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Canada

Social Assistance, Equality, and Section 15 of the Charter

by
Andrew Fainer

Prepared under the supervision of Professor Daniel Proulx and
submitted to the School of Graduate Studies of the University of
Ottawa to fulfil the thesis requirement of the Master of Laws
degree (LL.M.).



Andrew Fainer, Ottawa, Canada, 1993



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Abstract

Prior to 1982 the Parliament of Canada and the legislatures of the provinces were the sovereign powers within their respective constitutional areas of legislative jurisdiction. In 1982, with the passage by the British Parliament of the Canada Act 1982¹, the Canadian Charter of Rights and Freedoms² (hereinafter referred to as the "Charter") became part of the "supreme law of Canada"³. In order to secure fundamental rights, limitations were thereby imposed on the sovereignty of Parliament and the government of Canada, and upon the sovereignty of the legislature and government of each province.⁴ Conversely, the powers of the courts were significantly enlarged. The Charter, in its application to legislative and governmental bodies, and through its enforcement by courts of competent jurisdiction⁵, was to guarantee to individuals certain rights and freedoms otherwise denied them by the normal political processes of democratic majority parliamentary rule. For one who might view the inadequacy of a social assistance system to be the result of the

¹Canada Act 1982 (U.K.), 1982, c. 11.

²Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11 [hereinafter Charter].

³Constitution Act, 1982, s. 52 (1), being Schedule B of the Canada Act, 1982 (U.K.), 1982, c. 11: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

⁴Charter, ss. 32 and 33.

⁵Charter, s. 24.

failure of the parliamentary majority to represent and act upon the concerns of the poor, the Charter would hopefully assist in remedying the failure.

"Social assistance" or "welfare" is the bottom layer of governmental income support programs. In 1986, the government of the province of Ontario appointed a committee to undertake a significant review of its social assistance system. Informed by the committee's report brought forth in 1988, entitled Transitions⁶, the government has seemingly engaged itself in a process of significant reform to the social assistance system. The reformed social assistance system should itself be informed by the exigencies and the limitations of the Charter.

At the heart of the Charter is the right to equality contained in section 15. In everyday terms, equality is the idea which not only allows everyone to say, "I too am a human being," but necessitates that one conducts oneself in a certain manner towards all other humans. The nature of this conduct, its manifestation in the state's provision of social assistance, and its concordance with the meaning given to equality within the context of the Charter are the principal themes of this inquiry.

The thesis is composed of three distinct parts. The first part provides an overview of the Ontario social assistance system in its current state of transition. The second part, in order to assist in the resolution of some conflicting directions in social

⁶Ontario, Report of the Social Assistance Review Committee, Transitions (Toronto: Queen's Printer for Ontario, 1988) (Chair: G. Thomson)

assistance reform and to assist in understanding the equality guarantees in the Charter as they would apply to a social assistance system, consists of a response to the essential question of equality: what is the worth of a human being? A response to this question is sought within the framework of Western traditions. Based mostly upon a review of the literature and an analysis of the section 15 jurisprudence of the Supreme Court of Canada the third part consists of an evaluation of the likelihood of the courts interpreting section 15 of the Charter with regard to cases involving the social assistance system in a manner that is consistent with the conception of human worth and dignity developed in the first two parts of the thesis.

It is proposed that the idea of equality requires a social assistance system to recognize the satisfaction of need which is outside the control of the individual, with need being understood to comprise the element of social participation, to be its goal and guiding principle. The underlying basis to this proposition is that equality is essentially a demand upon the human capacity to empathize. Accordingly, the definition of need and the assessment of the individual's control over his poverty require the exercise of empathy. The institutional capacity of the courts to empathize with the poor, more than any other factor, is that which will determine the extent to which the equality of section 15 of the Charter will effectively recognize the dignity of the poor in case of the legislators' failure to do so.

Introduction

The English Bill of Rights¹ of 1688 declared the rights of the subjects of the Crown to include that funds would neither be levied for or to the use of the Crown without the grant of parliament. Prior to 1982 the Parliament of Canada and the legislatures of the provinces were the sovereign powers within their respective constitutional areas of legislative jurisdiction. In 1982, with the passage by the British Parliament of the Canada Act 1982², the Canadian Charter of Rights and Freedoms³ (hereinafter referred to as the "Charter") became part of the "supreme law of Canada"⁴. In order to secure fundamental rights, limitations were thereby imposed on the sovereignty of Parliament and the government of Canada, and upon the sovereignty of the legislature and government of each province.⁵ Conversely, the powers of the courts were significantly enlarged. The Charter, in its application to legislative and governmental bodies, and through its enforcement

¹Bill of Rights, 1688 (U.K.), 1 Will. & Mar. Sess. 2, c. 2, para. 4.

²Canada Act 1982 (U.K.), 1982, c. 11.

³Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11 [hereinafter Charter].

⁴Constitution Act, 1982, s. 52 (1), being Schedule B of the Canada Act, 1982 (U.K.), 1982, c. 11: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

⁵Charter, ss. 32 and 33.

by courts of competent jurisdiction⁶, was to guarantee to individuals certain rights and freedoms otherwise denied them by the normal political processes of democratic majority parliamentary rule. For one who might view the inadequacy of a social assistance system to be the result of the failure of the parliamentary majority to represent and act upon the concerns of the poor, the Charter would hopefully assist in remedying the failure.

"Social assistance" or "welfare" is the bottom layer of governmental income support programs. The exponential growth of private "food banks" in the last decade bespeaks the insufficiency of the social assistance system.⁷ In 1986, the government of the province of Ontario appointed a committee to undertake a significant review of its social assistance system. Informed by the committee's report brought forth in 1988, entitled Transitions⁸, the government has seemingly engaged itself in a process of significant reform to the social assistance system. The reformed social assistance system should itself be informed by the exigencies and the limitations of the Charter.

At the heart of the Charter is the right to equality

⁶Charter, s. 24.

⁷See R.E. Robertson, "The Right to Food - Canada's Broken Covenant" (1989-1990) 6 Can. Hum. Rts. Y.B. 185 at 193-194.

⁸Ontario, Report of the Social Assistance Review Committee, Transitions (Toronto: Queen's Printer for Ontario, 1988) (Chair: G. Thomson)

contained in section 15. It reads:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In everyday terms, equality is the idea which not only allows everyone to say, "I too am a human being," but necessitates that one conducts oneself in a certain manner towards all other humans. The nature of this conduct, its manifestation in the state's provision of social assistance, and its concordance with the meaning given to equality within the context of the Charter are the principal themes of this inquiry.

The discussion which follows is of three distinct parts. The first part provides an overview of the Ontario social assistance system in its current state of transition. The second part, in order to assist in the resolution of some conflicting directions in social assistance reform and to assist in understanding the equality guarantees in the Charter as they would apply to a social assistance system, consists of a response to the essential question of equality: what is the worth of a human being? A response to this question is sought within the framework of Western traditions. Based mostly upon a review of the literature and an analysis of the s. 15 jurisprudence of the

Supreme Court of Canada, the third part consists of an evaluation of the likelihood of the courts interpreting section 15 of the Charter with regard to cases involving the social assistance system in a manner that is consistent with the conception of human worth and dignity developed in the first two parts of this paper.

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The overview of the social assistance system in Ontario begins with an analysis of the Canada Assistance Plan⁹, which is the federal cost-sharing statute for the purposes of social welfare. The emphasis is on the principles and standards it sets for provincial social assistance systems through its establishment of the conditions with which provincial compliance

⁹Canada Assistance Plan, R.S.C. 1985, c. C-1.

is required in order to secure federal cost-sharing payments. The standards set revolve around the definition of the "person-in-need", so that categories, conditions and amounts of welfare eligibility are to reflect and respond to the situation of need. The evaluation of the social assistance system in the province of Ontario which then follows describes an outward respect of the federal standard, but an inner insubstantiveness of the right to social assistance. This insubstantiveness is considered to result in great unfairness. In Transitions the principle of a presumptive right to social assistance based on need is proposed as a fundamental principle of a reformed social assistance system. However, other perhaps conflicting principles are recognized as well. The most contentious principle involves the mutuality of obligations between the individual and the community. The simple question is, what must one do to receive social assistance other than demonstrate their poverty? Indeed, the report itself, and the work of those commissioned to implement the reforms, opine that there is a fundamental need to clearly articulate these principles in a new social assistance statute. The determination of the content of the most fundamental principle, as would be dictated by the principle of equality, is the goal of the second part of this paper.

As Justice McIntyre noted in the Supreme Court of Canada's first section 15 decision, the "concept of equality has long been

a feature of Western thought."¹⁰ The second part of the discussion attempts to uncover the essence of this concept and to trace its continuity, particularly as it relates to the treatment of the poor, in the history of the Western tradition. Responses to the question of human worth are traced from the time of the marriage of the Hebraic and Hellenic cultures, through the period of the secularization of the West, to the modern period with its concerns of justice and inherent human rights. The biblical moral imperative of the "Golden Rule", along with the Aristotelian perceptions of man finding his humanity only within the state and justice dictating that reward be attributed according to merit, remain the underlying basis of more modern considerations of human worth. The period of secularization during which Western man's vision of himself and the universe changed profoundly is represented in this paper through the considerations on human worth and morality of the philosophers John Locke, Jean-Jacques Rousseau, and John Stuart Mill. This bridge between the ancient and the modern periods is characterized by a continuing adherence to a belief in the necessary balancing between self-interest and compassion, and a reframing of this belief in terms of a balance between liberty and equality. Modern considerations on equality, as derived from international declarations of human rights and modern legal philosophy, form the final elements of this part of the paper.

¹⁰Andrews v. Law Society of British Columbia (1989), [1989] 1 S.C.R. 143 at 164, 56 D.L.R. (4th) 1 [hereinafter Andrews cited to S.C.R.].

Reaffirmed is the understanding of compassion as being central to the idea of justice. Equality, or the equal dignity of all persons, is guaranteed through protection from discrimination. The state, in its role of mediator between the individual and the community, is assigned the specific compassionate act of providing adequate social assistance. The balance between the presumed to be competing values of liberty and equality, as it relates to the state provision of social assistance, is achieved by the establishment of the criteria of the individual's control over his poverty as limiting upon the state's obligation to provide social assistance. The assessment of the individual's control requires consideration of the initial resources at the disposal of that person and the extent to which all of the person's human rights have been recognized.

The democratic process is intended to recognize, at least in a more perfect fashion than the autocracies which have historically preceded it, the concerns of all persons. However, this process has failings to the extent that the concerns particularly of the disadvantaged are not taken into account in the decision-making processes of the state. These failings are most important when the decisions taken, or not taken, affect those rights the possession of which are considered necessary to the dignity of the human person. A right to adequate social assistance is such a right. The criticisms of the current social assistance system in Ontario reflect that the concerns of the poor have not been adequately reflected in the Canadian and

Ontarian democratic process. The third and final part of this paper examines the extent to which the courts, primarily through the vehicle of section 15 of the Charter, could and would remedy this failure of the democratic process.

It is argued that it is the empathy of the courts for the disadvantaged which will determine the extent to which the right to social assistance (and other social rights) will be guaranteed by the Charter and, in particular, by section 15. The discussion focuses firstly on the academic commentary regarding the advancement of social rights through the use of the Charter. Although most of the academic discussion has been generated by consideration of the right to "life, liberty, and security of the person" of section 7 of the Charter¹¹, it is nonetheless pertinent to a discussion of the equality provision. The essentially indeterminate nature of the language of the Charter, which would allow for a judicial affirmation and enforcement of social rights, is placed in sharp contrast to the institutional nature of the judiciary, and to the personal characteristics of the members of the judiciary whose life experience and resulting values do not easily allow for empathy to be practised by them for the disadvantaged. The second focus of this discussion is on the decisions of the Supreme Court of Canada in which section 15 of the Charter has been interpreted. Its purposes are to verify

¹¹Charter, s. 7: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

this empathy hypothesis and to identify the significant elements to be put forth in a Charter argument regarding social assistance under section 15 that would allow the empathy of the courts to be engaged. This final part of the discussion concludes with a discussion and a critique of the underlying bias of the Supreme Court of Canada in its evaluation of human merit central to its development of the guarantee of equality - human merit being the essence of the concept of equality - and how it could possibly exclude the disadvantaged from the equality rights which are to be guaranteed to every individual.

A. Overview of Social Assistance in Ontario

I Introduction

The first section of this thesis is intended to provide an overview of the legislative acts directly affecting the right of an individual to welfare in the province of Ontario, and an understanding of the environment of change currently at work within the province's social assistance system. The discussion that follows is divided into four parts. The first part introduces the Canada Assistance Plan¹², in its role of national standard-setter in both financial and philosophical terms for assistance to the poor, or rather for those who, due to the Plan, were thereafter recognized as persons in situations of need. The second part examines the extent of the implementation of these standards and philosophy in the province of Ontario's social assistance system. This system, wherein any rights to welfare for the poor of the province find substance, is presently governed by two distinct statutes and sets of regulations and policies. The third part examines the nature of the current changes in the province's social assistance system by an analysis of Transitions¹³, the report ostensibly serving as the beacon to these changes. The final part of this section looks at the equality issues being identified as salient in the process of

¹²R.S.C. 1985, c. C-1.

¹³Supra, note 8.

developing a new unified social assistance statute to govern the social assistance system in the province of Ontario.

In providing the important and necessary contextual elements for an analysis of the substance of the equality provisions of the Charter in respect to social assistance legislation, the discussion in this section leads to the conclusion that there exists the necessity of developing and declaring in the new legislation a fundamental principle that underlies and resolves the other often competing principles that determine the nature and the equality of assistance to persons in a situation of need.

This fundamental principle will have to harmonize three interwoven issues: the definition of need; the conditions placed upon individuals who wish to receive assistance; and, the categorization of applicants/recipients into separate classes of persons whereby need, conditions and basic eligibility (or a pre-emptive ineligibility) for assistance are determined.

Need is thought of in this discussion as a deficit situation in which the amount of resources, either income or assets, that are available to a person are insufficient to meet his financial requirements. The manner in which "financial requirements" are defined is problematic without the establishment of a principle or a stated objective of the social assistance system. Fortunately, the framework established in the reform of the social assistance system in Ontario provides the benchmark for the determination of need, and hence the type and amount of assistance to be provided to meet that need: assistance is

quantitatively and qualitatively adequate if it enables the individual to fully participate in society. It must be recognized that there exists a large variety of human needs and an equally large number of varying degrees of human capacities to meet those needs and participate in society, to which social assistance has been perhaps unfairly required to respond in its position of "safety net". Assistance to satisfy need, although ultimately able to be measured in financial terms, therefore often means more in both theory and practice than the provision of a monthly cheque to pay for food and rent. Thus, even if the goal of social assistance was restricted to assuring that all persons be fed, clothed and sheltered, with standards clearly defined, an evaluation of the relative needs of people with regard to the achievement of this goal is a highly complex and not necessarily "scientific" process. This assessment is itself expensive, and is in practice achieved in relation to what often appears to be a relatively narrow base of "private not for profit" community resources from whom services are purchased with social assistance dollars (eg. hostels, homes for special care, etc.). Nonetheless, for the great majority of social assistance recipients for whom assistance does mean the provision of a monthly cheque, need can be measured in a rough manner. The problem for them, as for all social assistance recipients, is that assistance rates have historically been set at levels well

below recognized poverty lines.¹⁴

The conditions which one must fulfil in order to receive assistance can be thought of conceptually as taking into account the individual's capacity for financial independence whereby he is required to actively pursue or exhaust all possible "private" resources or "higher" forms of public benefits (unemployment insurance, government pension plans, etc.) before requesting social assistance from the state. In practical terms conditionality generally means that persons deemed employable have to look for work and sole support parents have to pursue support for themselves and their children from their spouse and/or other parent. One of the main criticisms of conditionality is that, conceptually once again, current administrative policies and practices serve more to stigmatize and otherwise harm recipients than they accurately reflect the individual's capacity for financial independence in the present socio-economic context.¹⁵ In practical terms this might mean that an individual who although "able-bodied" can neither read nor write is required to produce written proof of job applications he has made for jobs many of which require substantial literacy. It might mean a single mother is required

¹⁴See Canada, Special Senate Committee on Poverty, Poverty in Canada (Ottawa: Information Canada, 1971) at 26; Canada, National Council of Welfare, The Tangled Safety Net (Ottawa: Minister of Supplies and Services Canada, November 1987) (Chair: G.G. James) at 57-85; Transitions, supra, note 8 at 126-127; Robertson, supra, note 7 at 193-194.

¹⁵See The Tangled Safety Net, supra, note 14 at 10.

to pursue support from a spouse who has threatened to kill her.

Categorical eligibility, in the manner in which it has served to determine both need and conditions for assistance for individuals falling within different categories, has been seen to reflect now-considered illegitimate perceptions of the varying degrees of worthiness of poor persons.

Consideration will be given to these three elements of need, conditionality, and categorical eligibility throughout the course of this section. Many potential equality issues (although admittedly equality has yet to be defined) and the complexities of enforcing the fulfilment of any right to welfare borne by the equality provisions of the Charter (these too as yet to be discussed) will become quite apparent. The right to social assistance in Ontario is affected by federal, provincial and "local" governments. The right is determined in part by statutes, in larger part by regulations, and in an equally large part by administrative policy, all of which recognize or allow a large discretion to be placed in the hands of the local decision-making authority. The right is also affected by the willingness, ability, philosophy and existence even, of the "private sector" of community charitable agencies that in partial payment through social assistance moneys, provide services of a special nature for those who are in positions of greater dependence with regard to the satisfaction of their basic needs.

As stated above in the general introduction, the objective of this thesis is to establish the satisfaction of need outside

the control of the individual, with need being understood to comprise the element of social participation within its definition, as a general equality principle for social assistance which is respectful of human dignity and compatible with the requirements of section 15 of the Charter. As well, a general principle is required to permit the establishment of an understanding of the equality of a necessarily very complex system.

II. The Canada Assistance Plan

Historically, primary legislative power in the field of social services has been exercised by the provinces. This is due to paragraphs 13 and 16 of section 92 of The Constitution Act, 1867¹⁶ the last of which ascribes to the provinces, "generally all matters of a merely local or private nature in the Province."¹⁷

¹⁶Constitution Act, 1867 (U.K.), 30 & 31 Vict., c.3.

¹⁷In Reference Re Authority to Perform Functions Vested by Adoption Act, etc. (1938), [1938] S.C.R. 398 at 402-403, 71 C.C.C. 110, Duff C.J. attributes the responsibility for the relief of persons in distress to the provinces without specifying under what heading the attribution is made. In relation to the states responsibility to "educate" people in distress, also at play in this case, the Chief Justice recognized the provinces as the competent authority under section 93 of the Constitution Act, 1867. Subsequently, in A.G. (Ont) v. Scott (1955), [1956] S.C.R. 137, 114 C.C.C. 224, in a matter dealing with Maintenance Orders, of which a failure to enforce according to Abbott J. (at 147) would result in a "burden being thrown upon the local community", Abbott J. agrees with the opinion of Duff C.J. in the prior case while however attributing the provincial power to head 16 of s. 92. Concurring with regard to this attribution is Rand J., at 140-141. However, Locke J. attributes the provincial competency to head s. 92 (13), "Property and Civil Rights in the Province".

However, the central piece of current social assistance legislation is the Canada Assistance Plan (hereinafter referred to as CAP) which is a federal statute. This statute establishes the conditions for the federal government by which it may enter into agreements with the provinces for the funding of provincial social assistance schemes. The level of funding provided for in the statute being set at fifty per cent of provincial social assistance costs is quite significant in terms of both the amounts of welfare payments made to individuals and to the assurance of a sufficient inducement for the provinces to enter into such a federal-provincial cost-sharing scheme. Up until quite recently the federal funding was open-ended in that whatever amount of eligible social assistance costs were incurred, as defined in CAP, a contribution of fifty per cent of

It is interesting that in neither case is reference made to s. 92(7) of the Constitution Act, 1867: "The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals." For a discussion of conditional federal grants, and the federal spending power, see P. Hogg, Constitutional Law of Canada, 2d ed. (Toronto: Carswell, 1985) at 65-72; A. Abel & J.I. Laskin, eds, Laskin's Canadian Constitutional Law, 4th ed. (Toronto: Carswell, 1975) at 636-637; H. Brun & G. Tremblay, Droit Constitutionnel, (Cowansville: Les Editions Yvon Blais, 1985) at 318-321. In Poverty in Canada, supra, note 14 at 65, we find: "The men who framed the British North America Act made very little mention of governmental obligation towards the poor. Organizations supported by charity were declared to be within provincial jurisdiction, and that was considered sufficient. This was not a deliberate omission. The question simply did not arise. It never occurred to the legislators of the time that massive governmental intervention on behalf of the poor would ever be necessary. Local charities were already in business; local charities were quite enough."

those costs would be forthcoming from the federal government.¹⁸

CAP, which became law in 1966, departed radically from previous cost-sharing statutes in that it prescribed many very detailed conditions by which social assistance must be granted by the provinces, for federal contributions to be authorized.¹⁹ The intervention of the federal government into the provincial sphere of social services began at the time of the Great Depression and has increased as the provinces found themselves unable to meet the growing financial burden of caring for the poor. It was hoped CAP would have a positive bearing on the very

¹⁸The Government Expenditures Restraint Act, S.C. 1991, c. 9, reduced the funding provided by CAP for the provinces of British Columbia, Alberta and Ontario. In Reference Re: Canada Assistance Plan (1991), [1991] 2 S.C.R. 525, 83 D.L.R. (4th) 297 (S.C.C.), the Supreme Court of Canada recognized the sovereignty of Parliament with regard to allowing the federal government to amend CAP in a unilateral fashion.

¹⁹The Unemployment Assistance Act, 4-5 Eliz. II, c. 26, (1956), predecessor of sorts to CAP, established the impermissibility of a residency requirement for the receipt of assistance as a condition upon which contributions would be made by the federal government to the provinces for their costs in unemployment relief. The importance of this condition within the context of the evolution of social assistance can be understood with the perspective that historically, assistance to the poor had always been viewed as a local matter and as a matter having to do strictly with the local poor. For example, The Houses of Refuge Act, R.S.O. 1927, c. 348, which provided for the establishment and administration of poor houses, permitted the local authorities of a house of refuge to return a poor person from another county to his original county: "14.-(1) In the event of a person who is subject for admission to a house of refuge being found in a county in which he has resided for less than two years, but who before coming into such a county had been a resident of another county for two years or more, such person may be returned to the latter county and shall not be refused admission to the house of refuge thereof by reason of the break in his residence."

nature of welfare.²⁰

With the advent of CAP, the "poor" became known as "persons in need". This change in terminology and the conditions that were attached to federal contributions (to be discussed shortly) reflect a philosophy that considers poverty to be a situation in which one finds oneself as a result of social conditions which are themselves alterable, rather than a state of being intrinsic to a particular individual.²¹ The preamble to the statute reads,

Whereas the Parliament of Canada, recognizing that the provision of adequate assistance to and in respect of persons in need and the prevention and removal of the causes of poverty and dependence on public assistance are the concern of all Canadians..."

