

Poverty and the Courts

Keynote Address

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Niagara Falls, May 7 2004

Thank you for the introduction Justice Blishen and thank you to Justice Eberhardt, as well, for setting the stage for the discussion so effectively.

As Justice Blishen aptly predicts, Bishop Desmond Tutu's comment that one cannot be neutral in the face of injustice provides a good lead-in to my remarks. The theme of my talk this morning will be that judicial inaction with respect to poverty ought not to be mistaken impartiality.

I want to consider both how we can ensure that poor people are treated fairly by the justice system when they are dragged into, as it were, accused of wrongdoing or defending custody of their children, but also how we can ensure that poor people can participate as equals in the promise of a constitutional democracy, whereby courts might become a place poor people might actually choose to go to when other institutions fail to respect their rights, where they might receive a hearing they would otherwise be denied. I want to suggest that fairness and impartiality with respect to poverty issues is incompatible with a rigid adherence to the notion that addressing and at times remedying poverty is necessarily outside of the proper role of the judiciary.

While poverty has always been with us, and as Justice Spence pointed out in his introductory remarks, has long been recognized as a challenge to the administration of justice, we must also recognize that we are confronting in Canada new and challenging circumstances which impact directly on the constitutional values courts are mandated to

protect and which were not necessarily foreseen by the drafters of the *Canadian Charter of Rights and Freedoms*.

When the *Charter* was debated back in 1980-81, most parliamentarians would have had no idea what the term “food bank” might refer to. No one would have imagined at that time that food banks would become an apparently permanent fixture in every city and town across Canada, providing emergency food to three quarters of a million people every month, including over 300,000 children, but failing to come close to meeting the needs of an estimated 2.4 million hungry adults and children.

Homelessness as we know it today in Canada would also have been unthinkable to the drafters of the *Charter*. The only studies on homelessness in Canada in 1981 described a relatively small number of transient men living in temporary “flophouses” in Toronto and Montreal.¹ Who would have imagined that in two decades, the mayors of the ten largest cities in Canada would declare homelessness a national disaster, that 30,000 would use shelters for the homeless in the City of Toronto every year, including over 6,000 children, that increasing numbers of children would be born into shelters, that homeless people would die on the cold streets of Canada’s major cities every winter on a regular basis?

When the *Charter* was drafted, critical social rights were taken for granted in Canada. We had lived for a decade and a half under the *Canada Assistance Plan Act*, which, along with the *Canada Health Act*, provided the foundation of social rights of citizenship. CAP, you will recall, required that in exchange for federal cost-sharing of social assistance, provinces would provide to anyone in need financial assistance to cover food, clothing, shelter and other necessities. The Supreme Court ruled in the *Finlay* case², initiated by a welfare

¹Social Planning Council of Metropolitan Toronto, Report of Committee on Homeless and Transient Men (June, 1960) at p. 1; City of Toronto Planning Board, *Report on Skid Row*, (1977)

² *Finlay v. Canada* [1986] 2 S.C.R. 607.

recipient from Manitoba in the year the *Charter* was adopted, that individuals who alleged that their province was failing to provide adequate assistance had public interest standing to ask the court to determine whether the provincial social assistance scheme had complied with the adequacy requirements of CAP. CAP provided for what functioned, in effect, as a justiciable right to adequate food, clothing, housing and other basic requirements for every resident in Canada.³ It was part of a joint federal/provincial/territorial constitutional commitment, articulated in s.36 of the Constitution, to "providing essential public services of reasonable quality to all Canadians", and a commitment to social rights that was at the core of the values entrenched in the new *Charter of Rights and Freedoms*.

