

CANADIAN CHARTER EQUALITY AT 20: REFLECTIONS OF A CARD-CARRYING MEMBER OF THE COURT PARTY

Martha Jackman



On the 20th anniversary of the Charter's equality rights guarantees, Charter activist and expert Martha Jackman reviews the record of Charter litigation as a means to redress inequalities in Canada and concludes that it is mixed at best. Far from undermining Canadian democracy, she says, the Charter provides an important and legitimate avenue for challenging growing social inequities. Yet, low income litigants invoking the Charter have met with limited success due to a series of presumptions, including that social policy is beyond the legitimate purview of the courts, and that the state is neutral in its dealings with the poor. All in all, the relationship between rights and democracy is far more nuanced than the Charter critics argue, she says, and the real question, to her, is not whether the Charter and the so-called Court Party are destroying democracy, but rather how the Charter's equality rights can inform and contribute to further strengthening the underlying values of our democratic system.

À l'occasion du 20^e anniversaire des clauses sur l'égalité des droits de la Charte des droits et libertés, Martha Jackman a voulu établir si les litiges fondés sur la Charte avaient favorisé la réduction des inégalités : le bilan est pour le moins mitigé, conclut-elle. Loin de saper notre démocratie, la Charte offre un moyen important et légitime de s'attaquer aux inégalités sociales. Mais les plaignants à faibles revenus ont connu des succès limités en raison de présomptions diverses, dont celles voulant que les politiques sociales ne relèvent pas des tribunaux et que l'État se montre neutre vis-à-vis ses citoyens peu fortunés. Tout bien considéré, le lien entre droits et démocratie est bien plus subtil que ne le prétendent les détracteurs de la Charte, affirme Jackman. Selon elle, qui la vraie question n'est pas de savoir si celle-ci et le « Parti des tribunaux » sapent notre démocratie mais bien d'établir comment l'égalité des droits peut éclairer et favoriser le renforcement des valeurs qui fondent notre système démocratique.

For those of us who see the Canadian Charter of Rights and Freedoms as a potential catalyst for progressive social change, the twentieth anniversary of its equality rights guarantees provides an important opportunity to reflect on what we have accomplished over the past two decades, and what remains to be done. For my part I remain convinced, after more than 15 years of Charter activism, that the Charter provides an important and legitimate avenue for challenging growing inequities within Canadian society.

I began my scholarly career in the late 1980s by asserting that the Charter includes an absolute right to an adequate level of social assistance. I have since suggested that it

guarantees access to health care, housing and other basic social and economic rights set out under international human rights treaties ratified by Canada. I have argued that the right to equal protection and benefit of the law under section 15 of the Charter prohibits discrimination based on poverty, and renders systemic inequalities in social programs and fiscal policies unconstitutional. I have been directly involved in Charter litigation advancing positive rights claims at the trial, appellate and Supreme Court of Canada levels, most recently as co-counsel for the Charter Committee on Poverty Issues in its challenge to NAFTA's chapter 11. And I have participated in continuing legal and judicial education initiatives on all of these issues.

From this perspective I have reacted with bemusement, incredulity, and sometimes outrage, to claims made over the years by Charter critics of the right in relation to the Court Party, of which I would undoubtedly qualify as a card-carrying member. These have included Ted Morton and Rainer Knopff's insistence that the "Court Party's project...is deeply and funda-

Charter litigation has been taken up by low income people and their advocates not as a means of bypassing democratically elected governments, or of undermining Parliamentary democracy, but rather as a mechanism for calling the legislative and executive branches to account for their failure to respect the basic rights and interests of a group which has been totally marginalized within our political system.

mentally undemocratic, not just in the simple and obvious sense of being anti-majoritarian, but also in the more serious sense of eroding the habits and temperament of representative democracy." Peter Russell has described recourse to the Charter as a "flight from politics" and a turning away from "the procedures of representative government...as a means of resolving fundamental questions of political justice." To advocate for judicial recognition of social rights, John Richards argues, is to "trivialize a political foundation of civilized public life, namely that...the people's representatives — and not judges — spend public monies." Under the Charter, Ted Morton again warns, "the clientele groups of Canada's bloated welfare state will be able to retreat to the courts and effectively obstruct attempts to reform health, welfare, or labour policies" and, "unless or until this unaccountable, judicial law-making is reined in," Canada's economic competitiveness and Canadians' standard of living will continue to deteriorate.

