfare State" (2005) 76 Studies in Political Economy: A Socialist Review 7.

27 Bashevkin, *supra* note 24 at 134. See also generally the collection of essays in Brenda Cossman and Judy Fudge, eds., *Privatization, Law, and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002).

28 McCluskey, *supra* note 16 at 786.

29 Cossman and Fudge, *supra* note 27 at 20.

30 *Eaton v. Brant County of Education*, [1997] 1 S.C.R. 241.

31 *Canadian Bill of Rights*, S.C. 1960, c. 44, s. 1, reprinted in R.S.C. 1985, App. III.

32 *Native Women's Association of Canada v. Canada*, [1994] 3 S.C.R. 627.

33 See, for example, Joe Hermer and Janet Mosher, *Disorderly People: Law and the Politics of Exclusion in Ontario* (Halifax: Fernwood Press, 2002).

34 *Act to Combat Poverty and Social Exclusion,* R.S.Q. 2002, c. L-7.

35 *Canada Assistance Plan Act*, R.S.C. 1985, c. C-1.

36 *General Agreement on Trade in Services,* Annex 1B of the *Marrakech Agreement Establishing the World Trade Organization*, 15 April 1994, (1994) 33 I.L.M. 15.

37 *Convention on the Elimination of All Forms of Discrimination against Women,* 18 December 1979, 1249 U.N.T.S. 13 (entered into force 3 September 1981).

38 Ken Norman, "Taking Human Rights Lightly: The Canadian Approach" (2001) 12 National Journal of Constitutional Law 291 at 292.

39 *Agreement Reached in the Multi-Party Negotiations*, United Kingdom and Northern Ireland, 10 April 1998, U.K. Command Papers 3883.

Part 1
Reading *Gosselin*

1
Reality Checks: Presuming Innocence and Proving Guilt in *Charter* Welfare Cases

Martha Jackman

More than twenty years later, I can still vividly recall my feelings of shock and dismay during my first week of law school, as my contracts professor calmly discussed the reasoning and outcome in the *Peevyhouse v. Garland Coal & Mining Co*. case.[1] The defendant, Garland Coal, had leased Willie and Lucille Peevyhouse's farm in order to strip mine for coal. In the lease, Garland Coal agreed to restore the property to its original condition at the end of the five-year lease period. This remedial work was estimated at a cost of US$29,000 and Garland Coal subsequently refused to do it. The Peevyhouses sued the company for US$25,000 in damages for breach of contract but were awarded only $5,000 at trial. On appeal, damages were reduced to $300 on the reasoning that this amount represented the actual decrease in the value of the Peevyhouse's property because of Garland Coal's non-performance of the remedial work. The court came to this conclusion notwithstanding Garland Coal's admission that the Peevyhouses would not have signed the lease absent the remedial clause.

I sat in the front row of my contracts law class, aghast at this account: "*What?*" I silently exclaimed: "*I thought a deal was a deal!*" And then: "*I get it: another greedy corporation and their high priced lawyers trampling on the rights of some poor farmers!*" And finally: "*I bet the judges were corrupt too: what else could you expect in Oklahoma in 1963!*"[2] None of these possible rationales for the outcome of the case were, however, put forward by my professor. Rather, he explained – the very voice of legal reason – that *Peevyhouse* illustrated the basic contract law principle that "the party complaining should, so far as it can be done by money, be placed in the same position as he would have been had the contract been performed."[3]

Why is it that I, like so many other newly arriving law students, found this and many other legal claims and analytical approaches, to which I was introduced in my first weeks and months of law school, so preposterous and utterly impossible to accept? Why did what my professors presented as sound legal reasoning so often appear as absurd or, worse, as grossly unjust?

The explanation, I would argue, is found in the instinctive reflex of the young to engage in "reality checks" – to automatically test information presented to them against the truth, such as they know it, of the real world. As educators, but more especially as parents, we regularly see this device being employed. From our kids: "Get real mom!" or from our students: "Come on Professor Jackman, surely what is *really* happening in this case is that ..."

Inexorably, however, over the course of our legal studies (and, some would say, this is their very purpose), the automatic tendency to engage in reality checks is trained out of us. Instead of depending on our own independent assessment of reality, we are taught to rely on a series of ideological presumptions so entrenched as to be virtually invisible. Most especially, we are taught to presume the innocence of prevailing legal principles and decision-making structures: judge-made law, judges, and courts. And, like the common law concepts we first master, we are taught that legal rules imbedded in legislation, regulation, and government practice are also neutral and objective in their intent and their effects. At the same time, we are told that those casting doubt on the innocence of established legal norms and arrangements must be subject to the very highest burden of proof, must be politically driven, and, in short, must be presumed guilty.

