the POVERTY and HUMAN RIGHTS PROJECT

# Poverty is a Human Rights Violation *

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## Introduction

This paper is about obstacles to an understanding that poverty is a human rights violation.

## The Commitment

Over the past 50 years Canada has committed itself to an understanding of human rights that encompasses two particularly important insights. One insight is that everyone is entitled to an adequate standard of living, some of the commonly accepted elements of which include access to food, clothing, and housing; just and favourable conditions of work; education; a degree of income security throughout a person's lifetime; and health, including protection from environmental causes of ill health. There has been a growing recognition that there is a collective responsibility to create a society in which these are entitlements, and are provided, not as a matter of charity, but as a matter of right, as incidents of social citizenship. This is evidenced by developments such as Canadian governments having ratified the *International Covenant on Economic, Social, and Cultural Rights,*[1] constructed a social safety net, established rights to social assistance for persons in need, and made an express commitment in the *Constitution*[2] to provide essential public services of reasonable quality to all Canadians.

The other important insight is that inequality is not an individual phenomenon. Rather, inequality is disproportionately experienced by certain groups in the society that are particularly vulnerable to marginalization and discrimination, in particular, Aboriginal people, women, people with disabilities, and people of colour. This insight is reflected by the emergence in statutory and constitutional human rights law of the principle that when a government makes a legislative choice that has the effect of exacerbating the inequality of a group that suffers from pre-existing disadvantage, it violates the norm of equality. A corollary is that when a government creates a program specifically designed to assist a particular disadvantaged group this is not to be construed as discrimination against relatively advantaged individuals and groups. Further, in some instances, government must be understood to have a positive obligation to take steps to ensure that benefits and protections are provided to disadvantaged groups. This is known as the principle of substantive equality.[3]

## The Contradiction

However, in the past decade or so, the social safety net has been substantially weakened. One key example is cuts to social assistance programs and services relied upon by the most disadvantaged people, accelerated by federal government cutbacks to transfer payments and the repeal of national standards for social assistance programs. Both dimensions of human rights have been diminished: the right to an adequate standard of living, and the idea that government measures should not exacerbate the inequality of already disadvantaged groups.

## Gosselin v. A.G. Québec

In this paper we refer to the case of *Gosselin* v. *A.G. Québec*[4] because it is as an example of a government cut to a basic social program, in this case social assistance. *Gosselin*, which is a class action, tells a story about government and judicial responses to rights-based challenges to such cuts. However, references to the *Gosselin* case are not meant to suggest that lack of access to adequate social assistance is the only measure or indication of poverty. Rather, it is an example, albeit a stark one. Nor should it be concluded that access to social assistance is a sufficient response to poverty, especially given that even the regular social assistance rates in every jurisdiction fall well below the poverty line, based on any accepted measure. Poverty is being created and exacerbated by legislative measures including the withdrawal of federal programs in support of affordable housing, cuts to public education and related services such as after school programs, tuition rates increases which put advanced education out of reach for people from low income families, and reductions in publicly funded health care services.

At issue in Gosselin is a regulation, section 29 (a) of the *Regulation Respecting Social Aid*[5] of Québec which reduced social assistance for adults under age 30 to two thirds of the regular rate which the government had established as necessary to meet basic needs for food, clothing, and shelter. The question before the Supreme Court of Canada is whether it is a permissible legislative choice to reduce the social assistance entitlement of a group composed of otherwise eligible recipients, such that its members are deprived of the means to meet basic needs. The appellant, Louise Gosselin, and interveners including the National Association of Women and the Law[6] and the Charter Committee on Poverty Issues,[7] take the position that the regulation violated ss. 7 (security of the person) and 15 (equality) of the *Canadian Charter of Rights and Freedoms*,[8] and a provision of the *Québec Charter of Human Rights and Freedoms*[9] that establishes a right to social assistance for persons in need. The appeal was heard by the Supreme Court of Canada on October 29, 2001 and at the time of writing the decision is under reserve.

The record in *Gosselin* shows that the effects on young adults of the section 29 (a) cuts were devastating, from malnutrition, to being forced into demeaning survival strategies, to depression, despondency, and acute psychological stress.[10]

For the young women in the group there were also gender specific effects.[11] As a survival strategy, some young women on the reduced rate bore children in order to become eligible for benefits at the regular rate. Women who were pregnant while on the reduced rate were particularly likely to have low birth-weight babies, who are known to have a high incidence of health and learning problems. According to accounts of the Montreal Dietary Dispensary, the nutritional status of some of these pregnant women was comparable to that of pregnant women in Holland during the Great Famines of the World War II period.