In the 20 years since the coming into force of the Charter's equality guarantees, elected legislatures have become increasingly insensitive to the needs and basic human rights of the most disadvantaged members of Canadian society.

Governments in all parts of the country have been elected and have thrived on poor- and welfare-bashing platforms. Poverty has been characterized by our political leaders not as a serious and systemic economic problem, but an individualized phenomenon blamed on the poor themselves, who are depicted as fraudulent, lazy, and responsible for their own misfortune.

In this political context Charter litigation has been taken up by low income people and their advocates not as a means of bypassing democratically elected governments, or of undermining parliamentary democracy, but rather as a mechanism for calling the legislative and executive branches to account for their failure to respect the basic rights and interests of a group that has been totally marginalized within our political system.

What has been the record of success of Charter litigation as a means of redress against legislative choices having a disproportionately adverse impact on the poor? There have indeed been notable successes. For example, in the 1993 *Dartmouth/Halifax County Regional Housing Authority v. Sparks* case, the Nova Scotia Court of Appeal found that denying public housing tenants security of tenure and other protections under provincial residential tenancies legislation violated section 15 of the Charter. The Court held that this exclusion, which permitted Irma Sparks and her two children to be evicted from their apartment after 10 years residence, without notice or any explanation of the reasons for the eviction, was discriminatory on the basis of poverty,

single-motherhood, race, and the fact of being a public housing tenant.

In the 1999 *New Brunswick (Minister of Health and Community Services) v. G.(J.)* case, the Supreme Court of Canada held that the failure to provide publicly funded legal aid in child protection proceedings infringed a low income parent's security of the person rights under section 7 of the Charter. Jeannine Godin

had been threatened with loss of custody of her children based on evidence of her parental fitness contained in 15 affidavits presented by three lawyers acting for the Crown, over the course of a three-day hearing, after she had been turned down by legal aid and had resorted to bake sales and

other unsuccessful efforts to raise money to hire her own lawyer. Chief Justice Lamer concluded that: "Without the benefit of counsel, the appellant would not have been able to participate effectively at the hearing...thereby threatening to violate both the appellant's and her children's section 7 right to security of the person."

In the 2001 case of *Dunmore v. Ontario (Attorney General)*, the Supreme Court of Canada found that the exclusion of agricultural workers from the province's labour relations regime was a violation of their section 2(d) right to freedom of association. Evidence showed that agricultural workers in Ontario had suffered repeated attacks on their efforts to unionize, compounding their historic vulnerability to social isolation and economic exploitation. As Justice l'Heureux-Dubé put it: "in the case of agricultural workers in Ontario, the freedom to associate becomes meaningless in the absence of a duty of the state to take positive steps to ensure that this right is not a hollow one."

In the 2002 case of *Falkiner v. Ontario (Ministry of Community and Social Services)*, the Ontario Court of Appeal held that the "spouse-in-the-house" rule under the province's *Family Benefits Act*, which deprived

sole-support mothers of income assistance as soon as they began to live with a man, violated section 15 of the Charter. The Court found that, in contrast to the three-year waiting period provided under the provincial *Family Law Act*, by assuming a spousal relationship immediately upon cohabitation, the family benefits legislation discriminated against recipients, primarily women, on the enumerated grounds of sex and marital status. The Court also found the spouse-in-the-house rule to be discriminatory based on receipt of social assistance, which it recognized as an analogous ground of discrimination in view of the economic disadvantage and social stigma to which welfare recipients are subject.

While low-income Charter litigants have achieved some important victories, they have also suffered significant defeats. For example, in the 1996 *Masse v. Ontario (Ministry of Community and Social Services)* case, a challenge to the over 20 percent cut in provincial social assistance rates by the newly elected Conservative government was rejected by the courts. While the trial Court accepted evidence that the cuts would have severe effects for all welfare recipients, including increases in hunger and homelessness, it found that the Charter did not guarantee a minimal level of public welfare assistance. The Court also concluded that section 15 had not been violated because receipt of social assistance was not a prohibited ground of discrimination, and because setting social assistance rates was a matter of social and economic policy which should not be subject to second-guessing by the courts.