Presumptions of Innocence and Guilt in the Welfare Context

Similarily to those attempting to challenge the neutrality of law in the law school context, a particular set of presumptions of innocence and guilt creates obstacles for low-income litigants seeking to invoke equality and other guarantees under the *Canadian Charter of Rights and Freedoms* in order to address inadequacies and inequities in the social welfare setting.[4] These include the presumptions that welfare laws and policies are benign and that governments are innocent in their dealings with the poor, that welfare recipients are guilty, lacking in personal initiative at best and fraudulent at worse, and that if governments are guilty, they are not guilty within the meaning of the *Charter* or are not guilty enough to be found in violation of fundamental constitutional guarantees. As the case law amply demonstrates, these presumptions are applied vigorously by judges who, after all, are the most successfully trained law students.[5]

Confronting and disproving the presumptions of innocence and guilt commonly relied upon by judges is a major challenge for low-income litigants in the social welfare context. Failure to identify and to advance substantive legal and evidentiary arguments that will effectively address these presumptions, as they relate both to welfare recipients and to the state, makes it virtually impossible to succeed in *Charter*-based welfare claims. This difficulty applies, I would argue, from trial through appellate courts

and across jurisdictions, regardless of the doctrinal justification that any given judge might ultimately provide for an unfavourable welfare ruling. Given how essential it is to displace the presumptions of innocence and guilt that operate in welfare cases, how can this be done?

Feminist legal analysis relies upon the methodologies of context and voice to expose and to challenge patriarchal structures and tendencies in law.[6] Abstract and putatively objective legal claims are eschewed in favour of knowledge gained through a careful examination of the broader context of legal decision making and by listening to the voices of those whose rights and interests are most directly affected. This, in essence, is also the methodology of reality checks. Reality checks challenge the abstract and the absolute. They test what is asserted to be true against the concrete evidence of real life experience, as best as it can be grasped. In answer to the claim "*put on your coat or you'll catch a cold*" is the reality check: "*Mom, I didn't wear my coat at school and I didn't get sick*." In answer to the claim "*the Peevyhouses lost the case because the economic value of performance is the proper measure of damages*" is the reality check: "*They lost the case because the court ignored their circumstances and the context of their agreement – an agreement that Garland Coal not only agreed to but no doubt wrote*."

In the social welfare setting, reality checks question the accepted truths underlying judicial decision making: that governments are trying to help poor people when they enact social welfare reforms; that welfare recipients prefer to rely on public assistance rather than to work; and that the *Charter* should not prevent governments from making the choices they see fit in the face of competing demands for scarce public funds. Reality checks focus on the broader context of government decision making relating to the poor and the welfare state: why, amid such affluence in Canada, are people still lacking the most basic necessities of food, clothing, and shelter, and what are social welfare programs in fact designed to do? Reality checks take us to the actual experience of low-income people in their interactions with welfare laws and the state: what is it to be a social assistance recipient in the poor-bashing country we have become? And what possible good is a *Charter* that allows poor people to be denied the rights that matter to them most? In short, reality checks focus not on the fiction of social assistance and the welfare state but instead on the actual context and subjective experience of government action in this area, in an effort to allow judges to see, if perhaps only for a few moments, life as it truly is for the low-income claimants who appear before them.

In this article, I test the premise that judicial willingness to engage in reality checks directly affects the outcome of judicial decisions in *Charter* welfare cases. In particular, I examine the Supreme Court of Canada judgment in *Gosselin v. Québec (Attorney General)* in order to show that, whereas

Chief Justice Beverley McLachlin's rejection of Louise Gosselin's *Charter* claim reflects and perpetuates the most highly problematic presumptions of innocence and guilt operating in the welfare context, the dissenting justices' reliance on context and voice – their openness to reality checks – leads them to avoid such assumptions and to conclude that the social assistance regime at issue in the case was unconstitutional.[7]

The *Gosselin* Case

The *Gosselin* case involved a challenge by Louise Gosselin under sections 7 and 15(1) of the Canadian *Charter,* as well as under section 45 of the Québec *Charter of Human Rights and Freedoms*,[8] to a provincial welfare regulation that reduced the welfare benefit payable to recipients under the age of thirty by two-thirds, to approximately $170 per month, unless recipients participated in remedial education, community work, or on-the-job training programs. Expert evidence submitted by the plaintiffs at trial showed that young welfare recipients living on the reduced rate were malnourished, socially isolated, often homeless, and in poor physical and psychological health.[9] Some recipients resorted to prostitution and selling drugs to earn enough money to pay their rent; others attempted suicide.[10] Lack of stable housing, a telephone, and presentable clothing made it extremely difficult for recipients to find work. As one expert explained, "[w]hat employer would hire a person who couldn't provide a telephone number to call when a position opened? What employer would hire a youth with holes in their clothes?"[11]

Louise Gosselin's own experience of living on the reduced benefit rate was one of acute material and psychological insecurity, deprivation, and indignity. She was often hungry, and she suffered symptoms of malnourishment, including anxiety, fatigue, vulnerability to infections and illness, and lack of concentration.[12] The record showed that, in order to obtain food, she was forced to rely on her family and resorted to soup kitchens and other charitable food programs. As she put it, "when someone gave me food I went."[13] She lived in unsafe and substandard housing and was frequently homeless. As she described one basement apartment in which she spent an entire winter, "[i]t was badly lit, there were bugs everywhere, it wasn't heated. I rented it from the landlord heated but we froze like rats, my feet were blue all winter, my ankles hurt so much that I had trouble walking and I was cold."[14] At times, she exchanged sex for money, food, or a place to stay.[15] Under such circumstances, she described the difficulties she faced in finding and keeping a job: "Well, there was never anyone who called me back. I was unable to present myself properly to an employer and to sell myself as a good worker, I was completely lacking in terms of self-esteem and in terms of self-confidence, my meals weren't balanced, my social life wasn't either, I had absolutely nothing to keep myself together, to work, so often the places were filled."[16]