A number of young women on the reduced rate engaged in prostitution, or accepted unwanted sexual advances to try to keep their apartments, to pay monthly expenses, such as heat and electricity, or to buy food.

The appellant, Louise Gosselin, was no exception. She had to resort to what the trial judge described as "degrading ways of surviving."[12] She exchanged her sexual availability for shelter and food; she engaged in prostitution to get money to buy clothes so that she could look for a job; she survived an attempted rape by a man from whom she was obtaining food; she was sexually harassed by male boarders when renting a room in a mixed Boarding House.

Louise Gosselin said that when she turned 30 she felt as though she had won a victory simply by managing to stay alive.

Extreme poverty of the order manifest in a case such as *Gosselin* can be understood as a question of individual human dignity and individual social and economic rights. It can also be understood as a question of substantive equality rights, based on analysis of the effects on disadvantaged groups.

The regulation at issue in *Gosselin* was explicitly targeted at young adults reliant on social assistance. In all jurisdictions in Canada this group of people reliant on social assistance falls farthest below Statistics Canada's low-income cut-offs.

As a group, people reliant on social assistance face widespread prejudice, stereotyping, social exclusion, and discrimination. Negative myths abound about social assistance recipients, including notions that they are morally inferior, lazy, dishonest, not willing to work, and likely to cheat the system. The stigmatization and poverty that they experience lead to feelings of shame, inadequacy, and lack of self worth.

Single young people who are considered "capable of working" and who seek social assistance are particularly vulnerable to negative stereotyping as lazy and irresponsible, and thus suffer loss of self-esteem. Section 29 (a) plays on and perpetuates a negative stereotype of young poor people. The premise of the regulation is that young poor people will not seek work or job training unless they are coerced into it by means of severe economic deprivation.

For the young women in the group there is an intersection between age, poverty and gender. The significance of the impact on Louise Gosselin and other young women affected by the challenged regulation is most accurately understood when account is taken of the context of women's social and economic inequality. That context includes women's greater likelihood of being poor and in need of the security that social assistance represents; and poor women's increased vulnerability to particular kinds of harms that reinforce their subordination.

Poverty is a fact of many women's lives in Canada. More women than men are poor. They

experience greater depths of poverty than men, and they are more likely to be poor at every stage of their lives. Aboriginal women, women of colour, and women with disabilities are especially vulnerable to poverty. Rates of poverty are particularly high among single women when they are under 24 and when they are over 65. Most social assistance recipients are women.

Among the women most likely to have to rely on social assistance at some point in their lives are women who are recent immigrants to Canada and Québec, Aboriginal women, and women with disabilities. This makes access to adequate social assistance especially important to the well being of these particularly vulnerable groups of women.

Women reliant on social assistance experience negative effects of poverty even when receiving "regular rates" because regular rates allow for such a marginal existence. But these negative effects are intensified when, as in *Gosselin*, women are forced to survive without even the means to meet basic needs. In such circumstances, women become prey to pressure to exchange their sexual services for food and shelter, either as prostitutes or in transitory relationships with men. Young women are particularly vulnerable to the commodification of their sexuality as a survival strategy. Homelessness and life in communal shelters also increases women's vulnerability to sexual assault and sexual harassment.

Lack of access to adequate social assistance exacerbates women's inequality in domestic relationships, diminishes their capacity to leave abusive relationships, and increases their vulnerability to violence.

These patterns were borne out by the facts in the *Gosselin* case.

The harms that young women will inevitably experience when they live below subsistence level affect their economic and other opportunities as older women in terms of psychological well-being, physical health, access to job opportunities, and long term financial security.

The Québec regulation challenged in *Gosselin* is not an isolated situation. Without the constraint of the *Canada Assistance Plan*[13] standards, governments are choosing to drive rates still lower, to reduce entitlement periods, and impose new eligibility requirements that disentitle people in need. The usual candidates for relegation to the ranks of the undeserving poor are young, employable adults, who even in times of high unemployment are vulnerable to negative stereotyping as lazy and unmotivated to seek work, and single parents in need, most of whom are women, who are also subject to negative stereotyping as promiscuous and irresponsible. These stereotypes are an overlay on the negative stereotypes and political unpopularity to which all people reliant on social assistance are subject.