If we had painted the bleak scenario of widespread hunger and homelessness in Canada to parliamentarians in 1981 they would assume that we were describing the results of a serious economic decline, a global depression like that of the 1930's. What they would find hardest to fathom would be the idea that the scourge of homelessness and poverty in Canada would arise during two decades of unprecedented economic growth; that it would be most severe in the most affluent provinces, particularly Ontario, and in the most affluent cities – Toronto, Calgary and Vancouver; that it would result from a concerted assault on the well-being of the most disadvantaged - those who are mentally or physically disabled, who are young, who are new to the country, or who are single parents or without work, - an assault on what Chief Justice Dickson described in *Oakes* as the values and principles essential to a free and democratic society, such as "respect for the inherent dignity of the human person" and "commitment to social justice and equality".⁴

³ Justice Sopinka, for the majority of the Supreme Court of Canada, interpreted the *Canada Assistance Plan Act* as requiring that assistance be provided "in an amount that is compatible, or consistent, with an individual's basic requirements", and reviewed the provincial social assistance benefits for reasonable compliance with this standard. The remedy to non-compliance would be an order that transfer payments be withheld until the province had complied. *Finlay v. Canada (Minister of Finance)* [1993] 1 S.C.R. 1080 at 1125.

⁴ *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136.

Some would say that even if judges are concerned about these changes as compassionate human beings, and even recognizing that they may have obvious consequences for charter values like dignity and equality, these are not issues for lawyers or judges, except perhaps in their extra-curricular endeavours. “They are issues of social and economic policy, linked with complex global economic changes”, it is said, “not issues of the administration of justice.”

There is good reason, of course, for judicial reluctance to assume the role of arbitrating economic policy and social values. At the same time, we do need to be cautious about drawing fences around the role of different institutions in our democracy – what the bureaucratic jargon calls “silos” of responsibility – in a way which might cause us to miss the larger picture, and to ignore the importance of interdependent roles and shared responsibilities.

Poverty and hunger are social and economic policy issues which economists and social policy experts must engage, to be sure. But the Nobel Laureate in economics, Amartya Sen, who has studied in depth the phenomenon of hunger and famine at times of peak or relatively high food production in a number of different contexts, points out that the critical failures that may lead vulnerable groups to be denied food and other necessities are often not so much failures of economic production or market forces but rather failures of “entitlement systems”, or failures of rights. These failures arise in large part, he says, from a devaluing of the rights claimed by the most vulnerable in society, to food and housing, in comparison to the property oriented rights claimed by the more privileged.⁵

Surely the issue of how different rights are balanced and interpreted, and what status to accord to the right not to be hungry or not to be deprived of adequate housing in relation to other rights are very much matters on which courts can and must engage.

⁵ Amartya Sen, “Property and Hunger,” in *Economics and Philosophy*, v.4 (1988) pp. 57-68, reprinted in Wesley Cragg and Christine Koggel (eds) *Contemporary Moral Issues* (Toronto: McGraw-Hill Ryerson Ltd., 2004) at pp. 402-408.

As the Supreme Court noted in the *Gosselin* case, these issues are critical to the interpretive task presented to courts in the living tree of the *Charter*, and they have been left open by the Supreme Court precisely so that the justice system can ensure that the most fundamental values of the *Charter* are protected by courts in the face of unforeseen challenges.⁶

The dramatic changes over the last twenty years with respect to poverty and homelessness in Canada and the question of whether and how the rights of the poor will be valued cannot be avoided in the day to day administration of justice. We may think of homelessness as an economic or social problem, but most homeless people were once housed and were evicted through the operation of the justice system. 60,000 households are evicted every year in Ontario, with increasing numbers of them going directly into homelessness. In each case, a landlord's right to be paid rent has been weighed against a household's right to security and dignity, often in the context of cuts to welfare rates and increases in rent that make it impossible for many families to pay rent. In this sense, homelessness is not just the result of economic forces or social program design, but also of an ongoing pattern in the interpretation of law and the exercise of discretion which largely marginalizes the rights of the poor.

When a parent loses custody of a child because of an inability to provide housing, - which studies show is a factor in at least one in five admissions into care in Toronto⁷ - there has been an implicit judicial acceptance that the government's right to determine levels of assistance takes precedence over the right of parents and children to stay together, and again, a pattern or marginalization of the rights of the poor.

⁶ *Gosselin v. Québec (Attorney General)*, [2002] 4 SCR 429, 2002 SCC 84 at para. 82, (per McLachlin, CJ).