At trial, Justice Paul Reeves rejected the evidence submitted by the plaintiffs on the grounds that Louise Gosselin was the only witness to testify on behalf of the entire class of welfare recipients affected by the reduced rate and because the plaintiffs had failed to provide comparative evidence of the circumstances of recipients over the age of thirty, who received the full monthly benefit.[17] In terms of Louise Gosselin's substantive arguments, Reeves J. found that the section 7 right to life, liberty, and security of the person did not include a positive right to social assistance from the state.[18] He also concluded that the reduced rate was not discriminatory under section 15(1) of the *Charter* since recipients could obtain parity of benefits by participating in the available education and job training programs and since the differential regime reflected the actual characteristics of the targeted group and was designed to promote the beneficial objective of encouraging young welfare recipients to become financially independent.[19]

On appeal, the Québec Court of Appeal upheld the trial judge's decision that Louise Gosselin's claim to an adequate level of social assistance involved a purely economic right, which was not included under section 7 of the *Charter*.[20] A majority of the court also dismissed her section 15(1) claim. Justice Louise Mailhot agreed with the trial judge that, taken as a whole, the differential regime did not have a disadvantageous impact on young welfare recipients.[21] Justice Jean-Louis Baudouin found that the reduced rate discriminated on the basis of age but was justified under section 1 of the *Charter*.[22] In dissent, Justice Michel Robert found that the reduced rate was discriminatory on the basis of age, and he concluded that the regime could not be justified under section 1 and, in particular, that its purported benefit of inciting young people to move off social assistance and into the workforce did not outweigh its harmful effects.[23]

The Majority Judgment in *Gosselin*

At the Supreme Court of Canada, the respondent attorney general of Québec made three principal claims in defence of the differential welfare rate. First, the province argued that it was helping rather than harming young welfare recipients when it established the reduced rate. As the respondent put it, "[t]he Regulation was part of a remedial regime specially targeted at a group that was particularly vulnerable at the relevant time. As the appellant's case illustrates, the State aimed to improve the situation of this group. The alleged disadvantages remain hypothetical in the face of the real advantages offered."[24] Second, the respondent claimed that young people had to be forced off social assistance for their own good. The deplorable situation of young welfare recipients, the province argued, was owed not to the differential welfare scheme but rather to unemployment and long-term welfare dependence among youth with limited labour market opportunities. Granting young welfare recipients unconditional parity of rates would, the respondent

warned, have "disastrous effects" on their future prospects.[25] Third, the respondent argued that the difficulties facing young welfare recipients, including Louise Gosselin herself, were not due to the government's actions but rather to personal circumstances and individual choice. As the respondent put it, "[t]he State is not responsible for illness, lifestyles, accidents, family circumstances or simply the misfortunes of life. What is more, it exercises no control over individual choices that have consequences for the personal or financial security of citizens."[26]

In her judgment for the majority of the Court, McLachlin C.J., on behalf of Justices Charles Gonthier, Frank Iacobucci, John Major, and Ian Binnie, upheld the lower and appeal court decisions and dismissed Louise Gosselin's appeal. The chief justice held that, although section 7 might impose a positive obligation on the state to guarantee adequate living standards, the evidence submitted by the appellants was not sufficient to prove a violation of the right to life, liberty, and security of the person in this instance.[27] The chief justice also rejected Louise Gosselin's claim that the differential welfare regime violated section 15(1) of the *Charter*, on the grounds that the scheme was designed to enhance the dignity of young welfare recipients and that "a reasonable person in the claimant's position" would not have experienced it as discriminatory.[28]

In coming to her decision, the chief justice adopted all of the respondent's arguments in relation to the differential rate. In particular, although the province failed to provide any concrete evidence of the regime's benefits in terms of promoting the integration of young welfare recipients into the workforce or otherwise, the chief justice accepted the respondent's claim that the regulation helped rather than harmed young welfare recipients. As the chief justice explained it, "[t]he age-based distinction was made for an ameliorative, non-discriminatory purpose"[29] and, "notwithstanding its possible short-term negative impact on the economic circumstances of some welfare recipients under 30 ... the thrust of the program was to improve the situation of people in this group, and to enhance their dignity and capacity for long-term self-reliance."[30]

Although the respondent again provided no supporting evidence, McLachlin C.J. also accepted the province's claim that, left to their own devices, young people would develop long-term dependence on government assistance, and, therefore, they had to be forced off welfare for their own good. She asserted in this regard: "Simply handing over a bigger welfare cheque would have done nothing to help welfare recipients under 30 escape from unemployment."[31] She stressed that "reliance on welfare can contribute to a vicious circle"[32] and charged that "opposition to the incentive program entirely overlooks the cost to young people of being on welfare during the formative years of their working lives."[33] Consistent with the idea that young welfare recipients would not participate in education

and job training programs without being forced to do so, the chief justice concluded that "[b]ecause federal rules in effect at the time prohibited making participation in the programs mandatory, the province's only real leverage in promoting these programs lay in making participation a prerequisite for increases in welfare."[34]