For any member of Canadian society, lacking means of subsistence, access to social assistance in an amount adequate to meet basic needs is fundamental to human dignity and security of the person. As well, members of disadvantaged groups are disproportionately

affected by such cuts. Women, people with disabilities, and Aboriginal people are disproportionately reliant on social assistance. These groups, as well as persons of colour, are particularly vulnerable to poverty. And when they lack a subsistence income they are affected in particular ways that can deepen their inequality and compromise their enjoyment of all their human rights.

## The Challenge

It is clear that human rights norms, laws, and institutions should stand as a bulwark against government choices that attack the human dignity and security of individuals, and exacerbate the inequality of groups.

The question we want to address is what the obstacles are to realizing the human rights commitments that we have identified. We will talk about five obstacles: blaming of individuals and group stereotyping; the legal treatment of social and economic rights; difficulties with adverse effects analysis; the assumption that poverty is not about groups; and a conception of democracy that is too thin.

### 1. Blaming of Individuals and Group Stereotyping

Contemporary understandings of human rights are the product of debate and evolution. However, this is a time when an earlier, classical liberal, version of rights is reasserting itself. Central to this earlier theory is an extreme individualism that conceptualizes people as autonomous, self-defining individuals whose principal requirement for flourishing is freedom from state interference. This conception of the individual, separated from social reality and group context, fits well with the idea that poverty is an individual failing, which does not engage a societal responsibility, but, rather, should be dealt with by the individual alone.

The extreme individualism of this classical liberal theory may even lend credence to the idea that social programs to assist people in need are morally suspect — and therefore, certainly a fair target for cost-cutting — because they may undermine the goal of fostering self-reliance. Market liberalism, which has gained renewed vigour in recent decades, is consistent with this political theory.

Ironically, the rhetoric about the importance of individual self-reliance co-exists with negative stereotyping and blaming of certain groups of people who are poor. Patterns of concentrated poverty among certain groups, such as people with disabilities and single mothers, call into question the validity of individualistic explanations, and therefore cry out for some other analysis and explanation.

## 2. The Divided Rights Regime

The extreme individualism of classical liberal thought promotes a view of government as a threat to individual liberty, and not a significant actor in creating the conditions necessary for human flourishing.

This combination of the idea of the autonomous, self-defining individual, and a view of government as the key threat to freedom, can, and in 19th century United States constitutional law, did, give rise to a version of constitutional rights as primarily interested in constraining government from interfering with what should be a large sphere of individual freedom to act.

The development of substantive equality thinking in Canadian statutory and constitutional human rights jurisprudence, and the ratification of the ICESCR represent a significant departure from 19th century classical liberalism and United States constitutional law. Nonetheless, it is this older classical liberal conception of rights that gives rise to a divided regime wherein social and economic rights, which are redistributive, are understood to be merely expressions of government aspiration, whereas, civil and political rights, such as the right to a fair trial, which is a check against government interference with personal liberty, are understood to be "real rights."

This division is relied on by attorneys general in Canadian constitutional cases involving social benefit schemes. It is claimed that rights pertaining to social and economic policy should be treated differently from civil and political rights. More, particularly it is contended that the *Charter* is a negative rights instrument, that is, a restraint on too much government action or the wrong kind of government action, not a positive rights instrument, which can require government to act to eliminate disadvantage.

It is argued that the structure and content of the international human rights treaties support this view of the *Charter* as a purely negative rights instrument which only ever constrains government conduct. In this regard, certain distinctions within the international regime are identifiable. Economic and social rights are contained in a separate treaty from civil and political rights. And, whereas civil and political rights are said to be rights that must be implemented immediately, social and economic rights are subject to "progressive realization," that is, to implementation to the greatest extent possible given available resources. Further, at the international level there is no complaint mechanism for violations of social and economic rights, although there is a complaint mechanism for alleged violations of civil and political rights.