⁷ S. Chau, A. Fitzpatrick, J. D. Hulchanski; B. Leslie and D. Schatia, *One in Five: Housing as a Factor in the Admission of Children into Care. A Joint Research Project by the Children's Aid Society of Toronto and the Faculty of Social Work, University of Toronto* (Toronto: Centre for Urban and Community Studies, 2001).

Similar issues arise in sentencing. Offenders for whom a conditional sentence of house arrest would be appropriate, except there is no home available for the serving of the sentence, frequently end up in prison. Others serving sentences of house arrest may not have an income with which to pay the rent or provide for food and other necessities. It is clearly impossible to disengage the decisions made on a day-to-day basis within the justice system from social and economic policies that leave certain groups without access to the necessities of life. These are not simply economic and social issues, they are also issues of rights and of the administration of justice.

Assumptions about institutional roles, as well, cannot help but affect the balancing and interpretation of rights. If we assume that it is never the court's role to address or remedy the failure of a government to provide financial assistance sufficient for a family to pay rent, to provide housing for a child, or for an offender to serve a sentence in the community without being deprived of basic necessities, then for poor people the right to security of tenure, to family life, to the custody of children, or to fair and equitable sentencing will effectively be lost before ever really being heard.

An important factor in determining the extent to which deference to legislatures is legitimate is whether the group involved is one which suffers from discrimination in society at large and in the political process. As noted by John Hart Ely in the famous statement taken up by the Supreme Court of Canada in *Andrews*, describing the role of the Court in protecting the new guarantee of equality in the *Charter*: "The whole point of the approach is to identify those groups in society to whose needs and wishes elected officials have no apparent interest in attending. If the approach makes sense, it would not make sense to assign its enforcement to anyone but the courts".⁸

Though poverty, homelessness, reliance on social assistance or what is sometimes referred to more broadly as "social condition" are not enumerated grounds of

⁸ J.H. Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980) at 151, cited in *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 123 at 152.

discrimination in s.15 of the *Charter*, recent years have seen an emerging recognition, both legislative and judicial, that people living in poverty and homelessness, and particularly those relying on social assistance, face widespread discrimination and prejudice and therefore require the active protection of courts.

In the course of the last twenty years or so, every province, with the exception of New Brunswick, has acted to prohibit discrimination against people on social assistance or those living in poverty in human rights legislation. Ontario led the way in protecting social assistance recipients from discrimination in housing in Ontario's *Human Rights Code* back in 1981.

When former Supreme Court of Canada Justice Gérard Laforest headed a panel to review the *Canadian Human Rights Act* three years ago, the panel reported that it "heard more about poverty than about any other issue" and that there was "ample evidence of widespread discrimination based on characteristics related to social conditions, such as poverty, low education, homelessness and illiteracy." The panel concluded that "it is essential to protect the most destitute in Canadian society against discrimination."⁹

Courts, as well, have recognized the need to protect the poor from discrimination. In 1993 the Nova Scotia Court of Appeal, found in the *Sparks* case, contained in the collected materials at Tab 11, that poverty "is as much a personal characteristic as non-citizenship was in *Andrews*" and on that basis extended security of tenure protections to include public housing tenants¹⁰. More recently, in the *Falkiner* case, at Tab 33 the Ontario Court of Appeal found "significant evidence of historical disadvantage of and continuing prejudice against social assistance recipients, particularly sole-support mothers". The Court found that social assistance recipients face resentment and anger

⁹ Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Department of Justice, 2000).

¹⁰ *Dartmouth/Halifax County Regional Housing Authority v. Sparks* (1993), 101 D.L.R. (4th) 224 (N.S.C.A)

from others in society, who see them as freeloading and lazy, and that they are therefore subject to stigma leading to social exclusion.”¹¹

These sorts of discriminatory attitudes frequently make democratic processes into a poisoned and hostile environment for the poor. During protests last year to a proposed as-of-right by-law for shelters in Toronto, property owners claimed that allowing homeless families into neighbourhoods would lower property values, damage schools and bring drugs and crime. One councillor described homelessness as a cancer which the by-law would spread from downtown Toronto into surrounding neighbourhoods. These are precisely the kinds of stereotypes and inflammatory metaphors which have fueled racial discrimination and segregation in the past, yet they are too often considered acceptable political discourse with respect to the poor and the homeless. You can imagine that a homeless person in need of shelter, sitting in the council chambers listening to the debate, might feel deprived of equal citizenship.