McLachlin C.J. also accepted the respondent's argument that the difficulties facing young welfare recipients were not owing to the government's actions but rather to personal circumstances and individual choice. In other words, the chief justice supported the respondent's efforts to transfer responsibility for the harms caused by the differential rate from the government to recipients, endorsing the view that Louise Gosselin and other young welfare recipients living in poverty did so out of choice. Thus, McLachlin C.J. suggested that "there is no indication in the record that any welfare recipient under 30 wanting to participate in one of the programs was refused enrollment."[35] She expressed the view that Louise Gosselin "ended up dropping out of virtually every program she started, apparently because of her own personal problems and personality traits" rather than because of any flaws in the programs themselves.[36] She further asserted that "to cause young people to attend training and education programs as a condition of receiving the full 'basic needs' level of social assistance ... did not effectively consign the appellant or others like her to extreme poverty ... [T]he condition did not force the appellant to do something that demeaned her dignity or human worth."[37]

McLachlin C.J.'s acceptance of the respondent's claims in relation to the motivations of both the government and recipients led her to the doctrinal conclusion, equally removed from Louise Gosselin and other young welfare recipients' experience of the differential rate, that the regulation did not violate *Charter* equality guarantees because it promoted, rather than undermined, their dignity interests. In the chief justice's estimation, "the legislation's arguable failure to correspond perfectly to Ms. Gosselin's personal circumstances ... does not affect the ultimate conclusion that the legislation is consonant with her human dignity and freedom, and with the human dignity and freedom of under-30s generally."[38]

In the final analysis, McLachlin C.J. concluded that the province was innocent in its dealings with young welfare recipients and that any individualized or unintended ill effects of the differential welfare regime were not sufficient to constitute guilt within the meaning of the *Charter*. As the chief justice summarized her reasoning, "[c]rafting a social assistance plan to meet the needs of young adults is a complex problem, for which there is no perfect solution. No matter what measures the government adopts, there will always be some individuals for whom a different set of measures might have been preferable. The fact that some people may fall through a program's cracks does not show that the law fails to consider the overall needs

and circumstances of the group of individuals affected, or that distinctions contained in the law amount to discrimination in the substantive sense intended by s. 15(1)."[39]

The Dissenting Judgments in *Gosselin*

In contrast to the chief justice's approach, the dissenting Justices Michel Bastarache, Louise Arbour, Louis LeBel, and Claire L'Heureux-Dubé relied heavily on the contextual evidence put forward by the appellants relating to the operation and effects of the impugned regulation as well as on Louise Gosselin's subjective account of the impact of the differential rate. In his judgment, Bastarache J. examined both the expert evidence submitted at trial and Louise Gosselin's testimony relating to the government's claim that the impugned regulation benefited, rather than harmed, young welfare recipients. This claim, at the core of the majority's finding that the differential regime did not offend *Charter* equality guarantees, hinged on the premise that recipients were not in fact required to subsist on $170 per month – an amount that the province itself admitted did not meet basic needs[40] – but rather could achieve parity of benefits simply by participating in education and job training programs that would help recipients gain economic independence. Testing this claim against the reality of the programs' design and operation, however, Bastarache J. found serious problems.

First, Bastarache J. identified a number of restrictions on recipients' eligibility to participate in the available welfare training programs. In the case of the remedial education program, these restrictions included the precondition that recipients be out of school for more than nine months and financially independent of their parents for at least six months before being eligible to participate in the remedial education program. Bastarache J. also found that those with literacy problems were completely excluded. And, for recipients who did obtain placements, the program did not provide actual parity of rates but still fell $100 short of the over-thirty monthly benefit amount.[41]

Bastarache J. noted that the on-the-job training program was available only to recipients who had been out of school for at least twelve months, that recipients with CEGEP[42] or university degrees were excluded from the program, and that participation in the program was limited to a twelve-month period.[43] For the community work program, he noted that preference was given to those who had been on social assistance for more than a year and that participation in the program was also limited to a maximum of twelve months.[44] Added to these various conditions were significant administrative delays in obtaining placements in all three programs.[45] Bastarache J. described Louise Gosselin's particular experience of spending significant periods of time trying to survive on the reduced rate between

programs as illustrating the degree to which the differential regime exposed recipients to the constant risk of extreme poverty.[46] As he explained,

> Ms. Gosselin spent some months participating in the programs, receiving full benefits, and some months between programs, receiving a reduced amount in benefits. During the times that she was participating in the programs, she benefited from the experience that the programs offered, as well as the increase in benefits that such participation provided her. But, being a person under 30 years of age, much of the time she was living in fear of being returned to the reduced level of support ... This threat to her living income, described by a government witness as "the stick" to accompany "the carrot," caused a great deal of stress to the appellant. This additional stress ... dominated the appellant's life.[47]

Compounding the many barriers to program participation was the absolute shortage of available placements in the education and job training programs. As Bastarache J. noted, by the province's own calculations, only 30,000 placements were made available for some 85,000 eligible welfare recipients under the age of thirty.[48] This discrepancy meant that the province did not anticipate or allow for more than one-third of the young welfare recipients to increase their benefits through participation in the education and job training programs.