A "person in need" is defined in section 2 of the statute to mean,

(a) a person who, by reason of inability to obtain employment, loss of the principal family provider, illness, disability, age or other cause of any kind acceptable to the provincial authority, is found to be unable (on the basis of a test established by the provincial authority that takes into account the person's budgetary requirements and the income and resources available to him to meet such requirements) to provide adequately for himself, or for himself and his dependents or any of them...."

²⁰See Poverty in Canada, supra, note 14 at 67-70.

²¹The concern expressed in CAP of preventing one from becoming a person in need is evident not only in the plan's preamble, but also in the inclusion of services to be provided to those likely to become persons in need in its definition of "welfare services" in Canada Assistance Plan, R.S.C. 1985, c. C-1, s.2.

From the above there are two factors which become essential to the cost sharing agreements and therefore to the determination under provincial law of the individuals's right to welfare: a situation of need and an entitlement to assistance which meets that need; and, the cause of the person's poverty."

It is important to note that the definition of a person in need opened the door for the provinces to enlarge the number of causes for which one is poor in their entitlement of persons to social assistance. Of significance, given an historical bias against the unemployed employable poor, was the assimilation of unemployment as a cause of poverty (or specifically - "an inability to obtain employment") with other reasons for poverty in the definition of a person in need. To be noted as well in its efforts to protect this group from the legislative effects of this historical bias, was the provision in Part III of CAP dealing with "work activity projects" that no person would be denied assistance on the basis of refusing to take part in a work activity project."

Two other important conditions of the agreements arrived at

²Canada Assistance Plan, R.S.C. 1985, c. C-1, s. 6(2): "An agreement shall provide that the province (a) will provide financial aid or other assistance to or in respect of any person in need described in paragraph (a) of the definition "person in need" in section 2, in an amount or manner that takes into account his basic requirements; (b) will, in determining whether a person is a person described in paragraph (a) and the assistance to be provided such person, take into account such person's budgetary requirements and the income and resources available to him to meet them;...."

³Canada Assistance Plan, R.S.C. 1985, c. C-1, s. 15(3)(a).

under CAP were the undertakings by the province to not have a period of residence within the province as a condition of eligibility for assistance and the establishment of an appeal procedure for the decisions affecting eligibility for assistance.²⁴

For the purposes of determining who is a person in need and the amount of assistance the person in need is to receive, the "budgetary requirements" of a person are clearly and substantively, although not definitively, defined in the Canada Assistance Plan Regulations²⁵:

For the purposes of the Act and these Regulations, "budgetary requirements" mean the basic requirements of a person and his dependants, if any, and any other of the items and services described in paragraphs (b) to (h) of the definition "assistance" in section 2 of the Act that, in the opinion of the provincial authority, are essential to the health or well-being of that person and his dependants, if any;....

"Basic requirements" are defined in section 2 of CAP to include food, shelter, clothing, fuel, utilities, household supplies and minor items of a personal nature.²⁶

²⁴Canada Assistance Plan, R.S.C. 1985, c. C-1, ss. 6(2)(d) and section 6(2)(e); a similar condition with respect to residency was found in one of the predecessor's to CAP, The Unemployment Assistance Act, 4-5 Eliz. II, c. 26, Schedule A, s. 5.

²⁵Canada Assistance Plan Regulations, C.R.C., c. 382, s. 2(2).

²⁶The ambiguity in CAP with regard to a guarantee of an adequate standard of living is revealed in the tension found in the analysis presented by Robertson, supra, note 7. At 192, he writes that the "fatal flaw in the CAP system was, and still is, the absence of nationally recognized standards of adequacy." At

Items and services included in the definition of "assistance" which are left to the provincial authority to decide as to whether they are essential to the well being of the person in need (as well as to the definition of a person in need), are items necessary for employment, care in a home for special care", travel and transportation, funerals and burials, health care services, welfare services, and comfort allowances for residents of hospitals and certain other institutions. Also included in the definition of assistance is "prescribed special needs of any kind", which as defined in the regulations to CAP include other similar, objectively essential items such as "essential household furnishings and equipment", "essential repairs" to property, items "necessary for a handicapped person", etc.." Also to be considered as what amounts to be an optional item of assistance are welfare services. These include rehabilitation, casework, homemaker and daycare services." In spite of the preamble to CAP, cited above, the framework for the funding to be provided by CAP, and implicitly the rights to assistance to be bestowed upon the poor, encouraged rather than

208 he writes of the "objective standards of adequacy" to which provinces must conform in order to be in compliance with CAP.

²Canada Assistance Plan Regulations, C.R.C., c. 382, s. 6, defines a home for special care to include residential welfare institutions such as homes for the aged, nursing homes, transient hostels, childcare institutions, homes for unmarried mothers, and other supervised residential welfare institutions.

²Canada Assistance Plan Regulations, C.R.C., c. 382, s. 4.

²Canada Assistance Plan Regulations, C.R.C., c. 382, s. 5.

obliged the provinces to provide both fully adequate assistance (in terms of meeting basic human needs other than the most basic) to all of the poor, and to provide welfare services which as defined have "as their object the lessening, removal or prevention of the causes and effects of poverty, child neglect or dependence on public assistance...."³⁰

Before briefly summarizing the potential impact and influence of CAP on the realization of the principle of equality in provincial welfare programs, three interrelated contextual points regarding CAP need to be made. Firstly, CAP was designed to provide funding for programs already in existence. Secondly, these programs provided a broad gamut of services to very diverse populations. Thirdly, although to a large extent many of the programs to receive funding under CAP were to be delivered by "provincially approved" agencies, it was recognized that many of these agencies were (and still are) of a private nature. Therefore, in evaluating CAP and its success in guiding the provinces towards compassionate and adequate social assistance legislation, it should be remembered that it was not at the origins of the nation's welfare programs. Established at the genesis of a mentality of a "right to assistance", and prior to an organized planned network of services, the federal legislator would be happy to provide support for any existing welfare program or service, regardless of where the service might fit

³⁰Canada Assistance Plan, R.S.C. 1985, c. C-1, s. 2, the definition of "welfare services".

into a structure representing a hierarchy of needs of needy persons."¹ For similar reasons, much valued would be the role played by private charitable organizations in the provision of services to the needy. Finally, CAP coming into being prior to the Charter would not preoccupy itself with facilitating the degree of equality in the provision of social assistance by the provinces as might now be desirable."

In summary, CAP nevertheless created what can be thought of in terms of the Charter as an important contextual historical standard with regards to the purpose of, and the standards to be met by, provincial welfare legislation. Welfare was to have the dual goal of providing adequate assistance based on the objective need of the individual or benefit unit, and, to prevent or remove the causes of poverty. Both these goals reflect perhaps the singular conceptual contribution of CAP, referred to earlier,

"Indeed given the vast array of welfare programs and services funded by CAP, the establishment of a hierarchy of needs that are met by the programs that would be funded in part through CAP in order to monitor that similar needs would be met in a similarly sufficient manner, would be an awesome task except in cases of even the most basic needs. Even then, how does one choose, for example, between providing homemaking support to an elderly person who requires such services in order to prevent her from being institutionalized, and, providing day-care services to a single-parent to enable her to join the work-force?

¹See McKinney v. University of Guelph [1990] 3 S.C.R. 229 at 433, 76 D.L.R. (4th) 545 [hereinafter McKinney cited to S.C.R.] (an important decision of the Supreme Court of Canada regarding the application of section 15 of the Charter to the issue of mandatory retirement), per L'Heureux-Dubé J.: "The fact that 'mandatory retirement has become part of the very fabric of the organization of the labour market in this country'...is inapposite to the present analysis in so far as it ignores the promulgation of both the Canadian Charter of Rights and Freedoms and the Human Rights code, 1981."

which was the creation and elaboration of the concept of the poor -almost regardless of the reason for poverty- as being a "person in need", and hence meritorious of assistance. The recognition by the Parliament of Canada of the "person"-hood of the poor, and in other words his humanity, is certainly significant as it reflects the will and the vision of the people with regards to a human approach to poverty and the poor. Most significantly with regard to an approach to the equality provision contained in section 15 of the Charter that focuses, as we shall see later in this essay, on the practice of discrimination against individuals who are part of identifiable and historically disadvantaged groups, is that all poor are collectively equally meritorious persons in need. Discrimination, particularly in regard to the welfare beneficiary function of government, that is practised against a person who is poor is not just discrimination against that individual or the sub-group of the poor that individual represents, but constitutes discrimination against the whole class of persons that are "persons in need".

Whether CAP itself could be the object of a successful challenge under section 15 of the Charter given its not necessarily all-inclusive definition of person in need with regard to reasons for poverty, the variable distinctions that it makes in its definition of assistance which the provinces would be obliged to provide, and other distinctions in provincial social assistance schemes of which it might be seen as the cause, is somewhat doubtful. CAP does not appear to restrict the

province from providing an adequate level of assistance to all persons who are poor regardless of the reason for their poverty. The fact that CAP has now been capped might allow arguments to the contrary, for example, that adequate levels of assistance cannot be provided given the financial status of the provinces, that given differing financial capacities of the provinces an inequality between the poor has been created between the poor of different provinces (although this argument could have been made prior to the capping of the program) - these posit opening a constitutional can of worms that need not be opened here."³³ The main reason for this is that it has been decided that rights do not arise from CAP. They arise from provincial welfare schemes."³⁴

³³In R. v. S. (1990), [1990] 2 S.C.R. 254, 57 C.C.C. (3d) 115 [hereinafter S cited to S.C.R.], the Supreme Court of Canada decided in a section 15 Charter case involving the application of a federal statute which granted discretion to the provinces to designate alternative measures for young offenders, that neither the statute nor the decision taken could be constitutionally attacked simply because it creates differences between provinces. Dickson, C.J., at 288: "The division of powers not only permits differential treatment based upon province of residence, it mandates and encourages geographical distinction." If this reasoning was given in respect to legislation in a domain in which federal primacy is recognized, it should apply all the more to federal legislation in areas of provincial responsibility.; See also H. Beatty, "Federal-Provincial Fiscal Arrangements: Their Impact on Social Policy and Current Prospects for Reform," (1988) 3 J.L. & Social Pol'y 36 at 55-59, seems to consider the success of a Charter challenge to CAP quite speculative.

³⁴See Re Lofstrom and Murphy et al. (1971), 22 D.L.R. (3d) 120 (Sask. C.A.); Alden v. Gaillard (1972), [1973] S.C.R. 199, 30 D.L.R. (3d) 760 (S.C.C.); Finlay v. Canada (Minister of Finance) (1986), [1986] 2 S.C.R. 607 at 621, 33 D.L.R. (4th) 321. It is of note that in Finlay, the Supreme Court of Canada recognized the interest of a "person in need" as defined in CAP to sue the federal government over the question of its respect of its

III Welfare in Ontario in transition

Social assistance in Ontario has its legislative foundation in two statutes: the General Welfare Assistance Act³⁵ and the Family Benefits Act³⁶. In 1988, after a comprehensive review of the social assistance system in Ontario whose nature had been determined in large part for the previous two decades by these two statutes, the Social Assistance Review Committee completed their recommendations for the reform of social assistance in a report entitled Transitions. Subsequent to this report, the title of which is an accurate expression of the Committee's vision of the purpose of social assistance being to aid people in their transition from dependence to independence, many changes of a reformist nature have been made to the regulations and policies established in virtue of these statutes. As will be discussed these changes are insufficient in themselves to effect equality in social assistance.

Of these changes, most were directly attributable to the report and to a follow-up of the report entitled Back on Track³⁷. They were made pending the creation of a new unified social assistance statute and have had a significant positive

obligations under the Plan, to have the provinces respect their obligations made in agreements with the provinces pursuant to the plan.; see also H. Beatty, supra, note 33, at 56.

³⁵R.S.O. 1980, c. 198.

³⁶R.S.O. 1980, c. 151.

³⁷Ontario, Advisory Group on New Social Assistance Legislation, Back on Track (Toronto: Queen's Printer for Ontario, March 1991) (Chair: A. Moscovitch).

impact upon the assistance given to the poor of the province. These changes have included increases in assistance rates, at least partial elimination of many social assistance system caused barriers to employment, an enlargement of the list of items of assistance deemed mandatory, a more apparent equality in the setting of assistance rates, extending assistance to refugee claimants in need, extending assistance to fully employed persons, etc..

It has been possible to effect such significant changes through amendments to regulations and Ministry of Community and Social Services' policies because, generally speaking, in Ontario social assistance legislation is law through regulation and policy. In spite of this recent success, it is nonetheless suggested that therein lies the most fundamental flaw in terms of the equality of the social assistance system, vis-a-vis persons in need amongst themselves, and vis-a-vis persons in need and the rest of the community who are not presently in need. A right to social assistance, the essential content of which is the focus of this thesis, necessitates its clear and substantive articulation in a fundamental legislative act that removes the potential for infringement from the vagaries of the day-to-day workings of government.

Indicative of the present ephemeral nature of the assuredness with which those in need can find sustenance is that neither of the two statutes, nor regulations made thereunder for that matter, either define need substantively or clearly

establish need as a principal criteria by which levels of assistance, categories of assistance and eligibility for assistance are to be determined. The intent of the General Welfare Assistance Act was to provide for those whose need was expected to be of short duration. The Family Benefits Act was to provide for those whose state of need was expected to be of a longer duration.³⁸ Benefit levels, up until very recently, were significantly higher when extended under the latter rather than the former statute. The groups of persons most notoriously excluded in a complete manner from receiving benefits under the higher-paying act were single employable persons, two-parent families where both spouses were employable, and persons who were temporarily ill. These basic exclusions, demonstrative of an ephemeral, insubstantive right to welfare, constitute only one of the many equality issues that are apparent in Ontario's welfare legislation.

A brief examination of the General Welfare Assistance Act and its regulations will make readily apparent the innumerable equality issues arising from the essential flaw of an insubstantive right to social assistance. Borrowing the terminology of CAP, section 7 of the General Welfare Assistance Act reads,

A municipality shall provide assistance in

³⁸Transitions, supra, note 8 at 128, explains that with high levels of structural unemployment causing longer periods of unemployment for individuals, along with the entry of single parents and the disabled into the workforce, a two-tiered social assistance system no longer makes sense.

accordance with the regulations to any person in need who resides in the municipality and who is eligible for such assistance.

A "person in need" is not defined in the statute but is defined in section 1(2) of the regulations as a person who not otherwise ineligible for assistance has budgetary requirements that exceed the persons's income, all as determined by the regulations. In contrast to the CAP, "basic requirements" are not substantively defined. Rather, one is referred to a schedule of dollar amounts. Distinctions are made in this schedule with regard to family size, marital status, age, etc.,- all readily identifiable prohibited grounds of discrimination- and nowhere is the underlying basis for these distinctions made clear.

Further, three classes of assistance are established under this statute: general assistance, special assistance, and supplementary aid. It is only the class termed "general assistance" which local governments in Ontario find themselves obliged to provide. It is only from decisions concerning this type of assistance that an individual has a right of appeal to the administrative tribunal which conducts reviews under both welfare statutes.⁹ Assistance provided under special assistance to general assistance recipients and low-income earners, and under supplementary aid to Family Benefits recipients and recipients of other specified government benefits, include items such as furniture, dental treatment, prosthetic

⁹General Welfare Assistance Act, R.S.O. 1980, c. 198, s. 11(2).

devices, clothing, funeral expenses, travel and transportation, etc.. The bearing that the discretionary nature of the decision-making process applying to the provision of these rather necessary items has upon the equal treatment of different "persons in need" (let's not even consider the equality of treatment between persons in need and others!) varies quite obviously with the extent to which the general assistance they receive meets their state of need.⁴⁰ For example, in comparison to another category of persons who has three-quarters of their basic needs met by their general assistance allowance, someone who has only half their basic needs met by the general assistance allowance that they receive would be in much greater need of a

⁴⁰The distinctions between these types of assistance reflects to some extent the distinctions, discussed above, made in the definition of "assistance" in section 2 of CAP. It certainly raises the question of the extent to which the province of Ontario might be in contravention of the CAP agreement by not providing a procedure for appeal on decisions of special assistance and supplementary aid, as per Canada Assistance Plan, R.S.C. 1985, c. C-1, s. 6.(2)(e). In practice there exist great variations from municipality to municipality in Ontario regarding the items provided under the classes of special assistance and supplementary aid to persons residing in their municipality. These variations are due in no small part to the differences in the tax bases of municipalities. The recommendation for the full provincial funding of all classes of social assistance has been made in the Ontario, Provincial-Municipal Social Services Report (The Queen's Printer for Ontario, 1990) (Chairs: Colin Evans & Ron Book) recommendation #26, as well as in Transitions, supra, note 8, recommendation #197. The importance of this recommendation for equality in the provision of these essential items to persons who are in need of them, as it relates to discretionary nature of their provision, must also be understood in the provincial-municipal cost sharing context established by the regulation made under the General Welfare Assistance Act, R.R.O. 1980, Reg. 441, ss. 15(5) & 16, provide that items provided under special assistance are cost-shared at 50%, whereas the same items provided under supplementary aid have only 20% of their costs borne by the municipality.

special assistance item. As need is not defined, the fairness and equality of social assistance is very difficult to measure.

Even if further changes to the regulations, and to provincial and municipal policies greatly improved the benefits to be received by persons in need with regard to adequacy, if a substantive definition of need was not to be included in the statute or regulations, an essential component of equality would still be missing from the social assistance system. This element is a clear understanding of the situation of need in which persons of need find themselves (and indeed their comparative situation of need) and the extent to which the community is responding to that need. It is this element which allows the community at large to be compassionate and empathetic towards all persons in need. The idea, that will be developed in the next part of this thesis that looks at the philosophical underpinnings of the Western tradition that gave rise to the notion of human rights and to the Charter, is that the exercise of the human faculty of empathy is at the essence of the concept of human dignity. The more clearly that the situation of need is defined in the law that governs social assistance, the greater will be the compassion felt by both those fortunate enough not to find themselves in a situation of need and by the poor amongst and towards themselves.

A clear definition of need will not allow the community to shut its eyes to the suffering of the poor, or otherwise exclude the poor from the community. One of the characteristics of the

early poor laws was that the provision of assistance was often accompanied by a prohibition, particularly upon employable persons, of begging.⁴¹ In earlier times, as well, it occurred that those who requested assistance or charity were committed to poor houses.⁴² Today, the segregation of the poor from those more fortunate is not always so dramatic, but it is in some cases. For example, many persons in need find themselves living in hostels, considering themselves fortunate to secure even that shelter. Although their immediate living situation is arguably of a more voluntary nature than the poor of earlier times, their segregation from the rest of the community is as certain as those who preceded them. The point being here is that the provision of assistance to the poor should have as its goal (as identified in Transitions and in the next section of this paper) the full participation of persons in need in the community. This participation requires at its point of origin, at the very least, an understanding of the situation of need. Not to belabour the

⁴¹See W. Trattner, From Poor Law to Welfare State: A History of Social Welfare in America (New York: The Free Press, 1974) at 6-10. One of the first orders regarding the poor in New France was to prohibit the able-bodied from begging, "(1675)...Que pour obliger ces sortes de gens de suivre les intentions du Roy qui ont esté lors que sa Majesté les a fait passer en ce pais de s'habituier désertier et cultiver les terres et de les obliger déslever leurs Enfants dans la religion chrétienne et dans une vie civile et honête pur gagner leur vie, Requiert la Cour qu'il lui plaise faire déffences à tous mandians valide de geuser et mandier en cette ville sur les peines qu'il lui plaira ordonner Et de les renvoyer sur leurs habitations..." (Jugements et Délibérations du Conseil Souverain de la Nouvelle France [Québec: Legislature de Québec, 1886], vol. II, 30.

⁴²e.g. Of The Relief Of The Poor, R.S.N.S. 1923, c. 48, s. 12.

point but such an understanding requires the definition of the situation of need in law.

Before discussing some of the principles for the reform of the social assistance system in Ontario as elaborated in Transitions, reference needs to be made to two fundamental and intimately related principles of the current system that are central to an understanding of the definition of the situation of need. These are categorical eligibility and conditionality.

Categorical eligibility refers to the categories of persons referred to in the definition of a person in need within the General Welfare Assistance Act, and to the classes of persons deemed eligible for assistance under the Family Benefits Act, into which an applicant must fit before a budgetary test of the person's need and the more or less immediate ability to meet that need through income and assets is made to determine the amount of assistance for which they would be eligible. The category into which a person is designated serves to determine which of the two laws under which they may qualify for assistance, benefit rates within the particular law, conditions of eligibility, the treatment of income, and the amount of assets they are permitted to retain while still qualifying for assistance. As discussed above all the categories of persons recognized in the Family Benefits Act are recognized in the General Welfare Assistance Act, but not vice-versa. This in itself, given the differences in benefit rates and conditions attached to the receipt of assistance, has been considered a serious breach of equality in

that assistance does not relate to need." The merging of the two programs is foreseen."

Not all persons in a situation of need could attach themselves to a category of persons in need within the General Welfare Assistance Act. Although fully employed employable persons, who according to the regulations still display a budgetary deficit, have recently had their category of persons included in the definition, the "employable" person who is self-employed remains excluded from welfare benefits." The relationship to need of this exclusion, one which is now explicit in the regulations, is difficult to imagine. Its justification must be elsewhere, as in the administrative difficulty in monitoring income and determining assets, or the preclusion of the individual from engaging in more lucrative endeavours. Even these justifications pose some difficulty in that the "unemployable" self-employed are not categorically ineligible, and the obligation to pursue a more financially beneficial use of

*Ontario Ministry of Community and Social Services, Social Assistance Policy and Individual Rights (Social Assistance Legislation Research and Technical Background Documents, #L101) by S.Wain, at 33.

*See O. Reg. 546/91, amending R.R.O. 1980, Reg. 441, benefit rates for sole support parents have been equalized under the two statutes as of October 1, 1991 through an increase in the rates paid pursuant to the General Welfare Assistance Act, as a result of the Back on Track report.

*R.R.O. 1980, Reg. 441, s. 1(2)(aa), as amended by O. Reg. 546/91 now allows fully-employed low-income earners to qualify for assistance. S. 1.(3) states that, "no self-employed person shall be considered a person in need unless he or she is an unemployable person or the head of a family whose spouse is absent."

one's time is incumbent upon all those upon whom, categorically, it is incumbent to pursue employment, even those fully employed."

Conditionality, generally speaking, refers to those activities incumbent upon the individual if the individual is to be considered eligible for assistance and for the full amount of assistance that otherwise results from a budgetary analysis according to the regulations. In some cases it refers to those activities from which a person must refrain. The general condition which applies to all potential persons in need, which is inherently related to the nature of welfare programs as programs of last resort, is that applicants or recipients must attempt to obtain all other financial resources for which they might be eligible.⁴⁷ These financial resources include those of both a private and a public nature. Some specific conditions arising from this general condition relate more directly to the category of the person in need, or perhaps to the categorization of the person in a situation of need. Those who are employable, other than parents whose child care situation in the opinion of the welfare administrator prevents him or her from obtaining or improving their employment situation⁴⁸, and those whose immigration status precludes them from employment, are required to attempt to obtain a more remunerative employment situation.