One of the most dramatic changes in attitudes toward the poor in recent years is the idea that members of this group do not even have the right to have children – that having children when you are poor is an act of moral failure and social irresponsibility. A number of years ago a successful complaint was filed under the *Police Act* in Nova Scotia against a constable who, at a community forum on drug abuse, stated that parents on welfare are “dipping into a limited gene pool” and ought to be on birth control.¹² Justice LaForest in his Report cites several examples of negative stereotypes of low income parents from Toronto newspapers, such as a 1999 article in the *Toronto Sun*, characterizing single mothers as “impossibly selfish” for entering parenthood “single, as a lark,” not bothering to learn to feed their children nutritious

¹¹ *Falkiner v. Ontario (Ministry of Community and Social Services)*, [2002] O.J. No. 1771; 2002, 59 O.R. (3d) 481 at para. 86.

¹² *People on Welfare for Equal Rights v. Constable Michael Spurr* (Nova Scotia Police Review Board Decision, Halifax, October 8, 1991) at pp. 4-5

breakfasts.¹³ An editorial in the *Globe and Mail*, stated that “children in poor families have the parental deck stacked against them” and that “A supply-side approach to poverty would invest mightily in the...parenting skills of poor parents.”¹⁴ Attitudes toward poor parents are so negative that governments have for a number of years spoken primarily about strategies to address “child poverty” rather than poverty of families, and often these strategies have consisted primarily of addressing perceived parenting inadequacies among the poor rather than strategies to actually end family poverty. When the Ontario Government retained Angus Reid to conduct a poll to test public reaction to the idea of forcing parents on social assistance to attend a parenting course, sixty-seven per cent of respondents agreed with the idea.¹⁵

It might seem reasonable to assume, given the many challenges they face, that single mothers on social assistance might not measure up to every middle class standard of good parenting. Yet when I had a special tabulation done by Statistics Canada’s National Longitudinal Study on Children and Youth on the reading habits of parents, it showed that an astonishing 94.4% of single mothers in receipt of social assistance ensured that their children were read to once a week or more - slightly higher than the average in all two parent households.¹⁶ Given the lower education levels and the many other challenges facing social assistance recipients and other parents living in poverty, these data suggest a pattern of incredible determination to be good parents in the face of immense hardship.

In recent years, the poor seem to have become the primary scapegoat for social

13Christina Blizzard, "Breaking the poverty cycle", *Toronto Sun* (28 November 1999), quoted in Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Department of Justice, 2000).

14" William Thorsell, Editorial, *Globe and Mail* (30 November 1996), quoted in *Promoting Equality: A New Vision* (Ottawa: Department of Justice, 2000).

15Tom Blackwell, "Even tougher welfare rules on back burner 1999 Ontario poll shows 67% favoured parenting classes for recipients," *The Ottawa Citizen*.

and economic changes that are seen as global in scope and beyond the control of governments or individuals. There was a dramatic rise in discriminatory attitudes toward the poor which emerged from the recession in the 1990's and fed directly into legislative attacks on the poor and on the programs on which they relied during the 1990's. Food banks which tracked the treatment of poverty issues in the media documented a dramatic shift from sympathy toward intolerance between 1991 and 1993.¹⁷ This shift was immediately picked up by politicians. In March of 1993 Premier Klein of Alberta noted that: "There is a public mood that we have to get really tough on those who abuse the [welfare] system."¹⁸ Premier Harcourt of British Columbia noted that the coverage of alleged welfare fraud in the media had become "relentless" at that time. "Every day, a camera in your face about this welfare case or that welfare case."¹⁹ Preparing for the 1995 election in Ontario, the Harris election team was astounded at the extent of hostility toward welfare recipients shown in public polling.