Finally, Bastarache J. underscored the fact that only 11 percent of welfare recipients under the age of thirty actually achieved the full over-thirty benefit amount, while 73 percent of participants received only the reduced rate of $170 per month.[49] Thus, the province's claim that the differential welfare program helped rather than harmed welfare recipients by providing them with parity of benefits and education and training opportunities was true for only a minority of recipients. Like Louise Gosselin for much of the relevant period, the majority of recipients were forced to subsist on the grossly inadequate rate. As Bastarache J. concluded, "[g]roups that are the subject of an inferior differential treatment based on an enumerated or analogous ground are not treated with dignity just because the government claims that the detrimental provisions are 'for their own good.'"[50]

In her dissenting judgment, Arbour J. also assessed the claim that the differential welfare program was helping young welfare recipients by promoting their integration into the paid workforce, against the evidence of the actual impact of the regime. Having earlier referred to the multiple ways in which the inadequate benefits threatened the physical and mental health and security of young welfare recipients,[51] Arbour J. considered the specific impact of the differential rate on recipients' ability to secure paid work and, in particular, the difficulty, if not impossibility, of job hunting for those

who could not afford a telephone, suitable clothes, or transportation. "More drastically," she pointed out, "inadequate food and shelter interfere with the capacity both for learning as well as for work itself."[52] Arbour J. exposed the fundamental irrationality in the government's claim that the differential rate promoted the dignity of young welfare recipients: "[I]t is difficult to accept that denial of the basic means of subsistence is rationally connected to values of promoting the long-term liberty and inherent dignity of young adults. Indeed, the long-term importance of continuing education and integration into the workforce is undermined when those at whom such 'help' is directed cannot meet their basic short-term subsistence requirements. Without the ability to secure the requirements. Without the ability to secure the immediate needs of the present, the future is little more than a far-off possibility, remote in both perception and reality."[53]

For his part, LeBel J. focused on the government's argument that the differential rate was necessary to force young welfare recipients off social assistance for their own good. Pointing to the weight of expert evidence on the problem of high unemployment in Québec in the mid-1980s, particularly among youth, Lebel J. asserted: "Young social assistance recipients in the 1980s certainly did not latch onto social assistance out of laziness; they were stuck receiving welfare because there were no jobs available."[54] In such a context, LeBel J. argued, there was no foundation for the government's position that the differential benefit regime was a useful and necessary measure. As he described the problematic stereotype inherent in the government's policy towards young welfare recipients, "[b]y trying to combat the pull of social assistance, for the 'good' of the young people themselves who depended on it, the distinction perpetuated the stereotypical view that a majority of young social assistance recipients choose to freeload off society permanently and have no desire to get out of that comfortable situation. There is no basis for that vision of young social assistance recipients as 'parasites.' It has been disproved by numerous experts."[55]

There was no evidence, LeBel J. pointed out, that young welfare recipients who participated in the education and job training programs would not have done so without the financial incentive created by the differential regime and, therefore, he concluded, "the Québec government could have achieved its objective of developing employability just as well without abandoning recipients under the age of 30 to these paltry benefits."[56]

Presuming Innocence and Proving Guilt in the *Gosselin* Case

In principle, the *Gosselin* case involved a largely doctrinal exercise of determining whether Québec's differential welfare regime respected *Charter* guarantees. Applying the *Law v. Canada (Minister of Employment and Immigration)* test, McLachlin C.J., for the majority, held that it did respect these guarantees.[57] By applying the same test, the dissenting justices found that it did

not. I would argue, however, that what really distinguishes the majority from the dissenting judgments in *Gosselin* is not a doctrinal difference of opinion but rather the willingness of the judges in the case to engage in reality checks.

In rendering her favourable judgment for the province, McLachlin C.J. ignored both the context and the actual voices of those affected by the differential welfare regime, most especially the voice of Louise Gosselin herself. Instead of testing the government's claims against the reality checks provided by the appellants' evidence, the chief justice simply accepted the claims of innocence and guilt put forward by the respondent – that the differential regime was designed to, and did in fact, help young welfare recipients; that young people had to be forced off welfare if they were ever to become economically independent; and that young welfare recipients were responsible for their own unfavourable social and economic circumstances.

As suggested at the outset of this article, these claims reflect the most pervasive of presumptions of innocence and guilt operating in the welfare context. Governments systematically defend against *Charter* welfare claims by maintaining that welfare programs and policies, which are demonstrably inadequate, inequitable, and regressive in their objects and effects, have been adopted for the good of welfare recipients. Courts accept these claims of governmental innocence notwithstanding clear evidence that governments are motivated not by genuine concern for the rights and interests of the poor but instead by a desire to reduce public welfare expenditures or to respond to public pressure, which is often reinforced by governments themselves, for harsher and more punitive measures towards welfare recipients.[58]

Governments also argue, and courts regularly accept, that welfare recipients are morally weak and inferior: lacking in a proper work ethic, incapable of meeting dominant social norms relating to work and family, and actively dishonest in their willingness and propensity to rely on public support rather than on their own resources and efforts. Governments argue and courts accept that welfare recipients choose to rely on state assistance and that coercive measures are required to break the cycle of welfare dependence, especially for the young. Governments argue and courts accept that poverty is an individualized phenomenon, unrelated to government action and, therefore, beyond the scope of *Charter* review. Governments argue and courts accept these presumptions of innocence and guilt notwithstanding widespread evidence of the impact of fiscal and social policy choices on the distribution of wealth and the underlying causes of poverty in Canadian society, including structural unemployment, racism, gender inequality, and the exclusion of the disabled from equal participation in economic life.[59]