The question is whether these distinctions have any pursuasive implications for the interpretation of *Charter* rights in Canada. Although civil and political rights and economic, social and cultural rights are divided in the international human rights framework, and somewhat different obligations are understood to flow from each, there is nothing inherent

in the ICESCR that determines that interests in social and economic security should not be subject to protection by courts and tribunals in Canada on the same footing as civil and political rights interests. On the contrary, the UN Committee responsible for oversight of the ICESCR has specifically stated its objections to failing to provide a means of remedying violations of ICESCR rights under Canadian law. In its concluding observations on Canada's second report under the ICESCR, the Committee made these remarks:

> 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 is also concerned to receive evidence that some provincial governments in Canada appear to take the position in courts that the rights in article 11 of the Covenant are not protected, or only minimally protected, by the *Charter of Rights and Freedoms*. The Committee would wish to have heard of some measures being undertaken by provincial governments in Canada to provide for more effective legal remedies against violations of each of the rights contained in the *Covenant*....
>
> The Committee is concerned that provincial human rights legislation has not always been applied in a manner which would provide improved remedies against violations of social and economic rights, particularly concerning the rights of families with children, and the right to an adequate standard of living, including food and housing.[14]

Given these remarks, it is not surprising to find that the Committee made the following suggestions and recommendations:

> In recognition of the increasingly important role played by the courts in ordering remedial action against violations of social and economic rights, the Committee recommends that the Canadian judiciary be provided with training courses on Canada's obligations under the *Covenant* and on their effect of the interpretation and application of Canadian law.
>
> The Committee encourages the Canadian courts to continue to adopt a broad and purposive approach to the interpretation of the *Charter of Rights and Freedoms* and of human rights legislation so as to provide appropriate remedies against violations of social and economic rights in Canada.[15]

The *Charter* and human rights legislation are obvious vehicles through which legal effect can be given to Canada's treaty obligations. Moreover, in people's lived experience, the interconnections between poverty and violations of civil and political rights are as profound. What this means is that it does not serve the interests of justice or logic to take a categorical approach to the protections that people living in poverty need. Nevertheless, there is a continuing danger in Canadian law, that civil and political rights will be treated as "real rights" while economic and social rights are relegated to the category of "not real

rights at all." The question is by no means settled. The pending decision of the Supreme Court in Canada in *Gosselin* may shed some light on the matter, but the tendency for the economic dimensions of inequality to be separated from rights is likely to be an ongoing issue, as long as the ideas associated with classical liberalism resonate powerfully in Canadian politics and law.

## 3. Difficulties in Equality Analysis

The tug of classical liberalism is evident in the difficulty that courts are having in applying equality analysis in anti-poverty cases. Substantive equality analysis is concerned with addressing the conditions of historically disadvantaged groups. This requires addressing laws and policies, including those which appear to be neutral, which maintain or deepen their disadvantaged status. However, classical liberalism is characterized by an unwillingness to acknowledge that social context or group membership has any implications for individual freedom. Its concern is to liberate individuals from intentional, inaccurate group stereotyping. Such an anti-contextual mindset makes it difficult to actually see group disadvantage, and to recognize that people's freedom of choice may be constrained by group circumstances, including persistent forms of discrimination. This mindset creates a number of potential obstacles which can defeat a claim of discrimination in a poverty case.

### a) Shifting the Attention Away from Detrimental Effects

It is an accepted principle in Canadian equality rights law that discrimination is identified by the effects on the victim, not by the intentions of the perpetrator. Nonetheless, it is still the case that one way to discredit a claim of discrimination is to shift attention away from the harmful effects complained of by urging a focus on good intentions. In *Gosselin*, for example, the A.G. of Québec argued that the intention of the government, when it reduced the welfare of those between the ages of 18 and 30 to 170 dollars per month, was to improve the debilitating conditions of this disadvantaged group, including their low self-esteem and unemployment.

In aid of this argument, the A.G. pointed to the employability and workfare programs that were made available to some welfare recipients. However, because the employability programs did not result in most people getting back to the regular rate, the A.G. also argued that the government's purpose takes priority over the harmful effects. A crucial question, therefore, in a case such as *Gosselin* is whether the principle that discrimination is a question of effects, and not merely a question of intention, is actually applied.

Another way to shift attention away from the adverse effects complained of is to argue that although there may have been adverse effects, there were more important beneficial effects. This becomes a question of evidence. In *Gosselin* there was no evidence that instituting a reduced rate of social assistance had beneficial effects, even when the government's employability programs were taken into account. However, this is also a

question of equality rights theory. The question is whether evidence of positive effects for some claimants should be allowed to stand as a sufficient justification for harmful effects on others. This should be a non-issue. Early s. 15 case law in the Supreme Court of Canada, beginning with *Andrews* v. *Law Society of British Columbia,*[16] established that to justify discriminatory effects a respondent must show that a measure that violates a right impairs that right as little as possible. It is important that the requirement of minimal impairment be maintained.