After conducting focus groups on child poverty in 1996, Frank Greaves of Ekos reported to the Federal Government in a confidential memo:

Welfare recipients are seen in unremittingly negative terms by the economically secure. Vivid stereotypes (bingo, booze, etc.) reveal a range of images of SARs from indolent and feeble to instrumental abusers of the system. Few seem to reconcile these hostile images of SARs as authors of their own misfortune with a parallel consensus that endemic structural unemployment will be a fixed feature of the new economy.²⁰

¹⁶Special Tabulation, ARB-Strategic Policy, HRDC.

¹⁷ Gerard Kennedy, "Coping Strategies of People Using Food Banks" (1994) Expert Report prepared for the Board of Inquiry in *Kearney et al. v. Bramalea Ltd et al* (1998), 34 CHRR D/1 (Ont. Bd. Inq.); finding of discrimination upheld in *Shelter Corporation et al. v. Ontario Human Rights Commission et al* (2001), 143 O.A.C. 54 (Ont. C.A.).

¹⁸ Todd Kimberly, "Reforms Open to Change - Klein," *Calgary Herald* (28 March 1993) p.1.

¹⁹ Jean Swanson, *Poor-Bashing: The Politics of Exclusion* (Toronto: Between the Lines, 2001) p.100.

²⁰ Ekos Research Associates Inc., *Memorandum Concerning Child Poverty Focus Groups: Revised Conclusions* (February 4, 1997). Secured through a Freedom of Information Request.

Disenfranchising welfare recipients and other poor people has, indeed, become an issue on which, as Oliver Wendell Holmes would say, “elections are won or lost”, but I am not sure that this means that courts should hesitate to intervene to protect the interests of welfare recipients or others in need, when discriminatory policies based on prejudice and stereotype deny their most basic needs.²¹

The justice system, of course, is itself not immune from discriminatory attitudes toward the poor. Justice Ferrier, in the *Clarke* case at Tab 28, found in the context of challenge for cause in jury selection, that

There is widespread prejudice against the poor and the homeless in the widely applied characterization that the poor and the homeless are responsible for their own plight. It is not a large leap to conclude that this bias could incline a juror to a certain party or conclusion in a manner that is unfair.²²

In a climate of increased hostility and discrimination toward the poor, courts must be doubly cautious that negative stereotypes and prejudices do not taint assessments in court of parenting skills or possibilities for rehabilitation. With increasing poverty in Ontario and elsewhere, we have also seen a move toward the criminalization of survival strategies, such as panhandling, or the disproportionate response to welfare fraud in comparison to other types of fraud.²³ The criminal justice system has, to some extent,

²¹ Peter Hogg in *Constitutional Law of Canada* 3d ed. Scarborough, Ont.: Carswell, 1992) at 44-9 - 44-10 invokes the words of Oliver Wendell Holmes to suggest that “judges need a clear mandate” to enter areas involving levels of expenditure on social programs, and states that section 7 does not provide that mandate. See, however, *Gosselin, supra*, at paras. 330-333 (per Arbour, J, in dissent).

²² *R. v. Clarke*, [2003] O.J. No. 3883.

²³ According to available data on fraud prosecutions and sentencing under the *Income Tax Act*, it appears likely that welfare fraud is far more likely to result in criminal prosecution and incarceration than income tax fraud. In 1999, the Ontario government reported that there were 517 convictions for welfare fraud in Ontario. In the same year, there were only 32 convictions in provincial court for income tax evasion under section 239 of the *Income Tax Act*. Three cases were transferred to another court. In 2000-2001, there were 430 convictions for welfare fraud and only 47 convictions under section 239 of the *Income Tax Act* in provincial court, with 2 cases of income tax fraud referred to another court. (Data provided in special runs from Statistics Canada Centre for Justice Statistics, 2002)

been enlisted in the discriminatory scapegoating of the poor, and surely it is the courts role to resist such enlistment.