Thus, in the face of evidence that the differential rate caused immense harm to the physical and psychological health and security of young welfare recipients, the chief justice found that the regime affirmed their dignity

and autonomy. In the face of evidence that young welfare recipients relied on social assistance because no jobs were available, the chief justice found that the only option available to the government was to reduce benefits to a point at which, by the province's own admission, it was impossible to survive. In the face of evidence that the differential rate was making it difficult for recipients to focus on anything beyond the day-to-day struggle for existence, much less on finding and keeping paid work, the chief justice found that Louise Gosselin and other young welfare recipients continued to live in poverty as a matter of personal choice. To appreciate the chief justice's wholesale acceptance of the dominant presumptions of innocence and guilt relating to welfare recipients, it is perhaps sufficient to read the opening paragraph of her judgment: "Louise Gosselin was born in 1959. She has led a difficult life, complicated by a struggle with psychological problems and drug and alcohol addictions. From time to time she has tried to work, attempting jobs such as cook, waitress, salesperson, and nurse's assistant, among many. But work would wear her down or cause her stress, and she would quit. For most of her adult life, Ms. Gosselin has received social assistance."[60]

In contrast to the chief justice's abstract and ultimately implausible analysis of the *Charter* issues raised in this case, the dissenting justices relied heavily on the contextual evidence relating to the operation and effects of the impugned regulation, as well as on Louise Gosselin's subjective account of her own experience of the differential rate, in rejecting the government's claims. As discussed earlier, Bastarache, LeBel, and Arbour JJ. looked to the actual participation rates in the employment and job training programs, to the structural causes of youth unemployment in Québec, to the severe material and psychological effects of the differential regime on the vast majority of young welfare recipients who were forced to survive on the reduced rate, and to the specific impact that this depth of poverty had on the recipients' ability to secure long-term employment.

It is, however, L'Heureux-Dubé J.'s judgment that relies most obviously on reality checks in assessing the intent and impact of the impugned regulation. L'Heureux-Dubé J. restates the key doctrinal question posed by the majority in its section 15 analysis: "[W]hether a reasonable person in Ms. Gosselin's position, apprised of all the circumstances, would perceive that her dignity had been threatened." In answering this question, L'Heureux-Dubé J. reiterated the government's claim: "The reasonable claimant would have been informed of the legislature's intention to help young people enter the marketplace ... She would have been told that the long-term goal of the legislative scheme was to affirm her dignity."[61] L'Heureux-Dubé J. then provided the reality check: "The reasonable claimant would also likely have been a member of the 88.8 percent ... whose income did not rise to the

levels available to all adults 30 years of age and over ... The reasonable claimant would have made daily life choices in the face of an imminent and severe threat of poverty. The reasonable claimant would likely have suffered malnourishment. She might have turned to prostitution and crime to make ends meet. The reasonable claimant would have perceived that as a result of her deep poverty, she had been excluded from full participation in Canadian society."[62] In other words, L'Heureux-Dubé J. concluded that the reasonable claimant would have known that her right to dignity was being infringed and that she was being treated as a person of lesser value and as less deserving of respect.[63]

Conclusion

I have argued that the outcome in *Charter* welfare cases is dictated not so much by the language of *Charter* provisions or by other elements of traditional legal analysis but rather by judges' willingness to test the presumptions of innocence and guilt commonly advanced by governments against the reality of the existing welfare system and the actual experience of welfare recipients in their interactions with the welfare state. I have suggested that, absent a willingness on the part of individual judges to engage in this process of reality checks, *Charter*-based welfare claims will continue to be dismissed.

In the *Peevyhouse* example, what was clearly missing from the judges' reasoning and my first-year contract law professor's analysis of the case was any reference to the economic context in which coal mining agreements were being negotiated and carried out, including the circumstances and relative bargaining power of the parties. Similarly, the voices of Willy and Lucille Peevyhouse, and any subjective account of their experience of Garland Coal's contractual breach, were entirely absent from the case. In a parallel fashion, in the *Gosselin* case, the majority of the Court was unwilling to seriously consider the broader socio-economic context in which the impugned provincial welfare regulation operated, including the structural causes of youth unemployment in Québec in the mid-1980s. Nor did it consider whether the remedial education and training programs in place could reasonably have been expected to raise young welfare recipients out of poverty and welfare dependence as the province alleged. The majority was equally uninterested in Louise Gosselin's own account of the impact of the regulation on her physical and psychological health and security. Disconnected from context and voice, the majority engaged in a doctrinal analysis that, like the result in *Peevyhouse*, was out of touch with reality and, ultimately, unconvincing.

For lawyers, and more especially for law teachers, the idea that positive decisions in *Charter* welfare cases are contingent upon judicial willingness to engage in reality checks can be a disorienting one. As law students, we

learn, and, as legal academics, we teach our students, that legal rules are preeminent, reliable, and true. In welfare cases, however, this is demonstrably not the case. As the decision in *Gosselin* illustrates, no matter how compelling the legal argument, if judges refuse to accept contextual evidence and direct accounts of the impact of welfare laws and policies upon those living in poverty, *Charter* claims in this area are unlikely to succeed. Apart from forcing us to abandon the safety and certainty of legal rules, reality checks are also disorienting because they displace the traditional locus of knowledge and authority in *Charter* cases. If doctrine is important, lawyers are the experts. However, if experiential and contextual knowledge is key, we are not. Rather, we must look to our clients, and to the low-income community in general, as the primary source of relevant expertise. To the extent that our own legal training and socio-economic circumstances have muted our reflex to reality checks, careful attention to the voices and experience of *Charter* welfare claimants becomes even more important. It is only through our connection with our clients and others living the day-to-day indignities and injustices of the current welfare system that we can expose and test our own presumptions of innocence and guilt and grasp the reality that, as advocates, we must in turn attempt to convey to judges hearing *Charter* welfare cases.