While the appellants in *Dunmore* were successful in their freedom of association argument before the Supreme Court of Canada, the trial court rejected the equality claim raised in the case, and the majority of the Supreme Court did not disturb this finding. The trial judge accepted that agricultural workers were poorly paid, faced difficult working conditions,



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While Charter litigation is a legitimate means to redress social inequalities, writes Martha Jackman, low-income litigants have met with limited success. For instance, in 1996 the courts found that the Charter did not guarantee a minimal level of public welfare assistance; and in 1999, the claim that poverty is a ground for discrimination was rejected.

had low levels of skill and education, low status and limited employment mobility. However, he concluded that they were a “disparate and heterogeneous group,” whose economic disadvantage was not sufficient to establish discrimination on an analogous ground within the meaning of section 15 of the Charter.

The claim that poverty is an analogous ground for discrimination was also rejected in the 1999 case of *Polewsky v. Home Hardware Stores*, where the Ontario Superior Court found that barriers created for poor litigants by small claims court tariff fees did not violate the Charter. In the 2001 *Federated Anti-Poverty Groups of B.C. v.*

Vancouver (City) case, the BC Supreme Court dismissed a Charter challenge to a municipal panhandling bylaw on similar reasoning. As the trial judge put it: “Clearly poverty is nothing more than a proverbial handmaiden to those who seek protection under the enumerated grounds...Poverty is an economic disadvantage that is regrettably a social condition over which those who endure it have little control, but they are not without options that can result in such a change.”

The Ontario Court of Appeal also took the view, in the *Falkiner* case, that economic disadvantage *per se* was not a prohibited ground of discrimination under section 15.

Most significantly, in its December, 2002 ruling in *Gosselin v. Quebec (Attorney General)*, the Supreme Court of Canada dismissed the claim that a provincial social assistance regulation reducing welfare rates for recipients under the age of 30 by two-thirds, to some \$170/month, offended sections 7 or 15 of the Charter. The appellants submitted evidence that Louise Gosselin had experienced profound social isolation, hunger, cold, depression, threats of violence, deplorable housing conditions and prolonged periods of homelessness while trying to live on the reduced benefit rate. Expert testimony adduced at trial showed that other young welfare recipients suffered similar physical and psychological insecurity and illness owing to the low level of provincial assistance.

In response to the argument that the inadequacy of the provincial welfare rates violated section 7 of the Charter, the Supreme Court held that while governments might be found to have a positive obligation to sustain life, liberty, or security of the person in special circumstances, this was not such a case. A majority of the Court likewise concluded that the differential welfare rates had not been proven to be discriminatory under section 15 of the Charter, since recipients had the option of participating in work and training programs in order to top up their benefits. The majority was unpersuaded by the fact that the youth unemployment rate in Quebec at the relevant time was over 24 percent; that only 30,000 work and training placements were made available to 85,000 recipients; that those with low levels of education and literacy were ineligible to participate; and that a full 73 percent of welfare recipients under the age of 30 received only the \$170 monthly rate. Instead Chief Justice McLachlin concluded that, because “the thrust of the program was to improve the situation of [young welfare recipi-

ents], and to enhance their dignity and capacity for long-term self-reliance,” it promoted rather than undermined Charter equality principles.

The major difficulty facing low income litigants invoking the Charter in the social welfare context originates, I would argue, in a series of presumptions that are regularly applied by courts at all levels in welfare cases. These include the presumption that parliamentary sovereignty remains unfettered in the social policy context; that the state is neutral in its dealings with

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the poor; that social welfare policies and programs are benign in their intent and their effects in relation to low income people; and that welfare recipients themselves are primarily to blame for any disadvantage that they suffer.