⁴⁷R.R.O.. 1980, Reg. 441, s. 3(2a).

⁴⁸R.R.O. 1980, Reg.441, s. 3(3).

⁴⁹ R.R.O. 1980, Reg. 441, s. 3(1)(d).

These same employable persons, except for sole support parents, are required to refrain from attending educational institutions other than those equivalent to primary and secondary courses of study." The main principle behind these and other conditions would appear to be that one should attempt to do all they can to be financially independent before resorting to welfare benefits.

Some other distinctions might be considered to reflect an understanding of the personal and structural barriers to financial independence that might be faced by one belonging to a particular category of persons. Such would be the case for example of a disabled person who might require vocational rehabilitation, specialized public transportation services and an adapted work environment in order for him to begin to meet even the most basic of his financial needs. A condition that such a person must seek employment before receiving assistance, and certainly without a guarantee that the necessary supports and services would be made available to him, would be hard to justify. Although less apparent, the definition of employability relating solely to overtly medical health, produces equally unjustifiable results in that it tends to impose the same responsibility for job searches and job maintenance upon persons of decidedly different abilities.

Some distinctions in conditions reflect a high social value placed upon activities other than employment, of which caring for children is the predominant one to come to mind.

*R.R.O. 1980, Reg. 411, ss. 3.(1b) & 6.(3).

It is obvious that the conditions of eligibility as they are imposed upon the categories of persons in need, need to be re-evaluated in the present day social context. Not the least of which must be considered in the discussions of the modern social context is the changing nature and exigencies of employment and the very much related changing nature of families and child-care responsibilities.

Changes to the social assistance regulations in October 1989 that came under the banner of "The Supports to Employment Program" (commonly referred to as "STEP") recognized the costs of childcare as an important part of the costs associated with starting up and maintaining participation in employment and training.³⁰ The concern has been expressed that this recognition might be accompanied by a corresponding increase in the obligation to seek employment upon primarily sole support parents, of whom the great majority are female.³¹ Discussions of the nature of the family and of child care are highly complex, highly charged policy issues and touch the very foundation of

³⁰O.Reg 525/89 amending R.R.O. 1980, Reg. 441; O.Reg. 528/89, amending R.R.O. 1980, Reg. 318.

³¹See F. Stairs, "Sole Support Mothers and Opportunity Planning in the Thomson Report" (1989) 5 J.L. & Social Pol'y 165 at 179-180. She considers recommendation #78 of Transitions (supra, note 8 at 234), which excludes sole support parents from mandatory opportunity planning, to be a "soft recommendation". She believes it will likely be reviewed given the Committee's low esteem for "mothering" and its lack of understanding of the complex and arduous nature of being a working sole support parent. She also comments, at 196, upon the dangers of opportunity planning not being provided for those who are not obliged to respond to it, thus "trapping women in the home when their choice is otherwise."

society. This discussion is beyond the bounds of this thesis except to say that whereas conditions upon assistance, if there are to be conditions, should reflect the extent to which the individual has some control over his state of need (again, this appears to be what would have been the intent of the present regulations) there are social values which might properly compete with that of the economic self-sufficiency of the person.

IV. Transitions

The Social Assistance Review Committee developed its principles for the reform of social assistance based upon its belief in the primacy of the following public social policy objective:

All people in Ontario are entitled to an equal share of life opportunities in a society that is based on fairness, shared responsibility, and personal dignity for all. The objective for social assistance therefore must be to ensure that individuals are able to make the transition from dependence to autonomy, and from exclusion on the margins of society to integration within the mainstream of community life.⁵²

Of the ten operating principles the Committee established to guide the creation of a new social assistance system, it is significant in regard to the preceding discussion that the very first principle for reform addresses the issues of need, categorical eligibility and conditionality:

1. All members of the community have a presumptive right to social assistance based

⁵²Transitions, supra, note 8 at 8.

on need."³

Of the seventy recommendations made by the Committee with regard to the benefit structure of what would be a merging of the two existing statutes into one piece of social assistance legislation, many deal with the inclusion of theretofore excluded categories of persons and the reformulation of other categories. A reduction in the numbers of categories is recommended from the twenty-two at the time of the report to three. These categories are: 1) handicapped persons; 2) people in need who must respond to an offer of opportunity planning; and, 3) people in need who are encouraged but not required to respond to an offer of opportunity planning.⁴ Ultimately, the "disabled" and children would be removed from the social assistance system to have their needs met through a separate "Disability Benefit"⁵ and "Children's Benefit".⁶ Other recommendations appear to be concerned with establishing a greater equity and rationality in the financial entitlements of the different types of benefit units. The same concern with equity and rationality is found in the recommendations pertaining to the determination and treatment

³Ibid. at 11. At 13, the second principle articulates the criteria of need to be that which is necessary to adequately meet the basic needs for shelter, food, clothing and personal and health care. At 14, the third principle addresses the need to provide concretely for the inclusionary emphasis of the first principle through a guarantee of accessibility to the system.

⁴Ibid. at 47 (Recommendation #9).

⁵Ibid. at 105-112.

⁶Ibid. at 112-118.

of the financial resources other than social assistance that are available to persons in a situation of need, as such relates to reductions in social assistance payments.

The definition of need, divorced from considerations of chargeable income and permissible asset levels, is recommended to comprise considerations of the costs of a "market-basket" of such goods as would be deemed necessary to provide the basic needs - shelter, food, clothing, and personal and health care. The quality and quantity of the goods selected for the basket would be such as to provide for the "frugal comfort" of recipients, "that includes recognition of the need to reduce stigma and enables recipients to integrate into the community, achieve self-reliance and exercise choice."⁵⁷

The first principle of social assistance reform, cited above, uses the phrase "presumptive right to social assistance."

"Presumptive" refers not only to an overriding principle of inclusion as it relates to categorical eligibility, but also as it relates to conditionality (and not only as conditionality has an impact upon defining categories of eligibility, an example of which is the over 16 year old who no longer attends school and is therefore removed from the Family Benefits' budgetary calculations).

Before examining the nature of the conditions to be attached to the receipt of social assistance suggested in Transitions, the importance of a presumptive right should be underlined in the

⁵⁷Ibid. at 38, recommendation 61.

context of the administrative application of social assistance legislation. Instead of an applicant having to jump hoops to prove his eligibility, the onus would be on the administrator to prove otherwise. An atmosphere is created both within the administration of welfare programs and within the community that the "undeserving" is the exception rather than the rule, and that the deservedness of the applicant is based on the actions of the applicant rather than the inherent malevolent characteristics of the applicant.

"A presumptive right" that is based on need suggests as well that the greater and the more immediate is the need, the more difficult should be the requirements to refute the right to social assistance."

Conditions that are attached to the receipt of social assistance take the form of an obligation by the applicant or recipient to respond to "opportunity planning". The purpose of opportunity planning is to be viewed in the context of the proposed prime objective of enabling persons to make the transition from dependence to autonomy and to a state of integration in the community. Opportunity planning involves the process of the assessment of the recipient's skills, abilities,

¹Ibid. at 263, it is indicated that a grace period for a failure to meet the conditions imposed upon applicants for social assistance is an essential element in the establishment of conditions. Although this seems to be stated in the context of providing the person in need with a procedural protection against the imposition of inappropriate conditions, it could serve as well to guarantee assistance to those in immediate need, regardless of the responsibility for the creation of the particular situation of need.

experience and aspirations, and a referral to the appropriate resources within the community.

The concept of opportunity planning as described in Transitions recognizes that employment is the most effective means of enabling integration into society. In addition, it recognizes that it is not the only way. However, the obligation of participating in the process of opportunity planning, and indeed following the action plan thereby established, would rest solely upon those who under present day legislation are obliged to seek employment with the exception of sole support parents.⁵ Therefore, sole support parents, the disabled, the elderly, and the temporarily ill would not be obliged to participate in the process although they would be encouraged to do so.

In the targeting of conditions, the concept of opportunity planning would not be a change.⁶ The substance of the conditions, however, would be of a fundamentally different nature as they recognize more than the obligation upon a recipient to look for work. They recognize the mutual right of, and the

⁵Under R.R.O. 1980 Reg. 318, s. 2(7), (the regulation to the Family Benefits Act) sole support parents, in order to receive Family Benefits, do not have to look for work as long as they have dependent children living at home. R.R.O. 1980 Reg. 441, s. 3, (the regulation to the General Welfare Assistance Act) requires that sole support parents seek employment, unless the welfare administrator is satisfied that no suitable childcare arrangements can be made.

⁶Transitions, *supra*, note 8 at 235, proposes an important change in the consequences for an individual's non-fulfilment of the condition to participate in opportunity planning. Rather than be completely ineligible for assistance, a recipient would find the amount of his assistance reduced.

obligation for, an individual to be assisted in his pursuit of social participation.

The discussion of opportunity planning allowed the Committee to articulate its vision of the mutual obligations between the state and its citizens (and particularly its social assistance recipients):

In our view the state has a responsibility to ensure that realistic and meaningful opportunities are made available to recipients of assistance to help them increase their capacity for self-reliance and reduce their dependency upon assistance. If the state fulfils its responsibility, it is legitimate and reasonable to insist that some recipients also have responsibilities that they must fulfil. It is not legitimate to require recipients to meet those conditions if the state does not fulfil its part of the bargain, however. The almost symbiotic nature of this relationship may have the added advantage of encouraging the government to ensure that adequate resources are made available to provide real opportunities for self-reliance. Failure to do so will effectively release recipients from any obligations they otherwise may have had."
(my underlining)

Unless this last proviso, underlined above, that the application of conditions is suspended in cases where real opportunities for the individual do not exist, is written into the law, there is no reason to expect that complaints regarding the unrealistic expectations placed upon employable recipients would not continue to find justification. Equally problematic in the absence of such a proviso, would be the very potential breach of an individual's right to liberty whereby one would be forced by the

⁶Ibid. at 230-231.

powers of the state to pursue a course of action inimical to his own best interests.⁶² At the very least, the welfare beneficiary might be forced to follow a non-rational, non-purposeful course of behaviour - why should one look for an opportunity that is not there?⁶³ Further, it should be considered that CAP prohibits, in its manner, the non-voluntary participation in "work-activity" projects.⁶⁴ A work-activity project could be considered akin to the non-job-search components of an opportunity plan in that its focus is on the stages that are preparatory to employment.⁶⁵

⁶²See F. Stairs, supra, note 51 at 168; Paula Rochman, "Working for Welfare: A Response to the Social Assistance Review Committee" (1989) 5 J.L. & Social Pol'y 198 at 216-226, comments upon the inadequacies of job training in Canada, the bleak employment prospects for social assistance recipients, and concludes that opportunity planning would best be offered on a voluntary basis for all social assistance recipients.

⁶³Transitions, supra, note 8 at 235, in its description of opportunity planning insists upon an appeal for an individual from an opportunity plan that the individual does not agree with. A fundamental objection could be raised to opportunity planning that as Transitions itself seems to recognize, and as shall be shown in the next section of this thesis is also recognized by the classic thinkers regarding liberty - an individual truly knows what is best for himself. Indeed, if an individual cannot be persuaded, by a skilled counsellor, to follow a course of action that is in his "objective best interest", then perhaps the individual's "employability", and hence, his obligations to follow an opportunity plan should be put brought into question.

⁶⁴Canada Assistance Plan, R.S.C. 1985, c. C-1, s. 15.(3).

⁶⁵"Work Activity Project" is defined in the Canada Assistance Plan, R.S.C. 1985, c. C-1, s. 14 as "a project the purpose of which is to prepare for entry or return to employment persons in need or likely to become persons in need, who, because of environmental, personal or family reasons, have unusual difficulty in obtaining or holding employment, through participation in technical or vocational training programs or rehabilitation programs, their ability to obtain or hold

Transitions is considered by its authors to be based upon the assumption that "people will choose to maximize their opportunities."⁶⁶ To return for a moment to consider the interplay of the role of need in the determination of benefit rates and the principle that all other financial sources, including employment, are to be accessed before social assistance - it becomes apparent that a tension exists between the need to provide employment-earnings' incentives in order to motivate persons to return to or retain employment, and the desire to establish a formula for a budgetary analysis that truly reflects the amount of available financial resources. This tension is heightened in the absence of a minimum benefit rate that reflects even "frugal comfort", and in the absence of a minimum wage policy that provides wages at least marginally higher than the frugal comfort of social assistance. It is in these circumstances of heightened tension that there exists the greatest temptation for the state to keep social assistance rates at a minimum in order to keep people working for the minimum wage, and to force people into what otherwise would be irrational choices by mandating a policing role for the social assistance system.

employment."

⁶⁶Transitions, supra, note 8 at 230.

V. New legislation and the need to clarify criteria for
distinctions in treatment

The Ministers of Community and Social Services that have served since the publication of Transitions have expressed the desire of the Government of Ontario to move forward in large measure with the recommendations of the report calling for new social assistance legislation. As such, in May 1990 the "Advisory Group on New Social Assistance Legislation" under the chairmanship of Professor Allan Moscovitch was established by the then Minister Charles Beer. This group, under the direction of the then Minister Zanana Akande, reported back to the Minister in March 1991 with the report entitled Back on Track.⁶⁷ This report included a list of 88 suggested actions guided by the spirit of Transitions, that could be implemented in the short term without the need for changes to either of the two statutes. Many of these changes were subsequently implemented.⁶⁸ In addition, six project teams were established by the Ministry of Community and Social Services in May 1991, and coordinated by the "Legislation Development Section" of its Income Maintenance Branch, to provide both the Minister and the Advisory Group with advice on the development of the new legislation. Much of the discussion which is to follow is based upon the work produced by,

⁶⁷Supra, note 37.

⁶⁸O.Reg. 408/91, O.Reg. 546/91, amending R.R.O. 1980, Reg. 441; O. Reg. 407/91 amending R.R.O. 1980, Reg. 318.

or for, these project teams.

Recommendations #1 and #270 of Transitions⁶⁹ propose the merging of the two social assistance statutes into one statute, with one benefit structure that covers all social assistance recipients. Included in these recommendations are the suggestions that the principles underlying the new social assistance legislation be set out in a preamble to the legislation, and that the essential elements of the new social assistance system should be expressed in the statute rather than in regulations and policy manuals. The emphasis on the statutory declaration of the principles of social assistance is important in the context of the Charter's equality guarantees (as shall be discussed later), if for no other reason than it would either clarify that an apparent departure from the principle of equality is one only in appearance, or it would provide a clear legislative expression of the competing fundamental interests of society that might justify a deviation from the principle of equality.

However, even outside of the important though narrow desire to satisfy the requirements of the Charter, the rationale for declaring the underlying principle(s) of social assistance is enlightening with regard to the roles of need and conditionality in social assistance, to the meaning of equality, and to the necessity of developing an equality criteria for social assistance such as to be developed in the next main division of

⁶⁹Supra, note 8 at 139 and 519.

this thesis. Ultimately the ability to offer a thoughtful proposition on the general principle that should underlie an application of the Charter guarantees of equality to social assistance is advanced.

The Legislation Development Section initially developed an inventory of 248 technical, legal and policy issues which required resolution in the context of new social assistance legislation.⁷⁰ These issues were then assigned to the project teams and to the Advisory Group for discussion and resolution. Fully over one-third of the issues so indexed deal specifically with the benefit structure of income maintenance legislation. Benefit structures refer to those issues dealing primarily with the adequacy of benefits, categorical eligibility and the conditions placed upon the receipt of social assistance. One of the major methodological tasks assigned to the project teams and to the Advisory Group was to identify the manner in which the principles underlying social assistance reform, as identified in Transitions, relate to the issues that need resolution. The rationale for selecting this methodology was explained as follows:

- to achieve genuine social assistance reform, broad public consensus is required;
- in order to obtain that consensus, there must be wide agreement on the principles to be followed in the new legislation; and
- since it can be demonstrated that principles

⁷⁰Ontario, Ministry of Community and Social Services, Legislation Development Section, Inventory of Observations and Issues (Social Assistance Legislation Research and Technical Background Documents, report # LDS01) at 1.

underlie issues, a thorough resolution requires both a canvassing of the relevant principles and a weighing of the respective merits of the principles in conflict for each issue."¹

The need to achieve a broad public consensus, which can very much be seen as a response to "the presence of mixed feelings amongst the public towards social assistance spending,"² and towards social assistance recipients, requires that the principles underlying social assistance be openly declared. This sensitivity of the need to capture the favour of the general public was clearly articulated in Transitions, and particularly in the context of discussions of conditionality.³ Attention to public concern, because of the danger of reinforcing negative stereotypes of the poor, is certainly a double-edged sword. On the one side, taking the example of conditionality, to insist upon conditions so that the public believes in the deservedness of social assistance recipients can be viewed as stigmatizing all

¹Ontario, Ministry of Community and Social Services, Legislation Development Section, Objectives and Principles for Social Assistance Legislation: Integrating Principles into the Development of New Social Assistance Legislation in Ontario (Social Assistance Legislation Research and Technical Background Documents, report # LDS02) at 2.

²Ibid. at 4.

³Transitions, supra, note 8 at 226-231 contains a discussion of the pros and cons of conditional entitlement. Although the Committee believes only a very small number of social assistance recipients would abuse social assistance, it was decided that in some circumstances it is legitimate to attach conditions to social assistance based on an appreciation of the social contract. They add, at p. 231, "We also believe that a reasonable and realistic approach to conditional entitlement will find favour with the public and may also increase the likelihood of public acceptance of the balance of the report."

recipients just for the very fact that it has to be done, or it can be seen as de-stigmatizing recipients because they only become recipients if they do satisfy certain conditions. The important point being here that the public view the recipient as worthy of assistance, and for this to be achieved it is believed that the principles upon which social assistance is based have to be clearly and publicly established.

As noted above, Transitions lists ten basic operating principles for reform.⁷⁴ It is recognized in Transitions that on many occasions there will be a competition of sorts between these basic principles in the resolution of issues arising during the reform of social assistance, and that the principle of meeting need should almost always override competing principles and social objectives.⁷⁵ In the report Back on Track, one of the key criteria for their recommendations for change was that, these "changes should move the system in the direction of making need the sole criterion for providing assistance."⁷⁶

In a paper that addressed the major Charter issues that arise in the context of social assistance, Sandra Wain seemed to implicitly recognize the criteria of need as the sole criteria upon which the application of section 15 of the Charter will be based, before the government will be obliged to provide arguments that justify the social assistance statutes, regulations or

⁷⁴Transitions, supra, note 8 at 7-25.

⁷⁵Ibid. at 25.

⁷⁶Supra, note 37 at 4.

policies that deviate from this principle.

...Many benefits are given to some groups, but not others. In some cases, this can be explained on the grounds that the groups getting greater benefits have "special" or "extra" needs. Giving them more may, therefore, simply be a recognition of real differences between the different groups, like giving wheelchairs only to people who cannot walk.

In most cases, however, the reasons for the variations in benefits are not so clear-cut, and their impacts on different groups harder to assess. Sometimes the different benefit levels seem best explained as reflecting public perceptions of "deservedness", or the greater political clout of some groups, compared to others. These are perfectly understandable concerns from the government's point of view. But, if the Charter is to act as a check on political decision-making...these concerns may not prevail. The Charter may require that governments not reflect popular prejudice respecting disadvantaged groups, reinforce widely-held stereotypes about them, or fail to give some of them equal concern and respect because they are not as "worthy" in the eyes of the majority as others. As currently structured, family benefits and general welfare assistance have a number of potential equality problems."

Wain believes that the recommendations made in Transitions for the reform of the social assistance system are very much in line with the exigencies of the Charter, particularly with regard to the equality issues. However, she finds that some new problems are created by the report, where "it suffers from a vagueness that suggests an inability to come to firm conclusion

"Social Assistance Policy and Individual Rights, supra, note 43 at 14-15. Similarly at 63-64, when discussing possible government justifications for distinctions in benefits and the application of rules, Wain cites only two - administrative efficiency and "real differences in need".

on some difficult issues."⁷⁸ Identified in Transitions itself, as one of the most difficult issues, as discussed above, was the issue of conditionality. Wain seems to resolve the tension between the principle of need and others such as conditionality, as they relate to possible legitimate infringements upon Charter rights solely on the basis of section 1 of the Charter, by allowing for distinctions not clearly based upon need where the policy reasons for the departure from the principle of need are clearly articulated and optimally authorized by the statutes or regulations and not through policy directives.⁷⁹ A distinction based upon the fulfilment of conditions is viewed as being as at least in potential opposition to the principle of need.

It is far from clear that need should be the sole equality criteria for social assistance. It is clear that the development or the recognition of a fundamental underlying principle for social assistance, and its public articulation is desirable. Sandra Wain recognized the philosophical and legal complexities involved in the definition of equality. However, she states in her paper that was written after the Supreme Court of Canada's decision in Andrews⁸⁰ that there "is now enough agreement about the nature of "equality rights" that we can avoid these esoteric

⁷⁸Ibid. at 5.

⁷⁹Ibid. in "Executive Summary", recommendations 2, 11, 13, and 14.

⁸⁰Supra, note 10.

questions."¹¹ Justice La Forest discussed in the Andrews decision the role of the Courts when conducting a section 15 review. He implied an aversion to the esoterica of equality but also recognized its importance in questions of the nature currently under consideration:

...Much economic and social policy-making is simply beyond the institutional competence of the courts: their role is to protect against incursions on fundamental values, not to second guess policy decisions.

I realize that it is no easy task to distinguish between what is fundamental and what is not and that in this context this may demand consideration of abstruse theories of equality."¹²

To know whether the provision of social assistance represents fundamental values, and in its provision whether the criteria of need or some other best reflects these same fundamental values, the breach of which would invite the intervention of the Canadian Courts, it would be helpful to refer to a theory of equality somewhat specific to social assistance, however abstruse and esoteric.

¹¹Supra, note 43 at 6.

¹²Supra, note 10 at 194.

B. An Equality Theory of Social Assistance

I Introduction

This part of the discussion describes a vision of equality, based upon mostly primary and generally considered authoritative Western religious, philosophical and legal sources, that would suggest equality is essentially a force that demands the exercise of the human capacity for empathy and compassion. This vision in its application to the state provision of social assistance supports the thesis of "poverty which is outside the control of the individual" as being the overriding criteria of equality in the distribution of social assistance. Indeed, equality as it is to be defined addresses the moral, natural law and international law obligation of the state to provide for the poor of which the thesis at hand is an inclusive case.