**b) Breaking the Cause and Effect Linkage Between the Challenged Law, The Effects Complained of, and the Named Ground of Discrimination**

There are a number of techniques for breaking the cause and effect linkage between the challenged law, the harmful effects complained of, and a named ground of discrimination.

**i) Splintering the Group**

One technique is to argue that the adverse effects complained of are not confined to one group. This technique is a familiar one. In the early days of sexual harassment litigation it was argued that sexual harassment cannot be sex discrimination because men can also experience sexual harassment. An attempt to diffuse adverse effects was successful in the case of *Masse* v. *A.G. Ontario,*[17] in which discrimination against social assistance recipients was alleged. Rejecting the challenge to the 22 per cent welfare cuts, a majority of the Court held that those in receipt of social assistance do not constitute a protected group under s. 15 of the *Charter*. This conclusion, that people on social assistance do not constitute a protected s.15 group, was based, in part at least, on the fact that there are people living in poverty who are not in receipt of social assistance. Although that factual description is accurate, it does not necessarily follow that the challenged welfare cuts were not an attack on a group that is characterized by poverty.

In *Gosselin*, the challenged regulation made an explicit distinction on the basis of age, logically precluding a claim by the defence that members of other age groups were also affected. However, this is always a potential hurdle in a case of alleged adverse effects discrimination. For example, in *Thibaudeau* v. *A.G. Canada*,[18] the Federal Court of Appeal held that taxing child support payments in the hands of the custodial parent, while granting the non-custodial parent a tax break, was not sex discrimination, even though the vast majority (more than 90%) of those negatively affected were women. The Court reasoned that it could not be sex discrimination against women because some men who were also custodial parents were negatively affected by the taxation rules. Similarly, in *Gosselin*, the challenged regulation, on its face, was sex neutral, and race neutral. Showing that the regulation nonetheless had adverse effects on women, for example, depends on a court being willing to accept that lack of subsistence income has particular effects on women. In turn, this

depends on a willingness to see the specific harms experienced by women in the context of women's general social and economic inequality.

A variation on this splintering technique is to argue that not everyone in the affected group identified by the applicants is affected by the challenged law. This technique was also used in the early cases about pregnancy discrimination. Women said that discrimination based on pregnancy was discrimination based on sex. Respondents argued that it could not be sex discrimination because not all women get pregnant and not all women who do get pregnant are pregnant all of the time. In other words, pregnant women were a sub-category of women, and sex discrimination could only be occurring if a law or policy affected all women adversely all of the time.

This argument has not been raised in *Gosselin*. However, the logic of the argument, if it were applied, would preclude an analysis of the particular harmful effects of inadequate social assistance on subgroups of recipients, people with disabilities, immigrants, groups for whom lack of access to adequate social assistance may have dimensions that are relevant to understanding the full extent of the harm of schemes that deny adequate assistance to individuals. In *Masse* an argument along these lines was adopted by the Ontario Divisional Court. As part of its finding that people on social assistance are not a protected s. 15 group the majority said that s. 15 of the *Charter* protects "discrete and insular minorities,"[19] and does not protect disparate groups with diverse membership. In the view of the Court people on social assistance are such a group. It should be noted that in other cases courts have reached the opposite conclusion, that is, they have held that people in receipt of social assistance and related social services are protected by s. 15 of the *Charter.*[20]

**ii) Relocating the Cause**

Another link-breaking technique is to relocate the cause of the harmful effects complained of so that the challenged law is not seen as responsible for the suffering of the applicants. This technique was successfully employed by the respondent in *Gosselin* in the Québec Court of Appeal. It is has two strands. One argument is that the individual social assistance recipient is to blame for not receiving the regular rate of assistance. The gist of this argument is that the government did not discriminate against young adults reliant on social assistance. It merely established reasonable conditions for the receipt of assistance, that is, receipt of the regular rate was conditional on participation in employability and workfare programs. The government said it could not explain why the vast majority of people remained on the reduced rate, and did not participate in the employability programs. It suggested that they made that decision of their own free will.