The presumption that social policy is beyond the legitimate purview of the courts is pervasive in Charter cases. In *Dunmore*, for example, the trial judge suggested that: “There are many forms of injustice in our society, particularly those resulting from uneven distribution of wealth, that cannot be remedied by the courts through interpretation of

the Charter and that must be remedied through the legislative process.” The view that the courts should defer to the legislature in the social welfare context echoes similar conclusions of the trial court in the *Gosselin* case, where the trial judge argued that: “La Charte ne fait pas obstacle à la souveraineté du parlement et au processus démocratique...S’il fallait y voir des obligations positives ce serait les tribunaux qui...viendraient ultimement déterminer les choix de l’ordre politique, soit les pouvoirs législatif et exécutif. Or, pareil rôle n’est pas donné au pouvoir judiciaire par la Charte.”

The presumption that the state is neutral in its dealings with the poor is reflected in the Court’s reasoning and conclusions in the *Polewsky* case. While recognizing that fees, such as the \$100 Ontario Small Claims Court fee, create significant barriers to access to justice for the poor, the Court held that the failure to provide a discretion to waive fees could in no way be seen as discriminatory. In the judge’s view: “Court fees, albeit at lower levels, have been in place for some 200 years. Given the historical context, the legislation does not appear to stereotype, exclude or devalue poor persons.” Rather, she concluded: “imposing a reasonable fee for use of a limited public resource such as court services is permissible and serves a useful purpose. The existence of the hearing fee...prevents the Small Claims Court system from becoming overburdened with frivolous claims.”

Similarly, in the 2001 case of *R. v. Banks*, involving an unsuccessful Charter challenge to the prosecution of squeegee kids in Toronto under the Ontario *Safe Streets Act* — legislation admittedly designed to allay public concerns by banning this effective form of begging by street youth, the trial judge characterized the evidence presented by the defendants in the following terms: “Much of the affidavit material filed by

the defendants consists of complaints about the general thrust of current provincial social policy in Ontario; the affiants all have an obvious socio-economic and political perspective that is diametrically opposed to that of the government of the day. It is, however, frankly difficult to discern how the legislation in question in itself can be said to have a prejudicial effect on their 'essential human dignity' by placing restrictions on the place and manner of solicitation."

The presumption that social welfare laws are benign in their intent and effects vis-à-vis the poor is most evident in the *Gosselin* case, where a majority of the Supreme Court repeatedly asserted, in the face of glaring evidence of the extreme degradation and misery caused by the gross inadequacy of the under-30 welfare rates, that the regime could not be held to be unconstitutional because it was intended to "help" young welfare recipients. As Chief Justice McLachlin characterized it: "The age-based distinction was made for an ameliorative, non-discriminatory purpose, and its social and economic thrust and impact were directed to enhancing the position of young people in society by placing them in a better position to find employment and to live fuller, more independent lives."

The Court in *Masse* provided a similar justification in dismissing the welfare-rate-cut challenge — that the poor were being helped, rather than discriminated against by provincial welfare laws. As one judge explained: "in the absence of the reduced social assistance payments, the applicants would face an even greater burden brought about by the cost of rent and food, non-governmental activity. In my view the impugned regulations do not increase but alleviate the applicants' burden (albeit not to their satisfaction)."

A final presumption operating in the Charter welfare context is that

those seeking to invoke the Charter to challenge inadequacies and inequities in social assistance policies and programs, are themselves responsible for their impoverished circumstances, and so should not be heard to complain. In the 1992 case of *Fernandes v. Director of Social Services (Winnipeg Central)*, for example, Eric Fernandes, who was mobile in a wheelchair but required the use of a ventilator, challenged munic-

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pal welfare officials' refusal to cover the cost of part-time home care, so that he could remain in his apartment rather than moving into hospital. In rejecting his Charter arguments, the Manitoba Court of Appeal asserted: "The particular choices of a particular individual are not generally to be considered when those choices affect the public purse."

A similar tone suffuses the opening paragraph of the majority judgment in the *Gosselin* case. As Chief Justice McLachlin described the appellant's circumstances: "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...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." This contrasts with Louise Gosselin's own account of how, in attempting to survive on the \$170/month welfare payment — ill-fed, ill-dressed and often homeless — she effectively became unemployable: "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."