I propose to approach the subject of equality by stating at the outset that the essential question to be addressed is, "What is the worth of a human being simply as a human being, i.e., regardless of any trait, characteristic, or experience which might serve to distinguish one human from another?"¹

¹. Referred to here is the idea of a "common humanity" whereby any human has a right to certain treatment based solely upon the generally shared human traits of sentience, rationality, ability to feel affection, etc.. This common humanity is considered to be: an essential aspect of equality by B.O. Williams, "The Idea of Equality" in H.A. Bedau, ed., Justice and Equality (Englewood Cliffs, N.J.: Prentice Hall, 1971) 116; the essential element of equality by M.J. Adler, Six Great Ideas (New York: MacMillan Publishing Company Inc., 1981) 164; and, the only meritorious aspect of equality by J.R. Lucas, "Against Equality" in Justice and Equality, 138.

A complete response to this question would be certainly over-ambitious, with regards to both the capacities of this author and the scope of this thesis. Nonetheless, certain responses to the question that fall within the liberal democratic context of the Western tradition can be taken note of and synthesized into a notion of equality that could prove useful for determining the manner in which the equality guarantees of section 15 of the Charter should apply to the state provision of social assistance.

The central place to be given to the question of intrinsic human worth in the notion of equality, especially although not exclusively as it relates to the treatment of the poor, is suggested by the following three considerations. Firstly the usual meaning given to equality as an expression of the relation between two objects is that of identity. It is readily apparent, at least in the realm of physical perceptions, that no two people are the same. Equality, an enduring idea, would then seem to state that two people are the same who are not the same. Equality must therefore transcend the physical and measurable and deal with the metaphysical, that which either is or gives rise to value(s).¹ Secondly, and alternatively, it could be argued that what is meant by equality is really similarity, the sharing of even very few characteristics. Equality would be understood

¹W. Von Leyden, Aristotle on Equality and Justice (New York: St. Martin's Press, 1985) at viii, asks: "For how could equality ever have become an issue if men had truly and clearly been equal instead of different?"

thus to dictate, as in the Aristotelian idea of equality to be discussed later, that those sharing perhaps even but one pertinent characteristic should receive the same or similar treatment. It would seem logical and natural that the nature of the treatment would relate to the nature of the shared characteristic.⁸⁵ As this thesis deals with a "treatment" that is the provision for the satisfaction of basic human needs, the common characteristic to be considered is the basic human. Thirdly, as a rhetorical device it is useful to discuss an idea as it might be expressed in circumstances which pose the greatest challenge or contradiction to the idea. In this case it is the investigation of equality amongst people who are totally dissimilar, as commonly understood. Inasmuch as the granting or refusal of welfare benefits have been predicated quite often upon perceived dissimilarities amongst people, and more particularly upon alleged dissimilarities of human worthiness, this last point bears special significance in a discussion of equality and the poor.

This discussion of human worth will begin with a look at relatively ancient religious and philosophical writings. Biblical and Aristotelian considerations will be presented as hopefully representative of the marriage of Judeo-Christian revelation with Greek civilization that has been considered to be

⁸⁵See B. Williams, "The Idea of Equality", *supra*, note 83 at 127; *contra*, D. Harris, "Equality, Equality Rights and Discrimination Under the Charter of Rights and Freedoms" (1987) 21 U.B.C.L. Rev. 339 at 404-405.

the basis of Western civilization." The next step will be a large one forward in time to view the reflections on human worth of John Locke, Jean-Jacques Rousseau, and John Stuart Mill, contemporaneous as they were with the beginnings of the secularization of the West. This will be followed by an examination of United Nation's human rights documents and a general summary of some modern definitions of equality.

I hope to demonstrate thereby that the equality principle for social assistance proposed in this thesis - which is that it should be based on need and the individual's control over his poverty - is the product of three thousand years of belief in the intrinsic value of the human being, and of the necessity of a compassionate community for this intrinsic value to be realized. In existence at the inception of Western civilization, persisting and perhaps being strengthened during a period when to be fully human was believed by many to require freedom from what previously held sway as a sacred institution, the belief in what is known today as "the inherent dignity of man" has been confirmed, as a response to the barbarity and evil of this century, in what might be considered the most fundamental of legal contexts.

Long ago, a preacher renowned for his wisdom observed that

¹See J. Stone, Human Law and Human Justice (Stanford: Stanford University Press, 1965) at 9. In his historical survey of justice he accepts as "sufficiently correct" the generalization "widely held since Matthew Arnold, that Hebraism and Hellenism are the main source waters which fed the Western cultural stream."

"there is nothing new under the sun." The essence of that which is not new with regard to questions of human worth is the moral imperative to "love thy neighbour as thyself." What is new for the purposes of this discussion is the manner in which this obligation is to be fulfilled, or more precisely the role the state might be obliged to fulfil in the distribution of social assistance at the end of the twentieth century that recognizes and assures a balance in the actions of government and the individual between those based upon the public interest and those based upon compassion for the individual.

The sources referred to in this inquiry into human worth are indeed relatively narrow in scope and nature. They are limited to, and only illustrative of what might fall into the liberal and democratic area of western tradition." The basis for this limitation is the liberal-democratic bias of the Charter." It

¹Ecclesiastes I:9.

²A.S. Rosenbaum, The Philosophy of Human Rights, International Perspectives (Westport, Connecticut: Greenwood press, 1980) at 6-7, finds most philosophical responses to questions of human rights to be framed in the perspective of Western liberalism. In a political perspective the conception of human rights has at least three perspectives: western liberalism, Marxist socialism and Third World "self-determinationalism"; Davis Harris, *supra* note 2, at pp. 404-406 finds that although courts cannot but entertain moral arguments in equality cases, and that an understanding of the fundamental principles of liberal democratic morality would be ideal, disagreements in a liberal democratic society are too profound to reach such an understanding.

³Regina v. Oakes (1986), [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 [hereinafter Oakes cited to D.L.R.] at 225, Dickson C.J.C.: "The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter...."

is nevertheless recognized that the exclusion of non-Western sources from such a discussion on human worth is becoming increasingly problematic in a constitutional context that seeks to preserve and enhance its multicultural heritage at a time when the country's multiplicity of cultures increase in both sheer numbers and dimensions of cultural distinctiveness."⁹

Finally, references are made quite obviously to both "revealed" and "rational" knowledge, a combination with which one might be ill at ease for any number of reasons.¹⁰ The intention here, to be assured, is not to discover "truth", but rather to ascertain to some extent the spirit of Western tradition in which our law and belief in human dignity took form.¹¹ Indeed, an

⁹Charter, section 27: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

¹⁰E.g. T. Machan, Human Rights and Human Liberties: a radical reconsideration of the American Political tradition (Chicago: Nelson Hall, 1975) at 55: "Only the sort of knowledge is admissible that any person without severe brain damage, with the capacity for reasoning and experiencing life, could gain. Admittedly, many may not choose to pursue that knowledge, but at least they would not be barred from it as they would be if the knowledge consisted in intuition, revelation or the like, namely less than universally available, ineffable means of reaching truth."

¹¹See A. Brudner, "What are Reasonable Limits to Equality Rights?" (1986) 64 Can. Bar Rev. 469 at 491ff.. He discusses the choice of philosophical texts in constitutional interpretation. Judges are not engaged in a quest for absolute knowledge, but for the spirit of laws; C. Brunelle, "L'interprétation des droits constitutionnels par le recours aux philosophes" (1990) 50 R. du B. 353 discusses the increasing use of philosophical sources by the Supreme Court of Canada in Charter litigation. He concludes, that this process has been highly subjective, often intended purely for rhetorical purposes and poorly researched.

understanding of the Charter would appear at first glance to require an appreciation of both physical and metaphysical considerations - along with the "rule of law", the Charter's brief preamble hallows both rationality and religion."

II Ancient Writings (the Bible and Aristotle)

The essential equality concern is the worth of a human being simply as a human being. As indicated above, the moral response to this essential concern within the traditions of the West will be shown to have dictated, and to continue to dictate that "thou shalt love thy neighbor as thyself." The following brief survey of some biblical texts and of some of the thoughts of Aristotle, concerning the nature of man and man's humanity (or exalted stature otherwise termed) will provide at least an elementary understanding of the origins, context and content of this moral response.

Perhaps even more daunting for the jurist than for the poet is the task of defining love and its implications. However, that it is the purview of the jurist is understood inasmuch as it is true that morals, religion and law, were not differentiated in the beginning of law.⁹⁴ Such is certainly evident in the Old Testament. It will be of particular interest as the focus of this discussion advances through time to demonstrate not only the

⁹³"Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law."

⁹⁴See R. Pound, "Social Control Through Law" (1942) at 18-19, in J.W. Morden, "Law and Religion" (1983) 17 Gazette 250.

constancy of this moral response, but to examine as well the manner in which it gives rise to or coincides with law.

Although the frequent starting point for a review of the sources of the idea of equality is with Aristotle and his concept of Justice that demands proportionality¹¹, this review begins with a biblical vision of human worth. Aristotle's concept that persons of equal merit should receive an equal reward is often seen as purely formal in that there is no substantive definition of merit within the concept itself.¹² It is therefore helpful to approach the equality of Aristotle with an understanding of a Judeo-Christian view of human merit. In addition to its instruction about the nature of man and human interaction, an even cursory look at biblical texts reveals much about the motivating forces behind equality, or compassion, and the limitations of these forces.

a) The Bible

I submit for the purposes of the present discussion the Bible should be considered as a myth, and hence as true:

Myth, then, is always an account of a "creation"; it relates how something was produced, began to be. Myth tells only that of which really happened, which manifested itself completely.... In short, myth describes the various and sometimes dramatic

¹¹E.g. J. Rees, Equality (London: MacMillan Press, 1971) at 11; A.F. Bayefsky, "Defining Equality Rights under the Charter" in S. Martin and K.E. Mahoney, eds, Equality and Judicial Neutrality (Toronto: Carswell, 1987) at 106.

¹²See Stone, supra, note 86 at 326.

breakthrough of the sacred (or the "supernatural") into the World. ...a fact that we consider essential: the myth is regarded as a sacred story, and hence a "true history" because it always deals with realities."

Once again, the objective truth of the Bible is not at issue, but rather what are the truths and values held by those accepting of the biblical accounts as true.

To be found in the Five Books of Moses is the story of the divine creation of the world, of man and of the law. In many respects it appears as if the story of creation and the stories of the successive generations serve as a prelude to the giving and acceptance of the law." Man and Woman were created in the image and likeness of God and were given dominion over the earth. The human race is traced back to two parents, Adam and Eve, so that all humans are related not only in the sharing of the Divine image, but biologically as well. The text of Genesis narrates the corruption of succeeding generations, and the dispersion and confusion between brothers and sisters. One is intrigued by the place given to tracing the lineage of those who were to become the people of Israel. Perhaps in the midst of confusion, and blindness to the commonality of divine origins, common ancestry is a significant factor in creating a readiness to accept a law as large in scope and pervasive in daily life as that found in

⁹M. Eliade, Myth and Reality (New York: Harper and Row, 1963) at 6.

¹⁰D. Hartman, A Living Covenant (New York: The Free Press, 1985) at 21-27.

the Old Testament.

There were however other factors that created such a state of readiness. Those who stood around Mount Sinai awaiting the law and the Lawgiver, possessed not only a common ancestry (descendence from the patriarch Jacob) but also a common understanding of shared critical historical events (a miraculous escape from lives of bondage and misery in Egypt) and a common desire to secure the redemptive force as contained in this understanding through obedience to the Lawgiver. Creator, Lawgiver and the Law become one.⁹⁹

This emphasis on the readiness to accept the Law implies the necessity of the consent of those who are to be subject to the law. Indeed, such was the case with the children of Israel whereas it is written that in response to their God's offer of the Law "all the people answered together and said, All that the Lord has spoken we will do."¹⁰⁰

As will become more apparent later in this discussion, the

"The first of the "Ten Commandments does not appear to command at all: "I am the Lord, thy God who has brought thee out of the land of Egypt, out of the house of servants." (Exodus XX:2) The relationship of Creator, Lawgiver and the law is set out with perhaps greater clarity in the following passage which precedes the giving of the decalogue: "You have seen what I did unto the Egyptians, and how I bore you on eagles' wings, and brought you unto myself. Now therefore, if you will obey my voice indeed, and keep my covenant, then you shall be my own treasure from among all peoples: for all the earth is mine: ...And Moses came and called for the elders of the people, and laid before them all these words which the Lord had commanded him and all the people answered together and said, All that the Lord has spoken we will do." (Exodus XIX:6-8)

¹⁰⁰Ibid.

beliefs of human sacredness and the human family, the reflection that commonality of experience and shared visions of redemption should determine the extent to which the law orders and controls the life of the individual, and finally that the consent of an individual or group of persons are required to subject them to the law, are a well-spring of modern ideas and expressions of equality and human rights.

Of the content of biblical law, its fundamental obligation was that of love. Concerning the impact of this obligation to Western civilization it has been written,

Although the Hebrew contribution of reason and due process are of unquestioned importance, undoubtedly the most important contribution of the Jewish tradition about justice (spread to the West through Christianity) was the overriding concept of love....
...this element in thought came to pervade all of Western thinking.¹⁰¹

This "love" reflects the ideas of human sacredness and the human family. However, its impact on the ordering of relations between those of dissimilar people and peoples needs to be explored. The obligation to love is originally expressed as follows:

Thou shalt not avenge, nor bear any grudge against the children of thy people, but thou shalt love thy neighbor as thyself: I am the Lord.¹⁰²

The obligation of love, at least as it prohibits one to take justice into one's own hands, seems to be limited to members of

¹⁰¹Stone, supra, note 86 at 29-30.

¹⁰²Leviticus XIX:18

one's own people. This is neither an easy commandment to fulfil, nor a minor limitation in scope. Before turning to the later rabbinic interpretation of the obligation of love, commonly known as the "Golden Rule", there are other Mosaic laws to be referred to which concern the treatment of the poor and the stranger that implicitly recognize the difficulty of the commandment and what is required to overcome the limitation.

To begin with, in the application of the law the poor and the wealthy were to be treated in the same manner.¹⁰³ As well, specific practices were outlined to provide food for the poor.¹⁰⁴ The following general obligation of caring for the poor is particularly thought provoking:

If there be among you a poor man of one of thy brethren within any of thy gates in thy land which the Lord thy God gives thee, thou shalt not harden thy heart, nor shut thy hand from thy poor brother: but thou shalt open thy hand wide to him, and shalt surely lend him sufficient for his need, in that which he lacks.¹⁰⁵

If one is commanded to not harden his heart to another who is poor, it must be because it is all too easy to do so. Similarly,

¹⁰³E.g. Exodus XIII:6, "Thou shalt not pervert the judgment of thy poor in his cause."; Leviticus, XIX: 15, "You shall do no unrighteousness in judgment; thou shalt not respect the person of the poor, nor honor the person of the mighty: but in unrighteousness shalt thou judge thy neighbor."

¹⁰⁴E.g., leaving unharvested the corners of the field (Leviticus XXIII:22); leaving to the poor the produce of the sabbatical year (Exodus XXIII:11); and, tithes of the third year of the seven year cycle were to be given in part to the poor (Deuteronomy XXVI:12).

¹⁰⁵Deuteronomy XV:7-8.

if one is commanded to give a sufficient amount of what another is in need of, it is perhaps because it is more natural to give in lesser amounts or to neglect the person's true need. And finally, if one is told to give to his poor brother, one must usually either ignore that the poor person is truly his brother and, or, perhaps it is necessary to remind one of the brotherhood to soften one's heart and open one's hand.

Yet, perhaps on the contrary, it may seem to some natural to provide for one's destitute brother - at least after one is reminded that person is one's brother. Even to those sharing such an optimistic opinion of human kindness, it would seem less natural to act in such a benevolent manner towards a stranger. It is perhaps for this reason that one reads:

And thou shalt not oppress a stranger: for
you know the heart of a stranger, seeing you
were strangers in the land of Egypt.¹⁰⁶

This presents an essential element of the response to the question of human worth. When confronted with a stranger upon whom one could presumably exercise considerable power, it is quite possible that an awareness of their common divine image and their common biological ancestry might be dimmed. There is no common history or sense of shared destiny which would necessarily suggest a righteous course of behaviour. Rather, an appeal is made to one's capacity to understand the hardships and sufferings of another. In more general terms, an appeal is made to one's capacity to understand another, based upon one's own feelings or

¹⁰⁶Exodus XXIII:9

understanding of oneself and one's experiences. This human capacity to empathize obliges tolerance, if not benevolence.

To act empathetically is to fulfil the commandment "to love thy neighbor as thyself" as it was interpreted by the Rabbis.¹⁰⁷ It was recognized by them to be the essential commandment, and it was transmitted as thus in the New Testament:

Therefore all things whatsoever ye would that men should do to you, do ye even so to them; for this is the law and the prophets.¹⁰⁸

To act empathetically logically implies a careful balance in the relations between people of self-interest and compassion. As will be shown empathy is at the core of modern notions of equality and justice.¹⁰⁹ It is easily imagined that empathy becomes more difficult to achieve when the other person, that is the stranger, is very foreign. Similarly, within the course of everyday life, it would seem to be true that as suggested earlier, even the very motivation to pursue the understanding of

¹⁰⁷See Stone, supra, note 86 at 30.

¹⁰⁸Matthew VII:12. See also Mark XII: 30-31 for this commandment's cardinal position.

¹⁰⁹See Williams, "The Idea of Equality" supra, note 83 at 124: "...it appears that the Kantian injunction 'treat each man as an end in himself, and never as a means only' should be interpreted as saying that each man is owed an effort to have the world viewed from his perspective."; S.I. Benn, "Egalitarianism and the Equal Consideration of Interests" in Justice and Equality, supra, note 83 at 160: "If the human species is more important to us than other species, with interests worthy of special consideration, each man for his own sake, this is possibly because each one sees in other men the image of himself."

another is very much dependent upon factors in some way similar to those explored above in the biblical context of the early Hebrews, i.e., myths of the sanctity of man, shared ancestry, common destiny, etc.. Nevertheless, as a partial response to the central question of the worth of a human being simply as a human being is the "love" that forms the Hebraic contribution to Western civilization. This love refers to a religious, moral and legal imperative to discover, establish, and respect an essential point of human connection, an equality if you will, even between strangers.

b) Aristotle

The Greek idea of Justice as it is found in the works of Aristotle reaffirms the centrality of the question of human worth in the discussion of Equality. As a philosopher of the 4th century B.C. he was one of the first philosophers to offer detailed arguments about justice, equality, equity and the law.¹¹⁰ He, of whom it is written that "No other mind had for so long a time ruled the intellect of mankind."¹¹¹, wrote the following with regard to Justice in its distributive sense:

...if they are not equal, they will not have

¹¹⁰See Von Leyden, supra, note 84 at 2.

¹¹¹W. Durant, Outlines of Philosophy (London: Ernest Benn Limited, 1962) at 97. See also B. Russell, History of Western Philosophy (London: George Allen and Unwin Ltd., 1961) at 173: "Ever since the beginning of the 17th century, almost every serious intellectual advance has had to begin with an attack of some Aristotelian doctrine...."

what is equal, but this is the origin of quarrels and complaints - when either equals are awarded unequal shares, or unequals equal shares. Further, this is plain from the fact that awards should be according to merit in some sense, though they do not all specify the same sort of merit but democrats identify it with the status of freeman, supporters of oligarchy with wealth (or noble birth), and supporters of aristocracy with excellence.¹¹²

Those who are equally meritorious are equals.¹¹³ One who wishes to assist in the avoidance of quarrels and complaints by determining who are equals must struggle with the determination of the values upon which an opinion on merit is formed. Fortunately, given the Judeo-Christian vision of the sanctity of human life with its entailing central obligation of empathy discussed above, the present task is not to determine values but rather to use this value for the variable of merit in the Aristotelian formula for the peaceful distribution of shares or awards.¹¹⁴

The fulfilment of the commandment of empathy, as cited above from the New Testament, begins with an understanding of one's own

¹¹²Aristotle, *Nicomachean Ethics*, trans. W.D. Ross in R.M. Hutchins, ed., *Great Books of the Western World* vol. 9 (Toronto: Encyclopaedia Britannica, 1952) 339 at 378 (par. 1131a(20)).

¹¹³This confirms to some extent the centrality of the question of human worth in discussions of equality. People may be equal, not because they are identical, but because they possess equal merit.

¹¹⁴It is important to distinguish between Aristotle's definition of justice which involves the relation between equals, and Aristotle's own values which today might be found repugnant allowing as they do for slavery and the dominance of one man over another; see Russell, *supra*, note 111 at 194.

needs and desires. It would seem to be true that the more basic or strongly felt are one's desires or needs, the more one can assume that this desire or need is shared by others. As well, it would seem to be true in practical terms that there exists degrees of understanding of oneself and hence, of others. I suggest that the easier it is to identify one's own particular need(s), the greater is the obligation to act empathetically towards another with regard to that (those) particular need(s). To translate this understanding of biblical morality into the terms of Aristotle's equality would thus be to say that given people's equal merit (or "sanctity"), the more strongly felt and hence commonly held the human need, the more that justice demands the equal distribution of what is required to fulfil that need (according to the degree of individual need).

Conversely, the less fundamental the human need, the less justice requires an equal distribution of that which satisfies it.

It is useful to further pursue Aristotle's thoughts on the relationship between justice, human worth and human need insofar as they speak to and reinforce the conclusion arrived at above, that the basic elements of Western tradition require that all people be equally assured of the meeting of their most basic human needs:

The proof that the state is a creation of nature and prior to the individual is that the individual when isolated, is not self-sufficing; and therefore he is but a part in relation to the whole. But he who is unable to live in society, or who has no need

because he is sufficient for himself, must be either a beast or a god: he is no part of a state. For man when perfected, is the best of animals, but when separated from law and justice, he is the worst of all.... Wherefore, if he have not virtue, he is the most unholy and the most savage of animals, and the most full of lust and gluttony. But justice is the bond of men in states, for the administration of justice, which is the determination of what is just, is the principle of order in political society."¹⁵

When justice, the ordering principle of society, is lacking, individuals are left isolated and unable to meet their needs. In such a situation the individual must be either a "beast or a god". The justice of Aristotle appears here to intersect the biblical obligation of acting empathetically as interpreted above. Although "if he have not virtue" seems to refer to mankind rather than a specific person, one might still insist upon interpreting the above passage to mean that only a worthy person might have a place in the state. However, it would appear incorrect to do so insofar as the state is "prior to the individual" and "justice in the bond of men in states". Aristotle's instruction is that if the justice of the state integrates the individual he then becomes worthy or "perfected".

The beliefs that "awards should be according to merit", and that individuals should be "part of the state" are important

¹⁵Aristotle, Politics, trans. B. Jowett in R.M. Hutchins, ed., Great Books of the Western World, vol. 9 (Toronto: Encyclopaedia Britannica, 1952) 445 at 446 (par. 1253a(25)).

elements of the present day discourse on equality.¹¹⁶ It is the nature of and the relationship between award and merit, and the nature of participation in society which are often at issue.