In *Gosselin*, the reasonable conditions argument is weak because there were not enough spaces for the 70,000 18 - 30 year olds in the employability and workfare programs. There were eligibility requirements, such as literacy, and there were

waiting lists and administrative delays. People were kept on the cut rate while they waited to get into an employability program and were returned to the cut rate once a particular program was over.[21]

With the exception of the workfare programs, the possibility for recovery of the regular rate through participation in the government programs was only partial, not full — even those who got into the programs were barred from receiving the regular rate.[22]

Further, although the government says participation in the programs was voluntary, this is hardly accurate. The conditions under which the programs were imposed on the under 30 group were highly coercive, contrary to the workfare provision of the *Canada Assistance Plan*, which was in force at the time, and contrary to the *Québec Charter*. The context in which the conditions were imposed was also oppressive, with Louise Gosselin, for example, prostituting herself in order to get money to buy clothes so that she could attend for a job interview.

Moreover, there was no individual assessment of the reasons why people in the under 30 group were not in the employability and workfare programs. Section 29 (a) cut social assistance across the board for all 18-30 years olds who had been individually assessed as being in need, and then failed to ensure that everyone was able to get back to the regular rate through participation in employability programs. In the Québec Court of Appeal Robert J.A. found that 73% of young social assistance recipients received only the reduced rate.[23]

The fact that some victims of the government discrimination were able to fulfill the conditions and get back to the regular rate of welfare by participating in employability programs does not overcome the harmful effects and should not be considered to minimally impair rights to equality and security of the person.

**iii) Blaming the Harm Complained of on the Pre-Existing Disadvantage of the Group**

Another strand of the A.G.'s argument in *Gosselin* that is designed to break the cause and effect linkage involves trying to shift responsibility away from the legislation to the group. This is not an argument about individual freedom of choice. Rather, it is an argument about the characteristics of people on social assistance as a group. The argument is that tendencies towards depression, suicide, and low self-esteem are not the result of inadequate social assistance. Rather, these are characteristics of the people who seek social assistance. They are from troubled family backgrounds, and they are unemployed.

This means that, from the government's perspective, the group of people who are reliant on social assistance cannot claim stress, depression, health problems, suicide attempts, unwanted relationships, prostitution, and vulnerability to violence as harms

caused by trying to survive on 170 dollars a month, rather these are just the pre-existing characteristics of the group and their "lifestyle." This line of argument is also familiar. In early pregnancy discrimination cases respondents argued, with some success, that the so-called discriminatory effects of laws and policies that imposed penalties on pregnant women were not caused by those laws and policies, but rather by nature.

In other cases also, variations on the themes of blame the individual or blame the pre-existing inequality of the group, have included blaming another law, and blaming society in general.

Just as courts and tribunals hacked their way through the undergrowth of such arguments in early sex equality cases so too is some path-hacking required in the area of anti-poverty rights.

**4) Gender-Neutral, Race-Neutral and Disability-Neutral Framing of Legal Cases**

A fourth obstacle to advancing the discourse about poverty as a human rights issue is a deficiency in the way that anti-poverty cases are usually framed. At the first stage of a case when the record is being developed, cases are usually framed in gender-neutral, race-neutral and disability-neutral terms. Typically, not much evidence is adduced about harms to women, Aboriginal people, people of colour, recent immigrants, or people with disabilities. This results in an impoverished analysis of the nature and extent of the harms that flows from lack of access to a subsistence income, or from cuts to other essential social services. The less serious the harm appears to be, the lighter the government's burden of justification, and the greater the danger that a decision-maker either does not feel compelled to find a rights violation, and to grant a just and appropriate remedy, or issues a judgement that makes it too easy for a government to respond by equalizing the benefit downwards.

Of course, poverty is a problem for every individual who experiences it. However, talking about its group dimensions can strengthen the claim that there is a societal obligation to address it. When we look at poverty through a group-based equality lens we open up new opportunities to see that poverty is more than an individual problem, because the patterns of who is poor are entrenched and reflect long-standing discrimination in the society. The analytical risk of failing to take account of the particular effects on disadvantaged groups is that the nature and extent of the harm of poverty-producing measures and their potential to reinforce pre-existing disadvantage and compromise fundamental interests may not be fully appreciated. Purely individualistic and gender-, race-, and disability-neutral explanations of poverty are just too simplistic. Commentary about group-based effects tells more of the truth of what is happening; it can show that there are qualitatively different impacts on certain groups; it may implicate a range of different *Charter* rights and treaty provisions; and it can help to

call into question the validity of the thesis that poverty is all about individual irresponsibility.