Increasing poverty and distitution also mean that poor people suffer from the differential *effect* of particular sentences. This was demonstrated in the recent Coroner's Inquest in Ontario into the death of Kimberly Rogers , the results of which are found at Tab 5. of the materials.²⁴ A six-month sentence served alone, in an overheated apartment during the summer, by a pregnant woman initially cut off of welfare hopelessly indebted, was clearly different in its effects from the same sentence had it been served by a professional living in an air conditioned home and going to work each day.

Justice can easily be compromised for the poor if governments do not provide services necessary for just and appropriate sentencing and incarceration can frequently result from failures of governments to provide what is necessary for community living. The recent case of *R. v. Wu*²⁵ at the SCC, at Tab 26 of the materials, made it clear that poor people should never face incarceration because of an inability to pay a fine, but the Court did not really address the inherent problem of imposing a statutory minimum fine in a province such as Ontario where no fine option program has been made available. Sentencing judges often have no appropriate alternative when poverty makes the imposition of a fine an unacceptable choice. The result of restricted judicial choices is too often that poor people unable to pay a fine get bumped up to a more serious sentence, and incarceration because of poverty remains our Dickensian reality.

Justice Wright summed up the predicament of an aboriginal man convicted of welfare fraud in Ontario and therefore and cut off of social assistance for life, in the case of *Johnson v. Ontario (Attorney General)*²⁶, at Tab 13 of your book:

²⁴ *Verdict of Coroner's Jury into the death of Kimberly Ann Rogers*, (December 19, 2002).

²⁵ [2003] 3 S.C.R. 530.

²⁶ [2003] O.J. No. 3085.

The unfortunate fact is that when he was sentenced to the fraud charge, the applicant was granted a suspended sentence, conditional upon him repaying \$175/month assistance, and whose rent alone was \$400/month. From a realistic point of view, it appears that we are back in the condition of England of the 1840s. In the short term it appears that jail will once again provide the service which Scrooge contemplated when he asked those soliciting funds for the poor: "What, are there no jails?"

Under international human rights law, what has been occurring in Canada is quite clearly a crisis of rights, both in the substantive denial of them and, just as important, the failure of courts to provide effective hearings and remedies. Craig Scott, professor of international law at Osgoode, in an article provided at Tab 20 of the materials, describes the emerging consensus of concern emerging from virtually all UN human rights bodies about poverty, hunger and homelessness in Canada as being so unprecedented and "pathbreaking" that it should be impossible for domestic courts to ignore in the statutory and constitutional protection of human rights.²⁷

As you know, the *Universal Declaration of Human Rights*, and subsequent international human rights covenants and conventions ratified by Canada, recognize adequate food, clothing and housing and other economic and social rights as fundamental human rights. The international jurisprudence makes it clear that recognizing the right to an adequate standard of living means more than accepting this as a worth policy goal. It means providing effective legal remedies to violations of the right in domestic law, and interpreting and applying domestic law consistently with this right.²⁸

²⁷ Craig Scott, "Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally Into the Spotlight?" (1999) 10 *Constitutional Forum* 97-111 at pp. 99-100.

²⁸ United Nations Committee on Economic, Social and Cultural Rights, Nineteenth Session General Comment No. 9: The Domestic Application of the Covenant, Committee on Economic, Social and Cultural Rights, Geneva, 16 November - 4 December 1998, E/C.12/1998/24. See also U.N. Committee on Economic, Social and Cultural Rights, Concluding Observations on Canada, E/C.12/1993/5 (10 June 1993) at para. 21: **"Error! Main Document Only.** The Committee is concerned that in some court decisions and in recent constitutional discussions, social and economic rights have been described as mere "policy objectives" of governments rather than as fundamental human rights. The Committee was also concerned to receive evidence that some provincial governments in Canada appear to take the position in courts that

As global economic forces bring new challenges to human rights, courts around the world are placing increasing emphasis on international human rights norms, and the promotion of an international rule of law to which all governments can be held accountable. Many new constitutional democracies like South Africa, are explicitly incorporating social and economic rights recognized in international law as constitutional provisions to be judicially enforced. In interpreting and applying these rights, the Constitutional Court of South Africa has made it clear that it is not engaged in a radical departure from the traditional judicial role, but rather is engaged in protecting the same constitutional values of dignity and equality which are at the core of any constitutional democracy.²⁹ They have found Canadian jurisprudence particularly helpful.³⁰