It is important not to overlook the focus on proportionality in Aristotle's concept of distributive justice. It is easy to ignore the genius of the proposition that what one receives be in proportion to something else because it is so fundamental to our concept of justice and there is "something intuitively rational about the principle."¹¹⁷ It is this rational principle which allows us to differentiate or not in the treatment of persons. With Judeo-Christian values forming the basis of merit, proportionality assumes the function of differentiating as empathy diminishes in importance and the individual is less likely to be excluded from being a part of the state if not receiving that which is being distributed. When the satisfaction of essential human needs is at issue, including that of being part of the state, this same rational principle does not allow

¹¹⁶See H. Buch, "La notion d'egalite dans les principes generaux du droit" in H. Buch, P. Forrers and C. Perelman, eds, L'egalite vol. I (Bruxelles: Etablissements Emile Bruylant, 1971) 196 at 203-208; the Universal Declaration of Human Rights, U.N.G.A. Res. 217 (III), 3 U.N. GAOR, Supp. (no. 13) 71, U.N. Doc. A/810 (1948), art. 29 (1), to be discussed infra at 92: "Everyone has duties to the community in which alone the free and full development of his personality is possible."

¹¹⁷Von Leyden, supra, note 84 at 4. At 110-114, he states that although this formula of proportional equality has been criticized as empty, it was put forward in a context that allowed for and perceived numerous distinctions and gradations in human merit. It was a formula meant not to eliminate distinctions, but rather to permit them. As Russell writes, supra, note 111 at 106: "Aristotle thinks that justice involves, not equality, but right proportion, which is only sometimes equality."

for differentiation in treatment.

c) Summary

This survey of ancient considerations of human worth and equality was intended to be representative of the ingredients of the Hebraic and Greek cultures that were stirred into the pot of Western tradition.

The resulting stew, so to speak, gives rise to the following two savory concepts. The first is that law and justice are not only essential to the functioning of society but they as well determine the worthiness of man. There is a social aspect to the welfare of the individual which is a function of justice. Indeed, the worthiness of the individual, and the welfare of the individual which is both a cause and a result of the recognition of his worthiness, are criteria for measuring the existence of justice in the state. Simply put, the purpose of justice is not only to maintain the state, but to do so in order to recognize and realize the worthiness of the individual.

Secondly, based upon a belief in the similarity of some sorts between the human and the Divine, the essence of law concerns the obligation for one to treat another as one would wish oneself to be treated. The fulfilment of this obligation is recognized to be difficult even between "brothers", and certainly to a much greater extent between strangers - those who share neither ancestry, nor history, nor vision of redemption. Empathy, the ability to see oneself in another and in the

experiences of another, is the key to acting in accordance with the essence of law. The more commonly shared the human feeling, or rather the greater and the more shared is the consciousness of a particular feeling or need, the more justice would require that actions be based upon empathy and compassion.

This understanding of the basis of Western civilization will be shown in the following sections to be the root of the more modern discussions of equality and human worth, even when such discussions take place in the context of a call for religious freedom and reform.

Equality as described above implies a balance between actions of self-interest and of compassion. At this point in the discussion it is not possible to suggest with any specificity where lies the proper balance. Yet, from Aristotle's understanding that the state is a creation of nature and is prior to the individual, and from the biblical understanding of love as being based upon empathy, it can be stated in very broad terms that the maintenance of the state and the human capacity to empathize might be two probable limits to the requirement to act compassionately.

In the modern context, ascribed to the idea of equality is primarily compassion. Self-interest, or rather "liberty", is generally considered to be in opposition (rather than in a complementary position) to equality so-defined. More precisely, it is considered to be in opposition to the redistribution of wealth which such equality might entail.

It would be premature to continue to discuss this apparent conflict between liberty and equality. However, two points should be made in this regard before leaving this section of ancient considerations. The first is that the biblical account of the creation of man recognizes his possession of "freedom of choice and the capacity for deliberation and reasoned decision making."¹¹⁸ The second point is that empathy, the ability to put oneself in the place of another, implicitly requires that freedom be recognized for the other to declare or explain his situation and needs.

III Secularization

Secularization has been defined as "the process of change from the interpretation of reality in essentially supernatural, other-worldly terms to its interpretation in terms which are essentially natural and focused on this world."¹¹⁹ From it springs a belief in rational progress and an optimism that is based in many ways upon a critical evaluation of that which came before it.¹²⁰ Along with and related to urbanization and industrialization, "secularization" is considered to have been one of the most profound social processes shaping Western society

¹¹⁸Hartman, supra, note 98 at 23.

¹¹⁹P. Burke, "Religion and Secularisation," in P. Burke, ed., The New Cambridge Modern History, vol. XIII (London: Cambridge University Press, 1979) 293 at 294.

¹²⁰See J.H. Broome, Rousseau, A Study of His Thought (London: Edward Arnold Publishers, 1963) at 4.

in the last five hundred years.¹²¹ Historically, this process began to take form with the Renaissance, moved through the Reformation to the Scientific Revolution to the Enlightenment, and has continued to gain momentum through the nineteenth and twentieth centuries. The purpose of the brief exposition which is to follow of three of the major philosophers of the early part of this period - John Locke, Jean-Jacques Rousseau, and John Stuart Mill - is to suggest that in spite or perhaps even because of the radical change in human understanding, and the attendant material changes in the human condition, there remains as a central exigency of justice the balancing of self-interest and compassion in the ordering of human relations. This appears to be the case even in the somewhat conflicting philosophical traditions of liberalism (with John Locke at its genesis and continuing through to John Stuart Mill) and romanticism (with Jean-Jacques Rousseau near its origin).¹²²

At the beginning of this period, around the year 1500, the Church was still a great force of social regulation and government, and still the "custodian of culture" and "vessel of civilization."¹²³ The conventional world view was based upon

¹²¹See Burke, supra, note 119 at 293.

¹²²See Russell, supra, note 111 at 660. He considers Locke to be the father of liberalism and the progenitor of Roosevelt and Churchill, whereas Rousseau is called the father of the romantic movement and the progenitor of Hitler. However, Broome, supra, note 120 at 68, states that Rousseau's political theory cannot be reduced to liberalism or totalitarianism.

¹²³J. M. Roberts, The Pelican History of the World (Markham, Ontario: Penguin Books, 1985) at 509.

the medieval synthesis of Aristotle and the Bible.¹²⁴ However, in an atmosphere of profound social, scientific, and technological change, questions began to be raised about man's soul, the origins and function of religion, sanctions of the social order, and the sources of State authority.¹²⁵ Roughly three hundred years later, by the year 1800, European civilization had been given a secular foundation. The authority of the Church was greatly diminished, and that of science and of the State greatly increased.

Regarding the nature of this secular foundation, there are three points to be made in order to place the philosophers which are to be discussed in the proper context. Firstly, a broad utilitarianism was becoming the criteria for the judgment of institutions.¹²⁶ This utilitarianism was accompanied by a renewal of the belief in the inherent goodness or the educability of man, and a turning away from a belief in the essential corrupt nature of man due to the "original sin."¹²⁷

The second contextual factor, very much related to and giving rise to this belief in man's goodness, was the framing of the philosophical inquiry in terms of man "in the state of nature." Whether or not this original or ideal "state of nature"

¹²⁴Ibid. at 643.

¹²⁵See F.E. Manuel, "Introduction" in F.E. Manuel, ed., The Enlightenment (Englewood Cliffs, N.J.: Prentice Hall, 1965) at 3.

¹²⁶See Roberts, supra, note 123 at 537.

¹²⁷See Manuel, supra, note 125, at 4-5.

was actually considered a historical reality, it was considered necessary to reflect in present social, political and legal arrangements the character of man as he was envisioned to be in the state of nature by the philosopher.¹²⁸ As man was generally believed to be free and equal in the state of nature, the period almost necessarily gives rise to the ideas of inherent rights of the individual and a social contract.

Thirdly, and intrinsically related to the other contextual factors, during these centuries the idea of legislative sovereignty came to the fore:

To a medieval man the idea that there might not be rights and rules above interference by any man, legal immunities and chartered freedoms inaccessible to change by subsequent lawmakers, fundamental laws which would always be respected, or laws of God which could never be contravened by those of men, would have been social and juridical as well as theological blasphemy.¹²⁹

However, as the period of secularization progressed, and although there were great declarations to the contrary, there was also a generally shared feeling that provided the authority of the state was in the right hands, there should be no restriction upon its power to make laws.¹³⁰ It is therefore not surprising that there existed from the seventeenth century onwards a "state of conflict" or at best an "uneasy compromise" between demands for

¹²⁸See Russell, supra, note 111 at 605.

¹²⁹Roberts, supra, note 123 at 544.

¹³⁰Ibid. at 543-544.

social cohesion and demands for liberty.¹³¹

a) John Locke

The English philosopher John Locke (1632-1704) is considered a "presiding deity" of the early Enlightenment¹³², and father to American liberalism.¹³³ He viewed man in the state of nature as being in possession of absolute freedom and as being in a state of equality with all one's fellow men. Equality made every man lord over himself and not rightfully subject to the will of another.¹³⁴ It was freedom and equality, along with a belief in "men being all the workmanship of one omnipotent and infinitely wise Maker,"¹³⁵ that dictated an obligation amongst men of mutual love.

It is clear that he believed the Golden Rule to be the

¹³¹See Russell, supra, note 111 at 14-15.

¹³²Roberts, supra, note 123 at 652-653.

¹³³See Russell, supra, note 111 at 618; A.S. Rosenbaum, "The Editor's Perspectives on the Philosophy of Human Rights," in A.S. Rosenbaum, ed., The Philosophy of Human Rights, International Perspectives (Westport, Conn.: Greenwood Press, 1980) at 12: "It was through the innovative contribution of Locke... that natural rights theory (as a precursor to human rights doctrine) became recognized as legitimately asserted by all individuals everywhere and obligatorily respected by government as a first condition of its own legitimacy."

¹³⁴See J. Collins, A History of Modern European Philosophy (Milwaukee: The Bruce Publishing Company, 1954) at 357.

¹³⁵J. Locke, Concerning Civil Government, Second Essay, in R.M. Hutchins, ed., Great Books of the Western World, vol. 35 (Toronto: Encyclopaedia Britannica, 1952) 25 at 26 (chapter 2, par. 6).

foundation of morality.¹³⁶ He wrote:

Our Savior's great rule, that "we should love our neighbours as ourselves," is such a fundamental truth for the regulating of human society, that, I think by that alone, one might without difficulty determine all the cases and doubts in social morality.¹³⁷

The respect of the great rule requires the following:

Everyone as he is bound to preserve himself, and not to quit his station wilfully, so by the like reason, when his own preservation comes not in competition, ought he as much as he can to preserve the rest of mankind, and not unless it be to do justice on an offender, take away or impair the life, or what tends to the preservation of the life, liberty, health, limb, or goods of another.¹³⁸

The role of civil government, which resulting from man's equality in the state of nature is to be established by the consent of society, is to solely occupy itself with the pursuit of life, liberty, health and the preservation of property.¹³⁹ Man's freedom in nature was to be translated into political society by assuring that man, "be under no other legislative power but that established by consent in the commonwealth, nor

¹³⁶See J. Colman, John Locke's Moral Philosophy (Edinburgh: Edinburgh University Press, 1983) at 199.

¹³⁷J. Locke, The Conduct of Understanding, in Colman, ibid., at 199.

¹³⁸Locke, Concerning Civil Government, Second Essay, supra, note 135 at 26 (chapter II, par. 6).

¹³⁹See J. Locke, A Letter Concerning Toleration, trans. W. Popple, in R.M. Hutchins, ed., Great Books of the Western World, vol. 35, (Toronto: Encyclopaedia Britannica, 1952) at 3; see also Locke, Concerning Civil Government, Second Essay, supra, note 135 at 56 (chapter XI, par. 135).

under the dominion of any will, or restraint of any law but what that legislative shall enact according to the trust put in it."¹⁴⁰ The "trust" of which is spoken, is the desire to protect the well-being, liberty and property of individuals.¹⁴¹

Although the preservation of property was considered the "great and chief end... of men uniting into commonwealths,"¹⁴² Locke's concept of property as it exists in the state of nature reflects if not necessarily once again an obligation to mutual love, then a belief that a claim made on the common property would not make the obligation difficult to respect:

The measure of property Nature well set, by the extent of men's labour and the conveniency of life. No man's labour could subdue or appropriate all, nor could his enjoyment consume more than a small part; so that it was impossible for any man, this way, to entrench upon the rights of another or acquire to himself a property to the prejudice of his neighbor, who would still have room for as good and as large a possession (after the other had taken out his) as before it was appropriated.¹⁴³

It is therefore not surprising that John Locke recognized both a right to assistance for the poor who was unable otherwise to support himself, and an obligation to come to the aid of the poor:

Charity gives every Man a Title to so much

¹⁴⁰Locke, Concerning Civil Government, Second Essay, supra, note 135 at

¹⁴¹Ibid. at 54 (chapter IX, par. 131).

¹⁴²Ibid., at 124 (chapter IX, par. 123).

¹⁴³Ibid. at 32 (chapter V, par. 35).

out of another's Plenty, as will keep him from extream want, where he has no means to subsist otherwise...
...twould always be a sin in any Man of Estate, to let his Brother perish for want of affording him Relief out of his Plenty.¹⁴⁴

b) Jean-Jacques Rousseau

Jean-Jacques Rousseau (1712-1778), the famous "philosophe" who penned, "Man is born free; and everywhere he is in chains,"¹⁴⁵ was exceedingly wary of the triumph of rationality over that of feeling and a sense of morality.¹⁴⁶ He is seen to have straddled the Christian and the rationalist Enlightenment views on the goodness of man.¹⁴⁷ His was a moral critique of the stupidities of the social system; his perception being that its basic principles were opposed to individual liberty, and inimical to happiness and moral dignity.¹⁴⁸

In A Discourse on the Origin of Inequality he makes an impassioned exposition of the dangers inherent of an over-emphasis upon reason, as well of the dangers of simply living in society as it then existed. The distinction is drawn between

¹⁴⁴J. Locke, First Treatise of Government (#42), in Colman, supra, note 136 at 198-199.

¹⁴⁵J.J. Rousseau, The Social Contract, trans. G.D.H. Cole, in R.M. Hutchins, ed., Great Books of the Western World, vol. 38 (Toronto: Encyclopaedia Britannica, 1952)387 at 387 (Book I, chapter 1).

¹⁴⁶See Roberts, supra, note 123 at 655-656.

¹⁴⁷See Broome, supra, note 120 at 14-15.

¹⁴⁸Ibid. at 6.

natural and political inequalities. The former consists of the differences in the physical, mental and spiritual endowments among individuals. The latter are a grotesque magnification of the natural effects of the former. Of these inequalities, "wealth is the one to which they are all reduced in the end."¹⁴⁹

In his meditations on man in the state of nature, he arrives at a position requiring of man that he balance his actions between those based on self-interest and those based on compassion:

...contemplating the first and most simple operation of the soul, I think I can perceive in it two principles prior to reason, one of them deeply interesting us in our own welfare and preservation, and the other exciting a natural repugnance at seeing any other sensible being, and particularly any of our own species suffer pain or death. It is from the agreement and combination which the understanding is in a position to establish between these two principles... that all the rules of natural right appear to me to be derived - rules which our reason is afterwards obliged to establish on other foundations, when by its successive developments it has been led to suppress nature itself.¹⁵⁰

According to Rousseau, man's only natural virtue is compassion, the capacity to identify oneself with another, and

¹⁴⁹J.J. Rousseau, A Discourse on the Origin of Inequality, trans. G.D.H. Cole, in R.M. Hutchins ed., Great Books of the Western World, vol. 38 (Toronto: Encyclopaedia Britannica, 1952) 323 at 387.

¹⁵⁰Ibid. at 330-331.

particularly the sufferings of another.¹³¹ Reason, on the other hand, separates one from another. The philosopher states, "Perish if you will, I am secure:

...A murder may with impunity be committed under his window; he has only to put his hands to his ears and argue a little with himself, to prevent nature, which is shocked within him, from identifying itself with the unfortunate sufferer.¹³²

c) John Stuart Mill

In contrast to Jean-Jacques Rousseau, the influential utilitarian philosopher John Stuart Mill (1806-1873) viewed society's impact upon the individual as beneficial and the future progress to be made by man and society in removing suffering from the world as a certainty.¹³³

The utilitarianism of Mill held that actions are right in proportion to their tendency to promote happiness, and wrong as

¹³¹Ibid. at 345: "It is this compassion that hurries us without reflection to the relief of those who are in distress... which will always prevent a sturdy savage from robbing a weak child or a feeble old man... if he sees a possibility of providing for himself by other means."

¹³²Ibid. at 345.

¹³³See J.S. Mill, Utilitarianism, in R.M. Hutchins, ed., Great Books of the Western World, vol.43 (Toronto: Encyclopaedia Britannica, 1952)445 at 452: "Yet no one whose opinion deserves a moment's consideration can doubt that most of the great positive evils of the world are in themselves removable, and will, if human affairs continue to improve, be in the end reduced within narrow limits. Poverty, in any sense implying suffering, may be completely extinguished by the wisdom of society, combined with the good sense and providence of individuals."; see also Brunelle, supra, note 92 at 375, regarding the considerable influence of John Stuart Mill on the thinking of the Supreme Court of Canada.

they might tend to promote unhappiness. Happiness is the experience of pleasure and the absence of pain, whereas unhappiness is the experience of pain and the privation of pleasure.¹⁵⁴ This standard of correct human conduct was not only based upon the individual agent's happiness, but also the happiness of all those concerned with the agent's action. However, based upon his understanding of human nature, he believed that even the individual's happiness to have a strong social component:

When people who are tolerably fortunate in their outward lot do not find in life sufficient enjoyment to make it valuable to them, the cause generally is, caring for nobody but themselves.¹⁵⁵

Indeed, Mill takes the "golden rule of Jesus of Nazareth" to be the "complete spirit of the ethics of utility."¹⁵⁶ This complete spirit or ultimate end, is not amenable to direct proof. It must be admitted to be good without proof.¹⁵⁷ It is to be made manifest by establishing laws and social arrangements that harmonize the interests of the individual with those of society, and through education that has the aim of convincing the

¹⁵⁴See Mill, ibid. at 453.

¹⁵⁵Ibid. at 451; at 460, he writes that the "social state is at once so natural, so necessary and so habitual to man, that except in some unusual circumstances or by an effort of voluntary abstraction, he never conceives himself otherwise than as a member of a body...."

¹⁵⁶Ibid. at 453.

¹⁵⁷Ibid. at 446; see also Collins, supra, note 134 at 760-761, for a discussion of the distinction Mill draws between the sources of the factual and those of the normative.

individual of the identity of his interests with those that promote society as a whole.¹⁵⁸

It is particularly interesting that the "golden rule" is referred to as the essential spirit of his theory, in that one finds it in a context where both liberty and equality are viewed as strong complementary values. The realization of these values he believes to be evolving truths of the human condition.¹⁵⁹

A synthesis of his views on liberty and equality could be presented as follows. A society "between equals can only exist on the understanding that the interests of all are to be regarded equally."¹⁶⁰ However, it is through one's liberty, which is only to be limited to the extent that its exercise would be harmful to others¹⁶¹, that one's interests can even be made

¹⁵⁸Mill, supra, note 153 at 453.

¹⁵⁹Ibid. at 460: "Society between equals can only exist on the understanding that the interests of all are to be regarded equally. And since in all states of civilization, every person, except an absolute monarch, has equals, every one is obliged to live on these terms with somebody; and in every age some advance is made towards a state in which it will be impossible to live permanently on other terms with anybody."

¹⁶⁰Ibid.

¹⁶¹See J.S. Mill, On Liberty, in R.M. Hutchins, ed., Great Books of the Western World, vol. 43 (Toronto: Encyclopaedia Britannica, 1952) 267 at 271: "...the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection...to prevent harm to others."; see also D. Lyons, "Liberty and Harm to Others," in W.E. Cooper, K. Nielsen & S.C. Patten, eds, New Essays on John Stuart Mill and Utilitarianism, (Guelph: Canadian Association for Publishing in Philosophy, 1979) 1 for a full discussion on whether "not causing harm to others," imposes an obligation to prevent or remove another from a harmful situation. Although Lyons answers in the affirmative, he recognizes that Mill's inconsistencies are themselves the

known. Lest one believe that he has another's best interests at heart, Mill educates his reader:

...the interest which any other person, except in cases of strong personal attachment, can have in it (a person's well-being), is trifling compared with that which he himself has.. while with respect to his own feelings and circumstances the most ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by any one else.¹⁶²

It is interesting to note that in spite of Mill's stated beliefs in the educability of man, in a concept of liberty that recognizes that a person knows what is best for himself, and that poverty is one of the "positive evils of life", he considers the idle poor who receive support from the public to be deservedly subject to legal punishment.¹⁶³

d) Summary

During this period of history when Western man's focus was changing from the supernatural to the natural, and particularly to that of man in the state of nature. The belief that in the ordering of human relations there must exist a balance or a complementary relationship between actions of self-interest and compassion, that is itself based upon a belief in the equal

center of the debate.

¹⁶²Mill, On Liberty, ibid. at 303.

¹⁶³Ibid. at 314; at 319, he writes in a similar vein, "The laws which ...forbid marriage unless the parties can show that they have the means of supporting a family, do not exceed the legitimate powers of the State."

worthiness of all men, remains clearly articulated as an essential philosophical moral imperative. At least this was the case with the three philosophers discussed above. This was true in the philosophy of Jean-Jacques Rousseau where the instruments of reason and social organization were viewed as contributing to human degradation rather than to man's perfection. This was equally true in the philosophy of John Stuart Mill where rationality and the social contribution to the perfection of man were championed.

The Golden Rule continues to have been venerated, but translated and interpreted in terms of liberty and equality to mean that one has the natural freedom to take what one needs or to do what one wishes as long as one neither takes more than ones needs at the expense of others, or is otherwise destructive to themselves or to others. Both John Locke and John Stuart Mill express the understanding that the individual knows what is best for himself in relation to his spiritual and material well-being. And even if this not be true for a particular individual, the mind and the spirit should be subjects of education and not coercion.¹⁶⁴

In the analysis above of the Bible and Aristotle, the maintenance of the state and the human capacity to empathize were

¹⁶⁴See Locke, A Letter Concerning Toleration, supra, note 139 at 3: "And such is the nature of understanding, that it cannot be compelled to the belief of anything by outward force. Confiscation of estate, imprisonment, torments, nothing of that nature can have any such efficacy."; similarly, Mill, On Liberty, supra, note 161 at 271: "Over himself, over his own body and mind, the individual is sovereign."

seen as limits to the obligation to act empathetically. The period presently under discussion, based upon a belief in the natural equality of all men, much heralded the idea of human liberty. It is important not to forget that the basis of the idea of liberty was equality. Harm to others was considered the limit to the exercise of liberty. So, rather than liberty being seen as a limit to equality, it should be seen as an important facet of its expression. In other words, to allow for another's liberty is to act empathetically in an essential manner.

It is noted that this discussion has either blurred or not distinguished clearly enough the important distinctions between religion, morality and law, to which the period of secularization precisely gave rise. As well, sacrificed to the singular focus of this section on the continuity of the Golden Rule as the essential standard for human conduct have been a follow up to the other observations on equality and law drawn from the discussion above of the Bible and Aristotle, and a discussion of the manner and the extent to which the State was to facilitate the proper balance of interests in human conduct. In the following discussion of the responses to the question of human worth in the modern period these concerns are addressed, along with the identification once again of the Golden Rule, although less clearly identified as such, as the supreme standard of human conduct.