As international human rights monitoring bodies have repeatedly reported, notwithstanding their protestations to the contrary, Canadian governments are falling increasingly short of ensuring equal protection for the rights and interests of people living in poverty.[64] Over the past decade, governments of all political stripes have made sweeping welfare program cuts in order to limit government spending and to reduce taxes, blaming welfare recipients in the process.[65] Through statutory repeal, revision, and a liberal use of euphemism, the post-war consensus that individuals and families in financial need are entitled to an adequate level of public assistance, as a matter of social right, has been severely undermined. In place of a social safety net, we now have claw backs, lifetime bans, conditionality, "incentives," and snitch lines. Whether alone or in their cumulative effects, these features of our reconstituted welfare system deprive recipients not only of the material security that social assistance was designed to provide but also of any semblance of dignity, equal citizenship, privacy, and respect. People living in poverty recognize that escalating legislative and regulatory attacks on the core values and institutions of the welfare state are, at their base, egregious violations of fundamental human rights. *Charter* challenges in this area reflect the ongoing efforts of poor people to translate this growing international understanding into domestic law. From this perspective, in response to the claim: "the *Charter* imposes no obligation on governments to deal with poverty," the reality check must surely be: "then what does the *Charter* protect?"

Notes

1 *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109 (Okla. Sup. Ct. 1963), reprinted in John Swan and Barry J. Reiter, eds., *Contracts: Cases, Notes and Materials* (Toronto: Butterworths, 1978) at 1-19 [*Peevyhouse*].
2 Thanks to Wes Pue for alerting me to the fact that corruption was a likely explanation for the *Peevyhouse* decision and to John Kilcoyne for providing the reference to James E. Alexander and William A. Berry, *Justice for Sale: Shocking Scandal of Oklahoma Supreme Court* (Oklahoma City, OK: Macedon, 1996).
3 *Peevyhouse, supra* note 1 at 1-19.
4 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].
5 See, for example, Gwen Brodsky and Shelagh Day, "Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty" (2002) 14 Canadian Journal of Women and the Law 185; Martha Jackman and Bruce Porter, "Women's Substantive Equality and the Protection of Social and Economic Rights under the *Canadian Human Rights Act*" in Status of Women Canada, ed., *Women and the Canadian Human Rights Act: A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, 1999) 43 at 57-64.
6 For a classic description of feminist legal methodology, see Mary Jane Mossman, "Feminism and Legal Method: The Difference It Makes" in Martha Albertson Fineman and Nancy Sweet Thomadsen, eds., *At the Boundaries of Law: Feminism and Legal Theory* (New York: Routledge, 1991) 283. For an illustration of this approach, see Dianne Pothier, "But It's for Your Own Good," in this volume.
7 *Gosselin v. Québec (Attorney General)*, [2002] 4 S.C.R. 429 [*Gosselin* SCC], aff'g [1999] R.J.Q. 1033 (C.A.) [*Gosselin* CA], aff'g [1992] R.J.Q. 1647 (S.C.) [*Gosselin* SC].
8 *Charter of Human Rights and Freedoms*, R.S.Q. 1975, c. C-12.
9 *Gosselin* SC, *supra* note 7 at 1658-9.
10 *Ibid.* at 1658.
11 *Ibid.* at 1659 [translated by author].
12 *Ibid.* at 1658.
13 *Gosselin* SCC, *supra* note 7 (Appellant's Record, Testimony of Louise Gosselin, vol. 1) at 134 [translated by author].
14 *Ibid.* at 106.
15 *Gosselin* SC, *supra* note 7 at 1655.
16 *Gosselin* SCC, *supra* note 7 (Appellant's Record, Testimony of Louise Gosselin, vol. 1) at 110 [translated by author].
17 *Gosselin* SC, *supra* note 7 at 1664.
18 *Ibid.* at 1669.
19 *Ibid.* at 1681.
20 *Gosselin* CA, *supra* note 7 at 1042-3.
21 *Ibid.* at 1042.
22 *Ibid.* at 1047.
23 *Ibid.* at 1089.
24 *Gosselin* SCC, *supra* note 7 (Factum of the Respondent Attorney General of Québec) at para. 171 [translated by author].
25 *Ibid.* at paras. 184 and 187.
26 *Ibid.* at para. 200 [translated by author].
27 *Gosselin* SCC, *supra* note 7 at para. 83.
28 *Ibid.* at para. 66.
29 *Ibid.* at para. 70.
30 *Ibid.* at para. 66.
31 *Ibid.* at para. 43.
32 *Ibid.*
33 *Ibid.*
34 *Ibid.* at para. 44.
35 *Ibid.* at para. 47.
36 *Ibid.* at paras. 8 and 48.