In the *Gosselin* case, up to the level of the Supreme Court of Canada, the legal analysis of the situation of the 70,000 people between 18 and 30 who were cut to $170 per month was conducted as though the group was an undifferentiated mass. It is certainly possible to look at the challenged legislative scheme in this case and conclude on the basis of a purely individualistic analysis that the regulation violates the Charter. However, that was not the outcome in the Québec Court of Appeal. One judge found that there was no discrimination within the meaning of s. 15. A majority found that although there was discrimination, the discrimination was justified by the government's goals. The Court of Appeal may have underestimated the harm caused by the challenged regime, in part because no specific analysis was offered to that Court about the impacts on vulnerable sub-groups of 18 - 30 year olds.

**5. A Thin Conception of Democracy**

A further obstacle to an understanding of poverty as a human rights issue is the notion that it is undemocratic for courts to interfere with government decision-making in the area of social policy. This perspective is strongly advanced in *Gosselin*, to support an argument that the courts should defer to the government's wisdom about how best to address "a difficult social problem." In the Supreme Court of Canada, the lawyer representing the A.G. of Ontario, an intervener in the case, baldly stated that the correct approach to inadequate social welfare schemes is to leave it to a dissatisfied electorate to vote the offending government out of office.[24]

At the heart of this argument is a view of democracy that is too thin. The idea that the courts lack the democratic legitimacy to address certain issues rings hollow for groups who are underrepresented within legislatures and whose interests are systematically marginalized in the political process. Without question, people reliant on social assistance are such a group. This has been recognized in a number of court and tribunal decisions. Justice Parrett of the British Columbia Supreme Court has described people on social assistance as a group, "to whose needs and wishes elected officials have no apparent interest in attending."[25]

At one level this is a debate about institutional relations between courts and governments. The Supreme Court of Canada has held that whether the court should defer to government decision-making is not a threshold determination that can be made about certain types of governmental decisions. It would be particularly inappropriate for social assistance schemes to be treated as a class of legislation that, by definition, invites greater deference by the court to government decision-making, given that the people who are most likely to be negatively affected by such an approach are disadvantaged people, who are already subject to discrimination and deprivation. It would be

inappropriate to reduce the government's burden of justification for a rights violation, just because a challenge involves a social program.

At a deeper level, the question about whether poverty is recognized as a human rights violation is a question about the values that the society embraces. The values of respect for human dignity, and commitment to social justice and equality, require that the society acts to ensure that everyone has access to food, clothing, shelter, social services, education, health, and just and favourable conditions of work. Understandings of democracy must be informed by these values.

## Conclusion

There are three prongs to establishing that poverty is a human rights violation.

To move the anti-poverty human rights agenda forward, whether it be in the courts, the political arena, or in the media, work is needed to address the following challenges.

An adequate standard of living is fundamental to the human dignity and security of every individual. Therefore, social and economic rights commitments must be understood to be embodied by the *Charter*. This requires that the artificial separation of social and economic rights from civil and political rights, and the concomitant downgrading of social and economic rights must be resisted. This is not only an issue for the interpretation of the right to security of the person in s. 7 of the *Charter*. It is also an issue for s. 15 because, drained of its capacity to address social and economic manifestations of inequality, s. 15 cannot deliver on the promise of substantive equality.

The international treaty commitments that Canada has made to taking steps to ensure that people enjoy an adequate standard of living, social security, education, and health can be of assistance in this endeavour.

There is also support to be found in Canada's human rights and *Charter* case law. Although this paper is about obstacles to moving human rights discourse forward, there are also many positive precedents to build upon.

It must be recognized that poverty, as well as being an issue of social and economic rights, is an issue of discrimination. Poverty is a manifestation of longstanding discrimination against marginalized groups in the society. It has particular and disproportionate effects on these groups. Ongoing work is needed to document and analyze the links between poverty and the conditions of inequality experienced by major disadvantaged groups.

There are various strategic possibilities. One possibility is to take anti-poverty cases to courts and tribunals. This is on the theory that while adjudicative bodies are not needed to design social programs, they are needed to strongly remind governments of their human rights obligations when their actions do not meet their obligations. Litigation can create an

opportunity to influence public opinion. But clearly this is not only an issue for the courts. It is also a matter of using human rights-based strategies in lobbying, teaching, and in the media in order to establish that poverty in Canada violates our fundamental values.