IV Modern Considerations

As the final part of this inquiry into the concept of human worth within Western tradition, the following sampling of modern human rights and justice considerations has three objectives. It reaffirms the centrality of compassion within the idea of justice. It assigns to the state as a mediator between the individual and the community specific obligations to act compassionately; one of which is the obligation to provide adequate social security. Finally, in its definition of compassion towards the poor, it resolves the conflict between the competing values of liberty and equality which may arise by the guarantee of the state-mediated human right to social security. It does so by the establishment of the criteria of the individual's control over their poverty as limiting upon the state's obligation to provide social security.

Already in the eighteenth century the great declarations of France and the United States of America expressly incorporate the values of human liberty and equality, and, as well, the important beliefs that are derived from these values with regard to the purposes, limits and even the consensual basis of governments (as discussed in the previous section "Secularization").¹⁶⁵ It is

¹⁶⁵E.g., The Declaration of Independence (United States of America, 1774): "We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just

interesting that man's essential equality, and his endowment with rights, were considered then to be "self-evident". This is to say, they were without direct reference to a specific philosophical or narrowly religious basis. In the language of the United Nations' human rights declarations of the twentieth century, human equality and possession of rights are denoted by the phrase, "inherent human dignity."¹⁶⁶ The first part of the discussion on modern considerations of human worth which follows focuses on these seminal United Nations' human rights declarations. In them, the proclamation of human dignity is made without any reference to a system of ultimate values, suggesting perhaps that human dignity is necessarily or implicitly self-evident. Human rights therefore serve not only to promote human dignity, they serve as well to define it.

The brief second section discusses some modern legal-philosophical considerations of human worth and its purpose is two-fold: to demonstrate the ongoing requirement of empathy for human behaviour to be moral and just; and, to examine equality as a principle which condones or condemns distinctions in treatment primarily on the grounds of compassion.

In the conclusion there is an attempt to further negotiate

powers from the consent of the governed...."; The Declaration of the Rights of Man and the Citizen, 1789 (France), particularly sections 1-6.

¹⁶⁶See Rosenbaum, supra, note 133 at 9, is of the opinion that the predominant influence on the writing of the Universal Declaration of Human Rights (supra, note 116), is that of the Western European tradition of human rights.

the apparent conflict between liberty and equality, or as it has been proposed previously to be the conflict between self-interest and compassion. This conflict between the individual and other(s) is reframed for the modern period in the context of its mediation by the state through law. In very simple terms the question that is posed is the manner in which the state can take from one person to give to another so that the dignity of both persons is safeguarded and promoted.

The concern with human dignity and, by logical extension if not by religious revelation, the insistence upon respect to he who is "other" has endured as a central component of Western morality and justice. In this concluding part of this survey of responses to the question of human worth, the reintegration of morality and law through the agency of human rights guarantees is recognized. In the specific case of the respect that is owed to and can be claimed by the poor, the human rights guarantee is to assistance that meets the needs of the poor taking into account the human need for social inclusion, and, the individual's control over his poverty - to both hold the individual responsible for that which is in his control and to enable the individual to have greater control.

a) United Nations' declarations of human dignity

One of the main purposes of the United Nations, as written in the second paragraph of the preamble to its charter, is:

to reaffirm faith in fundamental human rights, in the dignity and worth of the human

person, in the equal rights of men and women
and of nations large and small....¹⁶⁷ (my
underlining)

The focus of this section will be in trying to understand the meaning and implications of this article of faith which is the dignity and worth of the human person, as it can be understood in the context of three principle human rights documents of the United Nations¹⁶⁸: the Universal Declaration of Human Rights¹⁶⁹; the International Covenant on Economic, Social and Cultural Rights¹⁷⁰; and, the International Covenant on Civil and

¹⁶⁷Charter of the United Nations, [1945] C.T.S. 7, T.S. 67 (1946).

¹⁶⁸For a full discussion of the relevance of international humans rights law to the Charter, see W. A. Schabas, International Human Rights Law and The Canadian Charter (Toronto: Carswell, 1991). At 156-158, Professor Schabas concludes that two principles have been established at this early stage of Charter interpretation. The first is that if the Charter is inconsistent with international law, the court will not consider international authorities at all. The second is contained in the dictum of Dickson C.J., in Reference Re Public Service Employee Relations Act (1987), [1987] 1 S.C.R. 313 at 349-350, 38 D.L.R. (4th) 161: "I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified. In short, though I do not believe the judiciary is bound by the norms of international law in interpreting the Charter, these norms provide a relevant and persuasive source...especially when they arise out of Canada's international obligations under human rights conventions." With respect to these remarks of the then Chief Justice, Robertson, supra, note 7 at 207-208, comments that Canada has declared the Canada Assistance Plan, R.S.C. 1985, c. C-1, to be one of the ways in which Canada complies with its international obligation to provide an adequate standard of living.

¹⁶⁹Supra, note 116.

¹⁷⁰International Covenant on Economic, Social and Cultural Rights, Annex to G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966). Ratified by Canada in 1976.

Political Rights¹⁷¹.

As mentioned above, there is no specific reference to the foundation or source for the belief in human dignity within these three documents, nor for that matter within the Charter of the United Nations. Perhaps indirectly, this source is related in some manner to the "outraged conscience of mankind" and to the "highest aspirations of the common people" which are phrases found in the preamble to the Universal Declaration of Human Rights justificative of the declaration. Nevertheless, it would still seem preferable, or at least easier, to understand the meaning of "dignity" by looking at the language and the rights guaranteed in these documents. Indeed, the preambles to both of the aforementioned human rights covenants explicitly state that the individual's equal and inalienable rights "derive from the inherent dignity of the human person."¹⁷² This leads to the conclusion that a person's worth is demonstrated and perhaps can be evaluated in large part, by the rights he is guaranteed.

1. Universal Declaration of Human Rights

The Universal Declaration of Human Rights (hereinafter Declaration), adopted by the General Assembly of the United

¹⁷¹International Covenant on Civil and Political Rights, Annex to G.A. Res. 2200A 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966). Ratified by Canada in 1976.

¹⁷²The second paragraphs of both the International Covenant on Economic, Social and Cultural Rights, and the International Covenant of Civil and Political Rights, read, "Recognizing that these rights derive from the inherent dignity of the human person."

Nations in 1948, in its article 1 proclaims the natural equal dignity of all human beings.¹⁷³ As creatures endowed with reason and conscience, they are to "act towards one another in a spirit of brotherhood." "Brotherhood" is to be understood as part of the metaphor of the "family of man." The family, in its usual sense, is itself identified as the "natural and fundamental group unit of society."¹⁷⁴ In its use of the metaphor of the human family, what is being asked is to extend the use of one's reason and one's conscience outside of the natural family unit. The spirit of brotherhood is to be realized by this extension of conscience and reason towards others from whom one can distinguish oneself and to do so in concrete terms by prohibiting that distinctions be drawn in this process of extension (which is the recognition of human rights) by virtue of the characteristics similar to those specified in article 2 of the Declaration ("race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other

¹⁷³The greatness of this declaration given the perspective of the monumental difficulties of international and human relations is framed in an inspiring manner by E. Schwelb, "Some Aspects of the International Covenants on Human Rights of December 1966" in A. Eide & A. Schou, eds, International Protection of Human Rights (Stockholm: Almqvist and Wiskell, 1968) 103 at 123: "...it is a noteworthy achievement that in a world so rent by strife 106 States from all parts of the world could give their unanimous agreement to a work of codification of this scope which touches upon the most delicate aspects and the whole range of problems of the relationship between the individual and society and between individuals and groups."

¹⁷⁴Universal Declaration of Human Rights, article 16.(3); similarly the International Covenant of Economic, Social and Cultural Rights, article 10, and the International Covenant of Civil and Political Rights, article 23.

status....").

The rights acknowledged in the Declaration to result from a belief in inherent human dignity, and proclaimed as a common standard for all peoples and all nations, were later more fully set out in two subsequent covenants which separated to a large extent those rights generally deemed to be civil and political from those deemed to be economic, social and cultural. The nature of this separation will be discussed shortly. To be taken note of immediately is the mediatory role assigned to the member states in the ordering of relations between the individual and the community with regard to their mutual responsibility of acting in a brotherly manner. Besides the obvious fact of the Declaration having been made by states (and the ensuing covenants representing an agreement between states), to the extent that it is the state which creates and gives sanction to law, that the state is to effect the balance between the prescribing of duties and the guaranteeing of rights and freedoms is declared in the Declaration as follows:

Article 29. (1) Everyone has duties to the community in which alone the free and full development of his personality is possible.
(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic

society.¹⁷

Paragraph 1 is reminiscent of Aristotle's contention that for man to rise above the beast he must be part of the state. It would seem important to note that this article speaks not only to limiting the burdens placed upon the individual by the state, but might also have the tendency to apply the same criteria of paragraph 2 and to so limit the benefits to be given to the individual by the state. Further, whereas the first part of paragraph 2 ("in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others") mandates the mutuality of obligations between individuals to be mediated by the state through law, the latter part of the paragraph ("and of meeting the just requirements of morality, public order and the general welfare in a democratic society") is reminiscent as well of another of Aristotle's contentions that the state is prior to the individual.

¹⁷Both covenants underline the role of law in the effective guarantee of human rights. The International Covenant on Economic, Social and Cultural Rights, art. 2, obliges the state to use all appropriate means in order to progressively realize the human rights in the Covenant, "including particularly the adoption of legislative measures." The International Covenant on Civil and Political Rights, art. 2, calls for the adoption of legislative measures and an effective judicial remedy for the violation of civil and political rights. K. Vasak, "Human Rights: As a Legal Reality" in K. Vasak, ed., The International Dimensions of Human Rights, vol. 1 (Westport, Conn.: Greenwood Press, 1982)1 at 3, considers the first requirement for a system of human rights to be the existence of a De Jure state. This state is characterized by its people's self-determination and the existence of the rule of law.

Actions of brotherhood, or human rights, as they relate to the sphere of economic, social and cultural life are encapsulated in articles 22-28 of the Declaration. These rights are coined "indispensable" for human dignity and the free development of the human personality.¹⁷⁶ In reference once again to the Aristotelian understanding of human worth presented earlier, it is the realization of these amongst other rights which would in a large measure define participation in the state.

Given the focus of this thesis, and as it goes right to the question of human merit and the receipt of social assistance, article 25 of the Declaration requires careful examination:

Article 25. (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

It appears clear from paragraph (1) that the right to an adequate standard of living in combination with the right to security, has for its particular application of the limits of

¹⁷⁶See Universal Declaration of Human Rights, art. 22: "Everyone, as a member of society has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."

article 29 of the Declaration cited above, with regard to the duties and rights of the individual and the responsibility of the community, the concept of the poverty of the person being due to circumstances beyond his control. A poor person merits the provision of an adequate standard of living if it is not his fault he is poor.

According to article 29 of the Declaration, any limit to a right must be determined by law, for the sole purpose of respecting the rights of others, and necessary as well for morality, public order and the general welfare in a democratic society. Whereas the recognition of the person's inherent dignity is the "foundation of freedom, justice and peace in the world," and whereas the right to social security is "indispensable" for the person's dignity, it would seem that a limitation to this right should be rather narrowly construed. This would seem to entail as well, that even the question of an individual's control over his poverty, as defining the right to social security itself, should reflect the criteria for the limitation of a right as contained in article 29. An examination of the right to social security within the context of social and economic rights as a whole, which is to follow, would seem to confirm this.

2. The Two Covenants

In 1966, the United Nations General Assembly gave its assent, in accordance with the member states' obligations under

the United Nations' Charter to promote the respect for human rights, to the International Covenant on Economic, Social and Cultural Rights, and to the International Covenant on Civil and Political Rights. The question has arisen whether the grouping of rights into two separate covenants, and based upon the grouping, the differences in the immediacy with which obligations upon the state are to be fulfilled as well as the mechanisms for their enforcement, are indicative of a greater importance being attached to political and civil rights than to economic, social and cultural rights.¹⁷⁷ Although opinion is somewhat divided, the answer to this question appears to be in the negative.¹⁷⁸

¹⁷⁷The International Covenant on Economic, Social and Cultural Rights, art. 2, sets as the objectives of the states the progressive realization of the rights contained in the covenant. Part IV of the covenant provides for a self-reporting system of enforcement, whereas the International Covenant on Civil and Political Rights, Part IV, provides for not only a self-reporting system, but for an international adversarial system as well (once the state parties recognize the competency of the Committee established under Part IV, article 41). The language of art. 2 of this covenant in contrast with that of the economic, social and cultural rights covenant, would indicate an undertaking by the states of the immediate realization of civil and political rights. The preambles to both covenants recognize the necessity for the realization of the rights contained in its companion covenant if the ideals of the Universal Declaration of Human Rights are to be achieved, even though the enumeration of these ideals differ slightly in the preambles to the covenants.

¹⁷⁸See T. van Boven, "Distinguishing Criteria of Human Rights" in K. Vasak, ed., supra, note 175, 43 at 50. He cites the reaffirmation by the General Assembly in 1977, res. 32/130, that "a) All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights; b) The full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible...."; M. Jackman, "The Protection of Welfare Rights Under the Charter" (1988) 20 Ottawa L. Rev. 257

The differences between these two documents are certainly significant. However, as the progressive realization of social, economic and cultural rights are tied to the resources of the state, and given the relatively rich economic context in which social and economic rights are to find their Canadian expression, the prioritizing of human rights is of less importance in this discussion than it might otherwise be.

It is rather the similarities between these two covenants which best serves as the starting point for a deeper analysis of the nature of the right to social assistance. The preambles to both covenants are nearly identical except for the inversion of the terms "civil and political rights" and "economic, social and cultural rights" in the phrase which declares the necessary realization of both for the achievement for the achievement of the ideal of the Declaration - "free human beings enjoying freedom from fear and want." Both groupings of rights are to be guaranteed without distinction or discrimination as to a broad non-limitative list of groupings by which there previously existed an experience of oppression. Discrimination carries with it the meaning of unfairness in making distinctions and its prohibition holds a most prominent place in the Declaration and the two covenants.¹⁷⁹ The non-limitative manner in which

at 284-286; V. Kartashkin, "Economic, Social and Cultural Rights" in K. Vasak, ed., supra, note 175, 111 at 111-114.

¹⁷⁹See K. Partsch, "Fundamental Principles of Human Rights: Self-Determination, Equality and Non-Discrimination," in K. Vasak, ed., supra, note 175 at 69.

discrimination is prohibited invites the prohibition of other similarly unfair distinctions.

Although economic, social and cultural rights are the subjects of progressive realization, the prohibition against discrimination during the process of progressive realization is of immediate application. In other words, it would seem that if only half the rights are to be fulfilled, or if all rights are to be half-fulfilled, this must be accomplished in a non-discriminatory manner.

It has been noted that with the objective of realizing equality, or human dignity, and given the widely varying legal systems and cultural contexts in which the principle of equality is to be applied, the focus had been put on prohibiting discrimination.¹⁸⁰ Therefore, if the rights recognized as inherent are denied to many individuals it would seem a worthwhile enterprise to find a distinguishing characteristic possessed by man if not all such individuals and prohibit discrimination based on that characteristic.

One of the most fundamental and controversial distinctions made in relation to the right to social assistance in Ontario at the present time, as discussed above, concerns the determination of whether an individual is responsible for his poverty. The question is raised whether this is an allowable distinction. The response provided by the economic covenant requires some reflection as it is not immediately apparent.

¹⁸⁰Ibid. at 69.

As noted above, the Declaration, article 25 (1), cited above,¹⁸¹ speaks of a right to security for an individual suffering from a lack of livelihood "in circumstances beyond his control." However the right to social security as provided for in the International Covenant on Economic, Social and Cultural Rights does not contain this proviso:

Article 9. The State Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

The economic, social and cultural rights are couched in general terms.¹⁸² Either, in the covenant, the intention existed to enlarge the right to social security originally referred to in the declaration, or the definition of social security was to be understood with the proviso of "control" . Assuming the latter to be the case, which is that the individual who is responsible for his poverty is unfavourably distinguished from others who are lacking an adequate standard of living, the matter of determining responsibility for poverty is still to be resolved.

Just as the individual's exercise of his full capacity to gain a livelihood is viewed as part of his duty to the community,

¹⁸¹supra, at 93.

¹⁸²See Kartashkin, supra, note 178 at 113. He suggests reference should be made to other documents of the United Nations and its affiliated agencies to learn what might be the substantive content of many of the economic, social and cultural rights; Robertson, supra, note 7 at 215 reports that in 1986 the United Nations created a new expert committee on Economic, Social and Cultural Rights, whose role includes clarifying the normative content of these rights.

this capacity itself could be dependent upon the strength and nature of his community "in which alone the free and full development of his personality is possible."¹⁸³ The strength of the community is in turn characterized by the extent to which human rights are realized. Therefore, the extent to which human rights are realized in the community is the barometer with which the individual's responsibility for his lack of livelihood can be assessed.

For example, the International Covenant on Economic, Social and Cultural Rights contains among other very significant rights, an extremely comprehensive right to work. This right to work includes the provision of technical and vocational guidance, training programs, policies to achieve full employment, etc..¹⁸⁴ In a community where the policy of full employment does not exist, or where there are few opportunities for vocational training, both the individual's capacity to provide for his own livelihood and his obligation to do so are somewhat diminished. As such, the community's responsibility for providing the individual with a livelihood increases.

The United Nations human rights documents described above have been described as philosophical and teleological. They declare humans to be inherently possessed of dignity and that this dignity requires recognition and realization through

¹⁸³Universal Declaration of Human Rights, art. 29 (1).

¹⁸⁴See International Covenant on Economic, Social and Cultural Rights, arts. 6-8.

primarily legal guarantees of a civil and political, and of an economic, social and cultural nature. Indeed, the "dignity" is defined by the possession of rights deemed to be human rights. Whereas the spirit of "dignity" is to be found in the term "brotherhood" and in the metaphor of the human family, a very real human family is brought about by the prohibitions against discrimination.

The individual's dignity can only be realized through participation in the community. The merit of the community can be measured by the extent to which it fosters individual dignity through its recognition of the full spectrum of human rights. Participation involves political and civil freedoms, to be discussed later in the section where freedom and equality are juxtaposed. As for the mutual duties and rights between the individual and the community with regard to economic well-being, the balance to be struck is over the fulcrum of the individual's control over his poverty as viewed within the context of the community's merit.

b) Modern Legal Philosophy

The modern legal philosophical considerations to be discussed here, as a response to the central concern of human worth, clearly demonstrate a mainstream reaffirmation of the Golden Rule as a social organizational and a legal imperative. This, as will be shown, is evident in the theory of justice of John Rawls, and equally transparent in many current definitions

or propositions for legal equality. Equality, in its legal meaning is neither solely nor necessarily concerned with the eradication of distinctions made in the differing rewards individuals may receive from society. Rather, based upon a desire to guarantee human dignity the modern discussion focuses on the distinctions which are permissible or impermissible, and perhaps even desirable. The main concern seems to be to bring the individual, indeed to bring all of humanity to a perfect state, perhaps even more perfect than the state of nature, whereby even those distinctions foisted upon men by the capriciousness of nature and previous social arrangements do not prejudice those who might otherwise be rendered disadvantaged. This is what seems to be expressed whether in John Rawls' "original position," the oft used phrase "creating a level playing field," or the more prosaic reference to the initial distribution of resources which either can be used to justify or to deny distinctions in treatment. Although reference has been made to individual rights, the context of modern discussions of disadvantage concerns the patterns of disadvantage among groups of persons, eg. race, religion, sex....

The application of a principle allowing for or insisting upon favourable distinctions in treatment to those who are initially disadvantaged in a distributive sense, to the issue of assistance to the poor would seemingly lead to the conclusion drawn earlier that the individual's control over his poverty should determine whether he should receive assistance.

In A Theory of Justice, John Rawls sets out to establish the basic principles of social justice, to develop a set of principles in order to choose among the various social arrangements which assign basic rights and duties in the institutions of society and appropriately distribute the benefits and burdens of social cooperation.¹⁸⁵

He arrives at two such principles of justice which would be chosen by rational persons in an initial position of equality. Of this initial position more will be said shortly. The two principles of justice echo the historical concerns of finding a proper balance between self-interest and compassion:

1. Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others;
2. Social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions open to all.¹⁸⁶

The first principle is indeed the prime principle in that the second cannot override the first. He explains further in relation to the second principle that inequalities are just only if they result in "compensatory benefits for everyone, and in particular for the least advantaged members of society."¹⁸⁷ This concept of justice, he considers to nullify "the accidents

¹⁸⁵J. Rawls, A Theory of Justice (Cambridge: Belknap Press, 1971) at 4-5.

¹⁸⁶Ibid. at 60-61.

¹⁸⁷Ibid. at 14.

of natural endowment and contingencies of social circumstance."¹⁸⁸

It seems that he rightly regards the acceptance of these principles as accepting certain moral principles. The morality begins with the original position of equality at which Rawls would have persons rationally arrive at these principles of justice. Ronald Dworkin considers Rawls' original position not as the starting point but as one of the "major substantive products of the theory as a whole."¹⁸⁹ Rawls' essential concern with the right to equal concern and respect is enforced by the original position.

The original position is one at which the person, considered a rational individual, is ignorant of his own nature or social situation. Basically, Rawls assumes it is only by being ignorant of his own best interest that man can accept a structure of society that would maximize social advantages and distribute them in a manner that demonstrates equal respect.¹⁹⁰ His principles

¹⁸⁸Ibid. at 15.

¹⁸⁹R. Dworkin, Taking Rights Seriously (London: Duckworth, 1972) at 158. At 181: "[The original position] ...supposes, reasonably that political arrangements that do not display equal concern and respect are those that are established and administered by powerful men and women who, whether they recognize it or not, have more concern and respect for members of a particular class, or people with particular talents or ideals, than they have for others.... The original position is well designed to enforce the abstract right to equal concern and respect, which must be understood to be the fundamental concept of Rawls' deep theory. ...the right to equal respect is not, on his account, a product of the contract, but a condition of admission to the original position."

¹⁹⁰See Rawls, supra, note 185 at 14.

of justice therefore are those chosen by an agreement of rational persons who are essentially coerced into identifying their own self-interest with that of others, by the wearing of blinders. The rational person's concern becomes what he would do unto others if he might be stuck being the other. It is with this concern, or motivation to act compassionately, that moral arbitrariness - which Rawls identifies with the existing distribution of wealth being based upon the cumulative effect of prior distributions of natural assets - would be done away with.¹⁹¹ Dworkin comments that Rawls must be of the intuition that the values that support the original position must be widely shared.¹⁹² The line of the present discussion would suggest this intuition to have a solid historical foundation.