The Supreme Court of Canada, in turn, has increasingly turned to international human rights law and jurisprudence emanating from U.N. human rights bodies to guide its interpretation of the open-ended provisions of the Canadian Charter, which the Court notes, is the primary means by which international human rights law achieves domestic effect. The Court found, in the *Baker* case, at Tab 18, that international human rights will not only be a “critical influence” on the interpretation of *Charter* rights, it must also

the rights in article 11 of the Covenant are not protected, or only minimally protected, by the Charter of Rights and Freedoms.”

²⁹ See, for example, *Government of the Republic of South Africa v. Grootboom* (2001) (1) South African Law Reports 46 (CC) at para. 1:

The Constitution declares the founding values of our society to be “[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms.” This case grapples with the realisation of these aspirations for it concerns the state's constitutional obligations in relation to housing: a constitutional issue of fundamental importance to the development of South Africa's new constitutional order.

³⁰ For example, the Court considers the Supreme Court of Canada's decision in **Error! Main Document Only.** *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 in considering appropriate remedies to violations of the right to health (*Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC), 2002 10 BCLR 1033 at para. 110.

inform the interpretation and application of domestic law and the reasonable exercise of discretion.³¹

Where governments have argued that the judiciary should leave issues of resource allocation to legislatures, the Supreme Court has replied, in cases like the *Eldridge* case, at Tab 8, that if positive measures are required to ensure meaningful equality for protected groups it is the court's role to ensure that appropriate resources are allocated. Justice LaForest wrote for the majority:

To argue that governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits bespeaks a thin and impoverished vision of s. 15(1).³²

Where governments have insisted that security of the person in section 7 can not possibly require governments to take measures to protect people from poverty or homelessness because this would assign to the judiciary a role restricted to legislatures, two of the nine justices, in *Gosselin*, at Tab 10, said section 7 does require governments to provide adequate social assistance and six others said they would not rule out this "novel" application of section 7 in a future case. All 9 agreed that courts can require governments to take positive measures to protect security of the person in the context of the administration of justice.

The Supreme Court of Canada has thus provided lower courts with a solid jurisprudential foundation through which the rights of poor people can be re-valued in the justice system, and through which the justice system can begin to play its proper role in considering challenges to fundamental human rights violations in Canada. The Supreme Court has been insistent that courts must accept their new constitutional

³¹ *Baker v. Canada*, [1999] 2. S.C.R. 817 at paras. 69-71.

responsibility to protect fundamental rights, noting that flexible approaches to remedy can allow courts to respect their institutional limits without abandoning the rights of the most vulnerable. Pre-conceived ideas about the role of courts should not be the basis for denying poor people the full benefit of the Charter's protections and promises.

As Justice McLachlin (as she then was) put it:

Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the constitution. But the courts also have a role to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.³³

To date, however, the full nature of judicial responsibility in the area of poverty is yet to be written. The Supreme Court has dealt with only two cases of welfare in 20 years. Chief Justice McLachlin wrote the passage I just quoted in the context of the rights of a tobacco giant. It is really up to lower courts and to judges who see people who are homeless and living in poverty on a regular basis, and who deal with the direct interaction of poverty and the justice system, to begin to apply these broad principles circumscribing the role of courts in a constitutional democracy more effectively to issues of poverty.

Poor people are really asking no more than equal treatment in the justice system. They are asking that the same principles applied to others' rights be applied to theirs, that words like 'equality' and 'security of the person' be read so as to include their equality and security as well as others'. They are asking that their rights not be swept to the side, in support of a pre-defined limit to the role of the judiciary. Rather, they are asking

³² *Eldridge*, *supra* note 30. at 677-78.

³³ *RJR-MacDonald Inc. v Canada (A.G.)*, [1995] 3 S.C.R. 199 at paragraph 136.

that courts define their role and responsibility in a manner which responds to the unique challenges of poverty and respects the rights of those who live its reality. They are asking, essentially, for a fair hearing.