37 *Ibid*. at para. 52.
38 *Ibid*. at para. 73.
39 *Ibid*. at para. 55.
40 *Gosselin* CA, *supra* note 7 at 1085.
41 *Gosselin* SCC, *supra* note 7 at paras. 160 and 277-80.
42 In Québec, students generally attend two years of CEGEP after grade 11, prior to being admitted to university or entering the workforce.
43 *Gosselin* SCC, *supra* note 7 at paras. 161 and 279.
44 *Ibid*. at paras. 162 and 279.
45 *Ibid*. at para. 281.
46 *Ibid*. at paras. 255 and 282.
47 *Ibid*. at paras. 255-6.
48 *Ibid*. at para. 283.
49 *Ibid*. at paras. 276 and 290.
50 *Ibid*. at para. 250.
51 *Ibid*. at paras. 373-7.
52 *Ibid*. at para. 392.
53 *Ibid*.
54 *Ibid*. at para. 409.
55 *Ibid*. at para. 407.
56 *Ibid*. at para. 410.
57 *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.
58 See generally Jean Swanson, *Poor-Bashing: The Politics of Exclusion* (Toronto: Between the Lines, 2001); Armine Yalnizyan, *Canada's Great Divide: The Politics of the Growing Gap between Rich and Poor in the 1990s* (Toronto: Centre for Social Justice, 2000); Pat Capponi, *The War at Home: An Intimate Portrait of Canada's Poor* (Toronto: Viking, 1999); Mel Hurtig, *Pay the Rent or Feed the Kids: The Tragedy and Disgrace of Poverty in Canada* (Toronto: McClelland and Stewart, 1999); and National Anti-Poverty Organization, *Poverty and the Canadian Welfare State: A Report Card* (Ottawa: National Anti-Poverty Organization, 1998).
59 See John Anderson, *Aboriginal Children in Poverty in Urban Communities: Social Exclusion and the Growing Racialization of Poverty in Canada* (Ottawa: Canadian Council on Social Development, 2003); Kevin K. Lee, *Urban Poverty in Canada: A Statistical Profile* (Ottawa: Canadian Council on Social Development, 2000); Clarence Lochead and Katherine Scott, *The Dynamics of Women's Poverty in Canada* (Ottawa: Canadian Council on Social Development, 2000); Abdolmohammad Kazemipur and Shiva S. Halli, *The New Poverty in Canada: Ethnic Groups and Ghetto Neighbourhoods* (Toronto: Thompson, 2000); Monica Townson, *A Report Card on Women and Poverty* (Ottawa: Canadian Centre for Policy Alternatives, 2000); Marie Drolet and René Morissette, *To What Extent Are Canadians Exposed to Low Income?* (Ottawa: Statistics Canada, 1999); Indian and Northern Affairs Canada, *Socio-Economic Indicators in Indian Reserves and Comparable Communities, 1971-1991* (Ottawa: Indian and Northern Affairs Canada, 1997); Human Resources Development Canada, "A Profile of Disability in Canada, 2001" (2003) 7(1) Developments 15; Gail Fawcett, *Living with Disability in Canada: An Economic Portrait* (Ottawa: Canadian Council on Social Development, 1996); and Canada, *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength*, volume 3 (Ottawa: Supply and Services Canada, 1996).
60 *Gosselin* SCC, *supra* note 7 at para. 1.
61 *Ibid*. at para. 131.
62 *Ibid*. at para. 132.
63 *Ibid*. at para. 133.
64 *Concluding Observations of the Human Rights Committee* (Canada), UN ESCOR, UN Doc. CCPR/C/79/Add.105 (1999); *Concluding Observations of the Committee on Economic, Social and Cultural Rights* (Canada), UN ESCOR, UN Doc. E/C.12/1/Add.31 (1998); *Adoption of the Report of the Committee on the Elimination of Discrimination against Women* (Canada), UN ESCOR, UN Doc. A/52/38/Rev.1 (1999); *Concluding Observations of the Committee on Economic, Social and Cultural Rights* (Canada), UN ESCOR, UN Doc. E/C 12/1999/5 (1993); and *Report of the*

Committee on the Elimination of Discrimination against Women (New York: United Nations, 2003) at paras. 325-89.

65 Janet Mosher and Joe Hermer, eds., *Disorderly People: Law and the Politics of Exclusion in Ontario* (Halifax: Fernwood, 2007); Janet Mosher, "Managing the Disentitlement of Women: Glorified Markets, the Idealized Family, and the Undeserving Other" in Sheila M. Neysmith, ed., *Restructuring Caring Labour: Discourse, State Practice and Everyday Life* (Toronto: Oxford University Press, 2000) 308; Shelagh Day and Gwen Brodsky, *Women and the Equality Deficit: The Impact of Restructuring Canada's Social Programs* (Ottawa: Status of Women Canada, 1998); Claude Girard and Lucie Lamarche, "L'Évolution de la sécurité sociale au Canada: La mise à l'écart progressive de l'état providence canadien" (1998) 13 Journal of Law and Social Policy 95; National Anti-Poverty Organization, *50th Anniversary of the UN Declaration: A Human Rights Meltdown in Canada* (Ottawa: National Anti-Poverty Organization, 1998); Ian Morrison, "Ontario Works: A Preliminary Assessment" (1998) 13 Journal of Law and Social Policy 1; National Council of Welfare, *Another Look at Welfare Reform* (Ottawa: Minister of Public Works and Government Services Canada, 1997); and Randall Ellsworth, "Squandering Our Inheritance: Re-forming the Canadian Welfare State in the 1990s" (1997) 12 Journal of Law and Social Policy 259.