Consistent with this compassionate stance and a belief in the moral arbitrariness of existing differences in wealth is the position found taken by people today, as described by Chaim Perelman, of having a lesser concern with equality of treatment than with reducing the glaring inequalities in the real circumstances in which people find themselves.¹⁹³ Otherwise, as some point out, efforts would have to be made to assure the equal

¹⁹¹Ibid. at 72-73.

¹⁹²See Dworkin, supra, note 189 at 158.

¹⁹³See C. Perelman, "Égalité et Valeurs," in H. Buch, P. Forrers and C. Perelman, eds, L'Égalité, vol. 1 (Bruxelles: Établissements Émile Bruylant, 1971) 318 at 318; C. Perelman, Justice, Law and Argument (Dordrecht, Holland: D. Reidel Publishing Company, 1980) at 84; Stone, supra, note 86 at 334.

distribution of evil - an uninspiring enterprise.¹⁹⁴ More to the point perhaps, is that underlying this direction in thought is a profound disappointment in the real as well as the theoretical inability of "formal justice" to remedy glaring social inequalities and injustice. Henceforth, "substantive" rather than "formal" justice is what is wanted. (As shall be discussed later, section 15 of the Charter was drafted to address this concern.)

Formal justice, with us from the time of Aristotle, dictates that likes be treated alike. Included in formal justice is the principle of "equality before the law", or the "rule of law" whereby rules are applied impartially to all those to whom the law applies - which is to say that laws should be laws.¹⁹⁵ A critique of formal equality is perhaps to be understood as frustration with real inequalities and human suffering, some of which are indeed to be attributed to the contents of and the distinctions made by laws, rather than a blindness to the grandeur of the human achievement of law, purely formal as its justice may sometimes be.

¹⁹⁴See Harris, supra, note 35 at 393.

¹⁹⁵See A.G. Canada v. Lavell (1974), [1974] S.C.R. 1349 at 1366, 38 D.L.R. (3d) 481 [hereinafter Lavell], Ritchie J. defines equality before the law to mean "equality in the administration or application of the law by the law enforcement authorities and the ordinary courts of the land."; This is considered a "thin sense of juridical equality" by Brudner, supra, note 92 at 480; see also Bayefsky, supra, note 95 at 107; F. Michelman, "The Meanings of Legal Equality" in F.E. McArdle, ed., The Cambridge Lectures 1985 (Montreal: Les Editions Yvon Blais Inc., 1987) 85 at 96-97.

The difficulty with the concept of formal justice, addressed at the very beginning of this discussion, is the definition of likeness.¹⁹⁶ It could be suggested that the issue of likeness is less problematic, and the concept of formal justice more acceptable, if it is tied to the concept of human dignity. Likeness so attached to human dignity would be understood in the prescription that "likes be treated alike with regard to the purposes of the law," to refer to likeness of human dignity. As the essential and universally revered characteristic of likeness of all human beings is the trait of being possessed of human dignity, the exigency of equality would therefore be that the purpose or the effect of the law would have an equal impact upon the dignity of all human beings. If a law did not have an impact upon human dignity, it would not be reviewed from an equality perspective.

It is important to remember that human dignity has both substantive and comparative aspects, assuming for example the human rights enunciated in the United Nations' human rights documents discussed above, to comprise an appropriate definition of human dignity. Prohibitions against discrimination in the enjoyment of human rights, as a human right itself, reflect the comparative element of human rights. To evaluate the manifest dignity of an individual or group of individuals, their enjoyment

¹⁹⁶See Perelman, supra, note 193 at 1-24. He finds that positive law can only be challenged on the basis of "concrete" rather than formal justice. Concrete justice is based upon a particular vision of the universe and a settled scale of values; Stone, supra, note 86 at 326-329.

of human rights must be compared with the enjoyment of human rights of others within that particular community. Equality, once again, would therefore further require that the law have a comparatively equal impact upon the enjoyment of human rights of all people.¹⁷

Given this comparative element of human rights, in regard to a distributive scheme, difficult questions arise involving the justification for differences in the enjoyment of human rights such as: 1) Does the increased substantive enjoyment of a human right by one person, without a decrease in the substantive enjoyment of a human right by another, nevertheless mean that the human dignity has been compromised?; 2) In the event that the substantive enjoyment of human rights by the latter has been diminished, has the human dignity of the latter been compromised?; and, 3) Must the lot of all equally disadvantaged groups, groups enjoying human rights to the same extent, be improved at the same time?

Intuitively, the answer to the first question in which one person or group is being aided without detriment to another is in the negative. Perhaps this is because the guarantee of human rights is without discrimination, and the distinction in the enjoyment of a human right is being removed, i.e., one previously

¹⁷In practical terms it might be most difficult to measure and compare the impact of a legislative scheme upon fundamental rights. What should be examined is the impact of the law rather than a law. The conflict between this process and that of constitutional adjudication which examines primarily laws in isolation is discussed by Brudner, supra, note 92.

deprived is no longer deprived.

The second and third questions are intuitively more difficult to answer. In these situations giving assistance to one person or group of persons is to the actual or potential substantive detriment of another.

The underlying issue is how can differences in the enjoyment of rights be justified? Rawls has written that "social and economic inequalities, for example inequalities of wealth and authority, are just only if they result in compensatory benefits for everyone, and in particular for the least advantaged members of society."¹⁹⁸ To reduce the advantages given to one group to assist a comparatively disadvantaged group could be justified in the case that the existing inequality (in favour of the advantaged group) did not result in a benefit to society as a whole or to the least advantaged members of society.

The enormity of the task of calculating benefits to society and its subgroups by redistributing rights, even if solely focused on a right to social assistance, precludes its inclusion in the present discussion. Fortunately however, by insisting that the question refer to inequalities in the distribution of "human rights", rather than rights in general, elements of a response are more readily accessible.

Professor Bayefsky suggests that an equality analysis of distinctions made in the law take a combination of an interest based and a classification based approach. The more serious is

¹⁹⁸Rawls, supra, note 185 at 15.

the issue in question and the more "suspect" the classification - the group being disadvantaged by the law has historically been disadvantaged or subject to persecution - the less likely that a distinction being made to the detriment of a disadvantaged group would be allowed.¹⁹⁹ Therefore in answer to the question of which human rights inequalities can be justified, the answer can be found by examining the seriousness of the human right at issue, the extent to which it is being affected and the extent to which the classification being used is suspect.

Preferential treatment with regard to fundamental human rights accorded previously disadvantaged groups could be justified if in fact fundamental rights and previously disadvantaged groups are involved. Indeed it has been said that the only time that not discriminating in preference of the disadvantaged produces a fair result, is if the initial distribution of assets was itself fair.²⁰⁰ Concern with an equitable, or equal distribution of resources is explicit in the theory of Rawls for when commenting that the existing distribution of income and wealth is the cumulative effect of the prior distribution of natural assets, he states that, "distributive shares are decided by the outcome of the natural lottery; and this outcome is arbitrary from a moral

¹⁹⁹See Bayefsky, *supra*, note 95 at 110-112.

²⁰⁰See A. M. Honore, "Social Justice" (1962) 8 McGill L.J. 77 at 97.

perspective."²⁰¹

The establishment of a criterion for the issuance of social assistance which is the poverty of the individual outside of his control can easily be viewed as a specific case in which there finds expression a concern with the initial distribution of resources. The expression of this concern over an unequal initial distribution of resources is often made, as it is by Rawls, in response to those (as, for example, Rawls makes to himself) who promote the idea that "liberty" is the supreme value.²⁰²

A specific expression of a "libertarian" concern with social assistance might be, for example, that an unemployed person should not receive social assistance because he really doesn't want to work. An "egalitarian" response might be that even if an unemployed person doesn't want to work, he should not be made to suffer poverty because the resources initially allotted to that individual - such as education, health care, family support, etc. - do not allow that person to want to work. To conclude this discussion of modern perspectives on equality it would be worthwhile to briefly look at, in more general terms, the seeming opposition of the values of equality and liberty.

V) Conclusion

²⁰¹Rawls, supra, note 185 at 73.

²⁰²Ibid.

Throughout this discussion it has been demonstrated that in recognition of human worth, whether in terms of "man's sacred nature" or in terms of "human dignity", society should be so organized for the proper relations between an individual and his neighbour(s) to be based upon complementary actions of self-interest and compassion. This complementariness is today expressed in terms of equality and liberty. Yet, in spite of liberty and equality having shared the banner of the French Revolution of 1789, these ideals have been viewed more as competing values, one of which must prevail over the other, rather than complementary values which must be balanced in order to help effect the equilibrium of human dignity.²⁰³ Although other values have been identified as being in competition with equality such as efficiency, stability, coordination, etc., it's the longstanding opposition of liberty to equality which requires discussion.²⁰⁴

Let us briefly summarize what has been considered up until now regarding the values of liberty and equality. Man is a rational being possessed of freedom of choice, who, when asked to act compassionately finds himself limited in this capacity either by the interests of the other being in conflict with his own, or by his being ignorant of the best interests of the other. In the

²⁰³See T. Axworthy, "Liberalism and Equality," in Martin & Mahoney, supra, note 95 at 43; Buch, supra, note 116 at 213; Honoré, supra, note 200 at 103; D. Proulx, "L'objet des droits constitutionnels à l'égalité" (1988) 29 C. de D. 567 at 569-580.

²⁰⁴See Honore, supra, note 200 at 103; Rawls, supra, note 185 at 6.

minds of the philosophers John Locke and John Stuart Mill, it is the individual himself who best knows what is in his best interests. Even if he does not, the mind and spirit should be subjects of persuasion and not coercion. In this respect, commonly recognized liberties such as those involving speech, assembly, representative government, opinion, thought, conscience and religion, amongst others, enable the rational being to act compassionately. This is so even to the extent that they just elicit information from the other person about the other's self-perceived best interests. The conflict of interests between individuals could be resolved if not through education and man's progressive enlightenment (assisted in no small part through the exercise of the liberties listed above in their role of communicating information on the desires of the other), then by the well-established principle that the limit to individual liberty is found where its continued exercise is harmful to the liberty of another.²⁰³

With regard to the provision of social assistance, in order to effect the balance between liberty and equality, the principle has been proposed in this section that social assistance should be provided in an amount sufficient to meet one's basic human and social needs as long as the person is not responsible for his

²⁰³It is this balancing between the interests of individuals (and between different groups of individuals) that takes place under section 1 of the Charter: "1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

poverty. A guarantee of liberty enables a person to pursue what is in his best interests. To put forward again an argument put forth earlier, based upon an intuition which would now seem more firmly established, the more important the interest, the more the freedom for its pursuit be protected. However, the more commonly shared is this interest, and the more conscious is this sharing of interest, the greater is the requirement to act compassionately. Therefore, if liberty is deemed to be the right to make a claim upon the common good, and if harm to others is considered to be the proper limit to the exercise of liberty, the mutual guarantee of the right to essential interests, such as food, clothing and shelter is imperative.

Ideally this mutual guarantee is brought about through the legislative acts of freely elected representatives of the people. The possible failure of a democratically elected legislature to act compassionately and represent the interest of all the people was described quite aptly by John Stuart Mill:

A completely equal democracy, in a nation in which a single class composes the numerical majority, cannot be divested of certain evils; but those evils are greatly aggravated by the fact that the democracies which at present exist are not equal but systematically unequal in favour of the predominant class. Two very different ideas are usually confounded under the name democracy. The pure idea of democracy according to its definition, is the government of the whole people by the whole people, equally represented. Democracy as commonly conceived and hitherto practised is the government of the whole people by a mere majority of the people exclusively represented. The former is synonymous with

the equality of all citizens; the latter strangely confounded with it is a government of privilege in favour of the numerical majority, who alone possess practically any voice in the state...there is a part whose fair and equal share of influence in the representation is withheld from them; contrary to all just government, but above all, contrary to the principles of democracy which professes equality at its very root and foundation.²⁰⁶

The overview of the social assistance system in Ontario presented in the first section of this paper would lead one to reflect that Canadian legislators have not always represented the interests of the poor effectively in their deliberations and decisions. The equal concern due the poor as human beings in a democratic state has not been respected. The Charter was enacted to guarantee rights and freedoms through recourse to the courts when legislators failed to respect these rights and freedoms. The discussion which follows addresses the issue of whether the judiciary can and will make effective use of the Charter, particularly the guarantee of equality found in section 15, to remedy failures of the Canadian democratic process in its treatment of the poor. The exercise of empathy, the core of Western morality, figures prominently in this discussion.

²⁰⁶J.S. Mill, Representative Government, in R.M. Hutchins, ed., Great Books of the Western World, vol. 43 (Toronto: Encyclopaedia Britannica, 1952) 327 at 370.

C. Section 15 of the Charter

I Introduction

In this third and final section, the guarantee of equality in section 15 of the Canadian Charter of Rights and Freedoms as it would appear to apply to the provision of social assistance is the focus of this discussion. This section is divided into two main parts. The first part examines the academic commentary regarding the merits of attempting to promote the recognition and respect of social rights through Charter litigation. Very much in the light of the insights provided into judicial reasoning and judicial philosophy that results from this analysis, the second part reviews the section 15 jurisprudence of the Supreme Court of Canada. Empathy, as discussed above, is the very foundation of equality. It is put forth in the first part, and demonstrated in the second part, that the concept of empathy as it finds its reality in the minds and hearts as well as in the judicial process of the judiciary, provides an excellent understanding of the forces at play in section 15 adjudication. This section concludes with suggestions as to the form in which to express the experience of poverty and the relationship between the poor and the state so that, if it is at all possible, the empathy of the courts will be engaged.

It is at first suggested that the impetus for the growing body of social rights literature with its overriding concern of securing social rights for the poor, whether individuals are for

or against the use of the Charter (and none are unequivocally either for or against), is an awareness by certain members of the academic community of the dependence of the disadvantaged upon, and their vulnerability to government.

What then follows is neither an exhaustive analysis of the equality issues of social assistance, nor one of section 15 jurisprudence. Rather what is hopefully achieved as mentioned above is an appreciation of empathy as an explanatory device. What is offered as well is an understanding and a critique of both the current process of section 15 judicial reasoning (and in particular the interplay of sections 1 and 15), which, will be suggested, stifles the voices of the disadvantaged and the contextual development of the concept of discrimination which in terms of social assistance seriously limits the empathic capacity of the courts.

Before proceeding to the main discussion, two final introductory contextual items must be covered. The first, for purposes of convenience, is a very brief review of the principal themes of the first two sections of this paper. The second is an introduction to the principles of two closely related equality issues very much at the centre of section 15 discussions; "systemic discrimination" and "substantive equality" - only indirectly considered in the previous section on equality. This second item is necessary for this discussion particularly as it ultimately elicits concerns that the definition of discrimination used by the Supreme Court of Canada in section 15 cases, adopted

as it was from the discussion of equality within the context of employment, is perhaps ill-suited and prejudicial to those most disadvantaged. The definition of discrimination needs to be adapted to the concrete context of poverty and the poor.

The first section of this paper presented an overview of social assistance in Ontario in the context of its dependence on the federal Canada Assistance Plan for both financing and philosophical orientation, and in the context of the current process of social assistance reform at the provincial level which is guided by the principles and recommendations of the report entitled Transitions. One of the primary philosophical approaches of the federal cost-sharing statute was the recognition of the social-situational aspect of poverty, and the suggestion that all those in situations of poverty were equally meritorious of government assistance. A social assistance system will necessarily have to make distinctions in treatment, at least in terms of benefit levels, based upon the categorization of persons by grounds normally thought of as suspect, and many enumerated within section 15 of the Charter. In the view of the authors of Transitions and of its "heirs", it is necessary to arrive at the statutory recognition of the main principle whereby social assistance is to be granted and whereby distinctions are to be made in amounts of, and conditions (if any) entitling one to, social assistance.

The underlying principle identified in Transitions was the

provision of adequate assistance, understood to mean that which allows both for the "frugal comfort" of the individual and for his transition to an enhanced quality of life in the community context, that supplements the individual's present capacity to meet his needs.

One of the more problematic issues, identified as such in the report, was the extent to which the individual was to be held responsible for his current and future state of poverty. This responsibility would be engaged by the individual's refusal to participate in the process of "opportunity planning" and it would result in the refusal or reduction of assistance to the individual. Distinctions with regard to the imposition of the obligation to respond to opportunity planning, by categories of persons in a situation of need, also raised equality concerns. Transitions attempted to resolve these concerns by making the obligation of opportunity planning itself contingent upon the existence of real opportunities for persons in need, and by recognizing that in the case of sole support parents the activity of child-rearing represented social values equal to those underlying financial self-sufficiency through employment.

The second section of this paper examined some of the responses to the question of human merit within the Western liberal and democratic tradition. Having identified and having traced the notion of empathy at the epicentre of these responses, it was concluded that the application of equality to the provision of social assistance requires that the state provide

assistance to those who are poor in a manner that allows the person to "participate in the state", as long as the person's poverty is outside of his control. "Control" is to be understood to be apprehended by an examination of the presence of effective guarantees of all rights pertinent to human dignity, so that as in the manner of opportunity planning within Transitions, enforcing obligations must be consistent with the presence of real opportunities.

Indeed there is little in the analysis of equality presented above which would result in vision of social assistance contrary to that of Transitions, except for noticeably less reticence in its recognition of the aspect of "control" as being limiting upon the state's obligation to provide adequate social assistance based on need. It is suggested that the difference in emphasis is due to the distinction that can be drawn between the development of an equality theory in the abstract and the manner in which it must be implemented in the concrete world. This is especially so where the gaps of social advantage (and disadvantage) are quite pronounced, and almost by definition of "advantage" so are the gaps in levels of real control possessed by different groups. In such circumstances it might be considered somewhat inappropriate to insist upon the complete transposition of all the components of a theory of equality in social assistance, particularly that of "control", to the concrete form of social assistance legislation. Otherwise there exists the potential for real harm to persons in situations of

poverty whose lack of control is very much in question.

This distinction between that which is emphasized in an abstract theory of equality and that in its concrete implementation, is recognized in a theory which identifies the capacity of empathy as the underlying basis of equality. The act of theorizing, or conceptualizing, can assist in the comprehension of another if it is predicated on the attempt to accurately translate the experience of another into a language one understands and not simply to judge another. Even then, it must be recognized that the gap always exists. The experience of the other, and particularly the experience of hardship faced by another, has the tendency to become less important than the I that theorizes. The more the theorizing, the less that empathy is exercised. The greater the distance between the I who observes and the "it" observed to begin with, (as between the rich and the poor - and the judiciary and the poor), the more the application of equality theory to situations, and rules of equality to equality litigation, requires information on and consideration of the concrete impact of inequality, and in the case which is the subject matter of this paper, poverty.

A juridical framework that has been constructed which serves to decrease the distance between the "I" that applies the rule and the "its" upon whom he rules, is the inquiry into "systemic discrimination". This inquiry examines in concrete quantifiable terms the varying impact upon identifiable groups of people in the distribution of burdens and benefits that are based upon what

might otherwise appear to be essentially neutral rules.²⁰⁷ These rules are deemed "neutral" in that they do not overtly target groups normally considered as having suffered from persecution. Evidence of an "evil" intent is not required for a finding that a rule is in fact discriminatory.

There are a number of considerations underlying an approach that looks for systemic discrimination. There is a recognition of tremendous variances between the situations of groups of people, identifiable by the usual grounds of discrimination upon which overt evilly-intended prejudice existed. Many of the rules that create or maintain these distinctions have been internalized to the extent that they appear to be necessary, or logical or a result of the natural order of things. Therefore the "persecutor" acts evilly without the desire of wishing to create or maintain an evil (leaving aside the difficulty in actually proving evil intent), and perhaps the "victim" does not know they are being victimized. There is also a belief that systems tend

²⁰⁷The concept of systemic discrimination was given initial recognition by the Supreme Court of Canada in Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd. (1985), [1985] 2 S.C.R. 536, 23 D.L.R. (4th) 321 [hereinafter O'Malley cited to S.C.R.]. The Court's finding that the actual adverse impact of a provision even absent an evil intent is sufficient for a finding of discrimination lays the foundation for the Court's later interpretation of section 15 of the Charter. The prohibition of systemic discrimination is clearly established in the Ontario Human Rights Code, 1981, S.O. 1981, c. 53, s. 10, which states in part, "10(1) A right of a person under part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member...."

to both create and afterwards maintain distinctions in the initial distribution of resources that are based on group membership.²⁰⁸ There finally is the moral judgment that it is wrong that this happens.

Once the moral wrong of systemic discrimination is accepted the remedies proposed cross a broad spectrum of mechanisms to achieve "substantive equality". As the words denote, equality in substance and in result is desired. The options are to change rules, to set quotas, to provide programs of affirmative action, employment equity, etc.. Once again, the underlying assumption is that if there exists a great variance in the real situation between different groups of people it must be because there is something wrong with the system. Within this framework it must be assumed that the distinctions in situation are in no way based on the free choice of the individuals of the group with respect to both the desired goal of an improved situation, nor to their contribution to the achievement of the specific overriding social goal for which they wish to be rewarded.

To cut short this line of thought, which if developed would require further considerations upon the interplay of liberty and equality, and to conclude this introduction to the guarantee of equality of section 15 of the Charter, it would be worthwhile in light of the remarks above on systemic discrimination to recall

²⁰⁸See Canada, Report of the Commission on Equality in Employment by Judge R.S. Abella (Ottawa: Ministry of Supply and Services Canada, 1984) [hereinafter the Abella Report] at 9, and the discussion of this report, infra at 204 ff.; D. Proulx, supra, note 203 at 574-580.

the observation of Jean-Jacques Rousseau, cited above, that of natural and political inequalities, "wealth is the one to which they are all reduced in the end."¹⁶⁵

II Arguments for and against the use of the Charter

This part presents some of the arguments for and against the use of the Charter in the attempt to secure the effective recognition of social and economic rights, particularly the right to social assistance. It was the expressed intention of the authors of the Charter that it was to provide for the protection of political and civil rights rather than social and economic rights.¹⁶⁶ The arguments made for the use of the Charter recognize this intent. However, as Professor Jackman suggests in conclusion to her forceful arguments for the Charter protection of welfare rights through the use of section 7 of the Charter¹⁶⁷, that are based in no small part on her appraisal of the set of fundamental Canadian values of mutual help and community,

¹⁶⁵supra, note 149.

¹⁶⁶Robertson, supra, note 7 at 196, considers that the suggestion that the rights of the International Covenant on Economic, Social and Cultural Rights be included in what was to become the Charter was "rejected with disdain" by the Trudeau government. At note 49, he cites Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, Minutes of Proceedings and Evidence, Issue No. 49, (January 30, 1981) at 65-71, to support his contention.