It must be recognized that addressing poverty, and calling on the language of rights to encourage governments to fulfill their social and economic rights and equality rights obligations, is not anti-democratic. Rather, achieving a more just and egalitarian society fulfills an essential democratic goal.

## END NOTES

* This paper was prepared for the December 2001 consultation of The Poverty and Human Rights Project. We wish to acknowledge the company of Margot Young and Rachel Cox in thinking about the ideas expressed in this paper.

1 GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 [hereinafter *ICESCR*].

2 *Constitution Act,* 1982, s. 36 (1) (c).

3 A discussion of cases may be found in Day and Brodsky's forthcoming publication, "Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty," in *Canadian Journal of Women and the Law.*

4 [1999] R.J.Q. 1033 (C.A.), affirming [1992] R.J.Q. 1647 (C.S.), leave to appeal to S.C.C. granted June 1, 2000 (S.C.C. File No. 27418). *Gosselin* was heard by the Supreme Court of Canada on October 29, 2001. Judgement was reserved.

5 R.R.Q., c. A-16, r.1

6 *Gosselin v. A.G. Québec,* leave to appeal to the S.C.C. granted June 1, 2000 (S.C.C. File No. 27418) (Factum of the Intervenor, National Association of Women and the Law, Supreme Court of Canada) [hereinafter the NAWL factum]. The NAWL factum may be found on the PovNet website: http://www.povnet.org/.

7 *Gosselin v. A.G. Québec,* leave to appeal to the S.C.C. granted June 1, 2000 (S.C.C. File No. 27418) (Factum of the Intervenor, Charter Committee on Poverty Issues, Supreme Court of Canada) [hereinafter the CCPI factum]. The CCPI factum may be found on the CCPI website: http://www.web.net/ccpi/.

8 *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.

9 *Québec Charter of Rights and Freedoms,* s.45, R.S.Q. 1977, c. C-12 [hereinafter Québec *Charter*].

10 References to the record in *Gosselin* may be found in the NAWL and CCPI factums, *supra* notes 6 and 7.

11 *Ibid.* The NAWL factum highlights the impact of the cuts on women, including Louise Gosselin. The equality arguments outlined below are similar to the arguments that were advanced by NAWL in its factum and oral argument in the Supreme Court of Canada. Many people contributed to the factum writing process. NAWL's counsel were Gwen Brodsky and Rachel Cox. Members of NAWL's case committee included Margot Young, Shelagh Day, Lucie Lamarche, Claudine Barrabé, Gunilla Ekberg, and Andrée Côté.

12 The NAWL factum, *supra* note 6 at para. 8, citing from the Gosselin Record Vol.18, at 3391. (Translation by NAWL Co-counsel, Rachel Cox.)

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

14 United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations on Canada,* E/C.12/1993/5 (10 June 1993), paras. 21 and 24.

15 *Ibid.* at paras. 29 and 30.

16 [1989] 1 S.C.R. 143.

17 (1996), 134 D.L.R. (4th) 20 (Ont. Div. Ct.), leave to appeal refused [1996] S.C.C.A. No. 373, affirming (1996), 89 O.A.C. (C.A.).

18 (1994), 114 D.L.R. (4th) 261 (F.C.A.), [1995] 2 S.C.R. 627.

19 *Masse, supra* note 17 at para. 373.

20 For example, see *Falkiner v. Ontario (Ministry of Social Services)* (2000), 134 O.A.C. 324. [2002] O.J. No. 1771 (Q.L).

21 In *Gosselin* (C.A.), *supra* note 4 at paras. 252-308, Robert J.A. analyzed the deficiencies of the various programs.

22 *Ibid.*

23 *Supra* note 4 at paras 101-102, 116, 285, 289, 396.

24 Videorecording of oral hearing, October 29, 2001. See also *Gosselin v. A.G. Québec,* leave to appeal to the S.C.C. granted June 1, 2000 (S.C.C. File No. 27418) (Factum of the Intervenor, Attorney General of Ontario, Supreme Court of Canada at para. 39).

25 *Federated Anti-Poverty Groups of B.C. v. British Columbia (A.G.)* (1991), 70 B.C.L.R. (2d) 325 at 344.