As a subject of public policy inquiry, the disproportionate focus by legal academics and constitutional lawyers on Charter litigation and the role of the courts is perhaps understandable. Given the mixed record of success described above,

however, it is hard to fathom in political scientists and other public policy experts. It is clear that the relationship between rights and democracy is far more nuanced than the Charter critics present.

Attempts by poor people to use the Charter to challenge laws and policies that adversely affect them can hardly be said to have undermined Canadian democracy, even in its current, seriously malfunctioning form. As suggested at the outset of the paper, people living in poverty have resorted to Charter litigation because the executive and legislative branches at the federal and provincial levels have been inaccessible to them, and willfully blind if not overtly hostile to their concerns. And, as described above, the courts have hardly greeted their claims with open arms.

The real question, then, is not whether the Charter and the Court Party are destroying democracy, but rather how the Charter's equality rights values can inform and contribute to further strengthening the underlying values of our democratic system, particularly from the perspective of the poor and other marginalized groups.

Rather than being decried as a source of democratic deficit, judicial review on Charter grounds should be recognized as a legitimate and necessary mechanism of accountability, particularly for those for whom alternate avenues are effectively closed. Instead of challenging the very idea of Charter-based scrutiny of social and economic policy-making, political scientists and other public policy experts could be providing valuable insights and direction as to how the judicial review process could be made more effective, accessible, and fair. In particular, such experts should be focusing on how financial and other resource imbalances affect potential litigants' ability to access the courts, to identify and marshal necessary evidence, and to participate on an equal footing in Charter review of government decision-making in the social welfare and other regulatory areas. Political scientists and other public policy experts should also be adding their voices to calls from the law reform community for systemic reform of the judicial appointments process, not to secure nominees more deferential to government spending choices, but rather to ensure a more diverse and representative judiciary—one more able and more willing to question the discriminatory presumptions about poor people and the state that underlie most poverty-related Charter case law to date.

More importantly, political scientists, like constitutional lawyers, must expand their Charter focus beyond the judicial branch itself. Section 52 of the *Constitution Act, 1982*

declares that "The Constitution of Canada is the supreme law of Canada." Section 32(1) of the Charter states that the Charter applies to Parliament and the federal government, and to provincial and territorial legislatures and governments in relation to all matters within their authority. Governments are called upon by the Constitution to respect Charter rights and principles in their laws, policies, and practices, whether or not the courts have ordered them to do so.


Instead of asking judges to remedy the results of a defective political process after the fact, as constitutional lawyers must perforce do, political scientists and other public policy experts are in an excellent position to examine how the Charter can be interpreted and applied to directly address the serious problems that exist within our current political and parliamentary system.

What is it about our political process that enables legislatures and governments to ignore the most fundamental interests of significant segments of society with impunity? At the level of basic governance and accountability, why is it that governments of all political stripes can continue to rely on discriminatory stereotypes about the poor and the unemployed in promoting regressive social and economic policy choices. In terms of our electoral system, is a first-past-the-post model really congruent with notions of substantive equality, not only from the perspective of the poor but of Aboriginal, racialized and other politically under-represented communities? Is the current lack of for-

mal legislative oversight over political parties and their resulting immunity from Charter scrutiny on expression, equality and other grounds justifiable in light of basic democratic principles? How can Charter guarantees of freedom of expression, liberty, security of the person, and equality be used to ensure better representation of, and accountability to, politically vulnerable groups? What do democratic rights guarantees under the Charter have to say to the lack of mechanisms to promote effective participation in local, provincial and national civic life beyond the bare right to vote in an election every five years? And what do Charter democratic rights have to say about the domination of the legislative by the executive branch; about the lack of effective legislative oversight over regulatory decision-making, particularly in the social welfare area; and about the lack of accountability of delegated decision-makers to those most directly affected by their decisions, especially the poor?


These are just some of the Charter-related questions which, in my view, are seriously deserving of attention from political scientists and other public policy experts in the face of declining confidence, not only of people living in poverty, but of all Canadians, in the legitimacy and competence of our governing institutions. I particularly urge them to this task since, from where I sit, the Court Party is not likely to be elected any time soon.

Martha Jackman is a professor of constitutional law at the Faculty of Law, University of Ottawa.



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