¹⁶⁷Section 7: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

Why should the intention of its authors be determinative of its meaning; why should we be content with a document which offers but an imperfect manifestation of our fundamental selves?¹¹²

Before examining the arguments "for" and "against", it is fruitful to ask the question of why, in the first place, it was considered important to construct these arguments? The obvious answer is that claims with regard to social assistance are directed at governments, and the Charter in virtue of its section 32 applies to government:

32. (1) This Charter applies
 (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
 (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Leaving aside for now the definition given to government and to the scope of government activities from which an individual is indeed afforded Charter protection by the courts, the proposition of a perhaps less immediately obvious explanation of the impetus to Charter-social action is useful as it serves to further inform

¹¹²Jackman, supra, note 178 at 338. These remarks of Professor Jackman are compatible with the concerns expressed by the then Lamer, J., in Re B.C. Motor Vehicle Act (1985), [1985] 2 S.C.R. 486 at 509, 23 C.C.C. (3d) 289, regarding the capacity of the Charter to adapt to changing societal needs: "If the newly planted 'living tree' which is the Charter is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials, such as the Minutes of Proceedings and evidence of the Special Joint Committee, do not stunt its growth."

this discussion of the experience of inequality of the poor.

Daniel Mockle, in his work with the administrative law section of the Law Reform Commission of Canada, has described the relationship of the individual with the government in matters having to do primarily although not exclusively with the distribution of government benefits in a manner that dwells upon the nature of the real inequality between the two parties (i.e., government and beneficiary), the internalization of the negative effects for the beneficiary of this disequilibrium, and ultimately the need to recognize the beneficiary as a distinct class of persons called "administrés et usagers de service public" as a first step in equilibrating the relationship.²³ As the discussion in this paper has up until this point centred more on the poor in relation to others in the community, on the fairness of the differences in their situation, and upon the obligation of the modern state to mediate the relationship between the poor and the more fortunate, it would be useful here to look at the concrete dynamics of this process of mediation.

In his text which speaks of the inadequacy of administrative law in both its formal sense of judicial review and in its informal sense of the English tradition of relying on one's member of Parliament to resolve problems with the administrative branch of government, Professor Mockle first observes that the

²³D. Mockle, Administrés et usagers de service public. Introduction à l'environnement social et juridique d'une catégorie floue du droit administratif, (Commission de réforme du droit du Canada, February 1987, un-published). The term "usager" would be perhaps best reflected in English by the term "consumer".

primary characteristic of the "administré" is his poverty. With respect to his analysis, it would be perhaps more correct to say her poverty, as he concludes that poverty does have a sex. The seriousness of the situation in which for the poor ordinary administrative law is of little usefulness, is heightened by his statistical conclusion that poverty is increasing and that more than half of the population live either in poverty or very close to it.²¹⁴

He sets the scene of the relationship between the government and the "administré" in the following manner:

Face à l'Administration se profile une clientèle principalement constituée de personnes désargentées, peu scolarisées, désinformées, vulnérables et dépendantes. Les attitudes respectives des deux acteurs en présence, Administration et administrés, ont fait ailleurs l'objet de nombreuses analyses qui insistent sur la pérennité de stéréotypes négatifs. Pour les administrés les plus démunis, l'Administration est volontiers perçue comme anonyme et compliquée, discrétionnaire et omni-puissante, impersonnelle et peu équitable, envahissante et pléthorique...ils ne sont guère en mesure de contester les exigences procédurales et formelles présentées par l'Administration.Les classes les plus favorisées ont la possibilité d'entretenir des rapports étroits et ouverts avec des administrateurs issus des mêmes milieux socio-professionnels. Dans les cas des plus démunis, la distanciation s'impose au contraire comme la norme, ce qui a permis à un auteur français d'avancer cette règle:
 "Le degré d'assujettissement ou de dépendance impersonnelle est inversement proportionnel au niveau social, économique et culturel."²¹⁵

²¹⁴Ibid. at 17-19.

²¹⁵Ibid. at 20-21.

The state of dependance and vulnerability of the individual "administré" vis-a-vis the state is significant, and cause for alarm, because this relationship goes beyond the question of the provision for the material survival of the person, albeit itself an important and fundamental interest. It affects the very dignity of the person, in that in a very substantial manner the "Administration - administré" relationship is that which defines the individual in his relations to others given the increasingly isolated individual in an increasingly atomized Canadian society.²¹⁶ One's social relationships have an obvious impact upon one's self-definition. Where there is an imbalance in the relative power of the parties in a social relationship it is not unlikely that the capacity for self-definition of the weaker party is somewhat abridged due to the ability of the stronger party to define the social relationship.

Professor Mockle observes that the state in its evolution from the "État Protecteur" to the "État Providence" becomes more involved in the technological management of life, in a manner that given the resources of the modern state becomes based upon a scientific and technological analysis to which an individual, and certainly an individual disadvantaged in terms of resources, cannot but conform.

²¹⁶Ibid. at 29-32; I. Johnstone, "Section 7 of the Charter and Constitutionally Protected Welfare" 46 U.T. Fac. L. Rev. 1 at 3-8 discusses the vulnerability of the poor in their relation to the government administration, and its impact upon their capacity to maintain a sense of individuality and a capacity for self-direction.

The purpose of this perhaps tangential discourse was to suggest that whether or not the Charter is the right mechanism to promote the rights of the poor (and indeed Daniel Mockle is of the opinion that it is not²¹⁷), whatever influence the Charter does bring to bear on the role and conduct of government in the realm of social assistance, has a profound impact upon the dignity and self-respect of the individual. This is particularly so if it is believed the poor thereby have the opportunity to have their relationship with the government re-equilibrated by the blind scales of justice.

a) For

This discussion will begin with the consideration of the arguments put forth for the use of the Charter to assist the disadvantaged, and in particular to assist the poor in the full recognition of their right to social assistance. It will become apparent that many of the same facts find a place on both sides of the argument. For some, a given situation portends evil. For others, it is, on the contrary, a harbinger of good things to come. Nowhere is this phenomenon more apparent than it is regarding the very language of the guarantees in the Charter, and of the principle of a "generous" approach to Charter interpretation that was established by the Supreme Court of

²¹⁷See supra, note 213 at 69-72. He considers that even if the Charter would serve in some way in positively establishing "une norme programmatrice" that structures the administration, its focus is primarily litigious. His focus and preference is in creating a structure for the day to day workings of the "Administration -usagers" relationship which recognizes an administrative citizenship.

Canada.

1) The Language of the Charter

The constitutional provisions around which the discussion of welfare rights have centred - either as affirmative rights, comparative rights, or procedurally protected rights - are sections 7 and 15 of the Charter²¹⁸. With regard to the significance of these Charter rights, their substantive scope is defined by section 1 of the Charter, and the effectiveness of the courts in fashioning a remedy appropriate to welfare considerations is referred to in section 52 of the Constitution Act, 1982, and section 24(1) of the Charter. For convenience, they are cited as follows:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

15. (1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any

²¹⁸The main focus of articles having to do either with the substantive affirmation or the procedural protection of welfare rights has been on section 7 of the Charter. See Robertson, supra, note 7 at 199, note 64. Whereas the recognition by the courts of an affirmative obligation to provide welfare is generally considered doubtful, the procedural protection that may be afforded by section 7 is considered in a more optimistic light. Although this discussion focuses on the application of section 15 of the Charter, the arguments put forth in the context of section 7, mostly having to do with the Charter's language and purpose are nonetheless instructive. In the words of Wilson J., in McKinney, supra, note 32 at 406: "the equality rights lie at the very heart of the Charter".

law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

(Constitution Act, 1982) s. 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency of no force or effect.

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

To the "uninitiated" who would wish to witness the re-equilibration of the relationship between the poor and the state (understood both as "Administration" and as "community"), the language of these provisions is cause for celebration. A commonly understood "right to life", right to "security of the person", and four-fold right to equality found in the "supreme law of Canada" is certainly enough to guarantee a welfare cheque that one doesn't have to beg for that actually covers the cost of food and rent for the month. All the more cause for celebration is the knowledge that all one has to do to secure these rights is to ask a "competent" (and presumably friendly) court to provide an "appropriate and just" remedy.

Yet even to some initiates of the Canadian legal system there appeared to be cause if not for outright celebration then for guarded optimism that the Charter could provide an effective vehicle for positive social action. In light of section 7, and section 15, there might be a constitutional basis for equality in benefits and for protection from the often humiliating and invasive practices associated with the welfare system. Perhaps there would ultimately be a recognition of an affirmative right to welfare. This guarded optimism had a sound foundation in the principles of the interpretation of the Charter established early on in the history of its stewardship as provided by the Supreme Court of Canada.

2) A "generous" approach

To the wide-open language of the Charter itself, the direction provided by Chief Justice Dickson in R. v. Big M Drug Mart Ltd.²¹⁹ seemed to invite the consideration of detailed and elaborate discussions of what the rights were to mean:

The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interest it was meant to protect.

In my view this analysis is to be undertaken and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept

²¹⁹(1985), [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321 [hereinafter cited to D.L.R.].

enshrined, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be, as the judgment in Southam emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee, and securing for the individual the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore, as this Court's decision in Law Society of Upper Canada v. Skapinker (1984)..., illustrates, be placed in its proper linguistic, philosophic and historical contexts.²²⁰

In R. v. Oakes²²¹, the case in which the Supreme Court of Canada established the standards by which an infringement of a Charter right can be justified under section 1 of the Charter (cited above), the purposes of the rights of the Charter were further defined in a manner that did nothing to restrict an expectation of a truly generous approach that might include the recognition of social and economic rights:

...the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, ...faith in social and political institutions which enhance the participation of individuals and

²²⁰Ibid. at 359-360; cited in part by Jackman, supra, note 178 at 260; cited by McIntyre J. in Andrews, supra, note 10 at 169.

²²¹Supra, note 89.

groups in society.²²² (my underlining)

The underlined phrases evoke reference to much of the discussion regarding equality in the previous section of this paper, which is mentioned only as an example of the type of activity invited by the interpretation of a document which in contrast to a statute, "is to provide a continuing framework for the legitimate exercise of government...It must therefore be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers."²²³

The underlined phrase "inherent dignity of the human person", which is of the essential human rights language of the United Nations, invites either now or "with an eye to the future"²²⁴ an interpretation calling for the inclusion of economic and social rights in the Charter.²²⁵ Even if "economic rights" were to be excluded from the protection offered by section 7 of the Charter, the Supreme Court of Canada in Irwin Toy v. Quebec (A.G.), deemed it "precipitous" at that early point in time to pronounce whether economic rights that are essential

²²²Ibid. at 136; cited in part by Robertson, supra, note 7 at 199.

²²³Hunter v. Southam Inc. (1984), [1984] 2 S.C.R. 145 at 155, 11 D.L.R. (4th) 641, Dickson J., as he then was.

²²⁴Ibid.

²²⁵The standards set in the declarations and conventions of the United Nations to which Canada has obliged itself internationally, figure largely in the "for the use of the Charter" discussions. E.g. Robertson, supra, note 7 at 187-191; Jackman, supra, note 178 at 283-290; see also Johnstone, supra, note 216 at 10 & 23.

to human life or survival are really to be considered economic rights as such.²²⁶ As such, the door was left invitingly open.

Finally, the rejection by the Supreme Court of Canada, very early on in the history of the Charter, of the ruinous heritage bequeathed by the Court's interpretation of the Canadian Bill of Rights, signalled what could be perceived as the Court's readiness to assume its full responsibility in promoting the protection of fundamental human rights.²²⁷ That section 15 of the Charter was drafted, to include equality before and under the law, equal protection and benefit of the law - the latter being of particular importance given the focus of this paper - was an intentional and purposeful departure from the past.²²⁸

²²⁶ (1989), [1989] 1 S.C.R. 927 at 1003, 58 D.L.R. (4th) 577.

²²⁷ See Oakes, *supra*, note 89 at 216, Dickson C.J.: "Although there are important lessons to be learned from the Canadian Bill of Rights jurisprudence, it does not constitute binding authority in relation to the constitutional interpretation of the Charter." The desire of the Supreme Court of Canada to distance itself in its application of the equality guarantees of the Charter from its equality decisions under the Canadian Bill of Rights, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III, is clearly stated by McIntyre, J., in the Court's first section 15 case, Andrews, *supra*, note 10 at 166-168. The decisions he specifically refers to are those of Lavell, *supra*, note 195, and Bliss v. Attorney General of Canada (1978), [1979] 1 S.C.R. 183, 92 D.L.R. (3d) 417. In the first case the Court upheld a legislative provision whereby women, but not men, were deprived of membership in an Indian band if they married non-Indians. In the second case, the Court dismissed a claim by a woman who when pregnant was denied unemployment insurance benefits to which she would have been entitled had she not been pregnant.

²²⁸ See Canadian Advisory Council on the Status of Women, Canadian Charter Equality Rights For Women: One Step Forward Or Two Steps Back by G. Brodsky & S. Day (Canadian Advisory Council on the Status of Women, 1989) at 14-16, & 35; D. Proulx, "Le défi de l'égalité et la Charte canadienne des droits" (1988) 48 R. du B. 636 at 636-639; M. Eberts, "The Equality Provisions of the

b) Against

There have been a number of different arguments put forth that the use of the Charter could prove detrimental to the interests of the disadvantaged. Yet so often do the elements of one argument interweave with those of another, that it seems preferable to construct an underlying rationale to all these arguments, rather than to treat each of these arguments independently, even with the risk of adopting a theoretical stance which distorts the vision of each individual argument.²²⁹

To accomplish this task, the following proposition of Professor Andrew Petter is a good starting point:

Far from advancing the interests of disadvantaged Canadians, the Charter is much more likely to work to the detriment of those interests. The reason for this lies partly in the nature of the rights themselves but, more fundamentally in the nature of the judicial system charged with their

Canadian Charter of Rights and Freedoms" in E.G. Baldwin, ed., The Cambridge Lectures 1983 (Toronto: Butterworths, 1985) 25.

²²⁹The writings cited below which form the basis of the following discussion advising against the use of the Charter are those which either are against its use, although each article generally presents some significant elements of balance, or are those which while advocating the use of the Charter nevertheless perceive considerable risks. Their conclusions are not simply "for" or "against": J.C. Bakan, "Strange Expectations: A Review of Two Theories of Judicial Review" (1990) 35 McGill L.J. 439; Brodsky & Day, supra, note 228; H.J. Glasbeek, "Some Strategies for an Unlikely Task: The Progressive Use of Law" (1989) 21 Ottawa L. Rev. 387; R. Hasson, "What's Your Favorite Right? The Charter and Income Maintenance Legislation" (1989) 5 J.L. & Social Pol'y 1; Mockle, supra, note 213; Andrew Petter, "The Politics of The Charter" [1986] 8 Sup. Ct. L. Rev. 473; S. Salter, "Inherent Bias in Liberal Thought" in Martin & Mahoney, supra, note 95 at 50; R. Vandycke, "La Charte constitutionnelle et les droits économiques, sociaux et culturels" (1989-1990) 6 Can. Hum. Rts Y.B. 167.

interpretation and enforcement.²³⁰

As discussed above, the expression of equality requires the exercise of empathy. This, along with the nature of the arguments to be discussed immediately below, suggest that Professor Petter's proposition could be modified, especially in relation to equality rights, by referring to the exercise of empathy in the Charter law-making process. Therefore, the underlying rationale emerges in the proposition that the disadvantaged are likely to be further disadvantaged by the Charter in part because of the "nature of the rights themselves but, more fundamentally...(because of) the nature of the judicial system charged with their interpretation and enforcement," as it limits the exercise of empathy in the Charter law-making process." This modification is perhaps more for the sake of clarification and emphasis, than it is to serve as a departure in substance from the proposition of Professor Petter.²³¹

In the "for" argument presented above, the essentially

²³⁰Petter, ibid. at 474.

²³¹That this addition might be adding more emphasis than substance to Professor Petter's proposition is illustrated by his remarks after demonstrating that the judicial interpretation which must give meaning to the rights of the Charter will ultimately be shaped by the interests of the wealthy to which they will have the greatest exposure in constitutional litigation, ibid. at 147: "Perhaps there would be less reason for concern on this score if the courts had an equal understanding of, and empathy for, the problems of all segments of Canadian society. Unfortunately, there is no reason to suppose that this is the case. There are few public institutions in this country whose composition more poorly reflects, and whose members have less direct exposure to, the interests of the economically and socially disadvantaged."

indeterminate nature of the language of the Charter rights combined with a judicial invitation for legal, social, political and historical discussions to help give substance to the rights of the Charter were considered to be a positive omen for the promotion of social rights. The "against" contingent sees the same eventuality of the judiciary giving meaning and substance to the language of rights in a more pessimistic vein. Professor Joel Bakan proposes a psychodynamic whereby out of overwhelming despair one constructs a delusionary solution that disregards the institutional constraints that affects one's endeavours. This attempt at psychology seems less intended to describe the frame of mind of those deluded than it does to describe the delusion he considers to be possessed by progressive scholars and lawyers who embrace judicial review under the Charter. He writes that such persons,

end up in the ironic position of defending and legitimating either explicitly...or implicitly...the power and authority of undemocratic institutions - the judicial and legal elites - which have, throughout history, expressed little sensitivity or responsiveness to the needs of disempowered people and their demands for social power and participation in genuine self-government.²²²

There is the opinion that neither the Charter nor the courts provide a process which really allows the disadvantaged to speak.²²³ To the extent that the disadvantaged do speak, the

²²²Bakan, supra, note 229 at 434-444.

²²³See Petter, supra, note 229 at 479-486. He writes of the expense of court proceedings which precludes the participation of the disadvantaged, except perhaps in criminal proceedings which

courts even with the best of intentions, cannot understand what they are saying.

It is believed that it will largely be the values of the judges which will serve to define the rights guaranteed by the Charter. One's own life experience, understood in very broad terms, is the foundation of one's values and of one's perceptions of the situations or interests to advance in order to achieve the manifestation of these values.

Judges are by and large able-bodied white males whose understanding of the world has been shaped by this very privileged birthright.²³⁴ They have spent considerably more time in university libraries than in waiting rooms of welfare offices or in line-ups at food banks. As males, they most probably have not been beaten by their spouses.

They have presumably a relatively long way to go in terms of

present issues of limited economic and social significance.

²³⁴See Petter, supra, note 229 at 487-488. He considers the composition of the courts to very poorly reflect and have little direct exposure to the interests of the disadvantaged: "In short, there is nothing about the Canadian judiciary to suggest that they possess the experience, the training or disposition to comprehend the social impact claims made to them under the Charter, let alone to resolve those claims in ways that promote, or even protect, the interests of lower income Canadians."; K.A. Lahey, "Feminist Theories of (In)Equality" in Martin & Mahoney, supra, note 95 at 71, at 83, writes that to "affirm the importance of all human beings, including women," the theory she proposes, and the judiciary in its implementation would have to, "discard the norm of the white, middle-class, able-bodied male." To do so, she believes that, "Judges will have to begin to listen to women, to what they have to say."; Day & Brodsky, supra, note 228 at 149-150, define Canadian society as a "very well designed affirmative action program for white temporarily able-bodied men."

financial resources, social supports and employment security before hitting bottom - though unfortunately, this too does happen.

The life experience presented to them in their work, in the evidence put before them, is no matter how persuading of ultimately a rational, logical bent.²³⁵ A crying, hungry, undiapered baby - which infrequently finds itself the guest of the higher courts - can be assumed to evoke a more compassionate response than the most rigorous reasoning and the most persuasive language.

Their private relationship with the government is characterized more by taxes and tax incentives than it is by benefits (a government pay-cheque is not to be confused with a government cheque!). The system which keeps them employed has the face composed of countless well-resourced litigants. The system which takes from them has the singular face of government. They naturally seek protection rather than benefits from government.

The law shaped by judges is necessarily shaped by the cases before them, and by the arguments of those before them. If only the wealthy can afford the justice that is dispensed by the

²³⁵Whereas Hasson, supra, note 229 at 1-3, seems to criticize the "less aggressive stance" of reformers who like to "seek out the judicial process where no voices are raised and cool, rational argument is supposed to prevail," Vandycke, supra, note 229 at 178, sees in this more in terms of serving the interests of the powerful who through the judicialization of social grievances renders them void of substance, context and wholeness.

courts, the law itself will be a reflection - as will be the values of the judges- of the interests of the wealthy which are presented before it.²³⁶ Legal precedent, the work of judges, is not likely to be denied by the very judges who as any other workers, seeks to find meaning in their work and more importantly, the work that they have already accomplished.

The face of poverty is predominantly female, although not as exclusively so as the face of the high courts is male.²³⁷

There is no reason to ascribe to the judiciary as a class any more or any less good-heartedness than any other class of persons. Judges surely say, "I only want for others what I would want for myself!" They might even say, "I only want for others what I would want for myself if I were them!" What is being argued is that their life experience, and the structure of their work do not allow them to draw close to the life of the

²³⁶See Petter, *supra*, note 229 at 479-486. Disadvantaged Canadians, availing themselves of legal aid, will be able to raise Charter arguments in response to criminal charges. The issues raised however are of limited social and economic significance.

²³⁷At the time of writing, Justices L'Heureux-Dubé and McLachlin are the only females on the Supreme Court of Canada, which equals roughly 22% of the Court. According to *Transitions*, *supra*, note 8 at 30, approximately 70 % of the families receiving social assistance in Ontario are headed by female sole support parents. As a further note on the "empathy gap", only 20% of the social assistance caseload at the time of *Transitions* was considered "employable". For general comments on this gender issue from a unique perspective, see Madame Justice B. Wilson (as she then was), "Will Women Judges Really Make a Difference?" (1990) 28 Osgoode Hall L.J. 507.

disadvantaged, to know what they want and need."²³⁸

It has been suggested that the experience of women is primarily one of identification with others, while the male experience is one of autonomy and separation.²³⁹ While men therefore seek independence (and given their "advantaged" status they can afford it), women seek community. This analysis serving as a paradigm for judicial activity, and of the judiciary's opinion of the beneficiary function of government, results in an attempt to secure either an unwanted or an unrealistic independence for the disadvantaged from government action.

There have been concerns expressed about the institutional competence, or rather incompetence, of the courts for deciding complex social policy issues.²⁴⁰ It is argued that the courts

²³⁸If it is indeed the case as put forth in Brodsky & Day, supra, note 228 at 149-150, that "our society is a very well designed, finely tuned affirmative action program for white, temporarily able-bodied men," then the needs of women, and other disadvantaged groups, are not the same as men even if they had the same aspirations and even if they otherwise started at the same starting point in the race for achievement; see also Lahey, supra, note 234 at 83.

²³⁹See Salter, supra, note 229 at 50-51.

²⁴⁰See Hasson, supra, note 229 at 20. He is of the opinion that the decision Tetreault-Gadoury and Canada Employment and Immigration (1988) 53 D.L.R. (4th) 384, [1989] 2 F.C. 245 (F.C.A.) (later overturned by the Supreme Court of Canada regarding a question of jurisdiction, but confirmed with regard to Charter section 15 determination, [1991] 2 S.C.R. 22) in which it was decided that a provision of the Unemployment Act that restricted benefits to those over the age of 65 infringed section 15 of the Charter, was one example in which the courts show "no understanding of elementary principles of social policy." Of a similar opinion is F. Morrisette, "Le droit à l'égalité de la Charte appliqué à certains programmes sociaux fédéraux" (1991) R.G.D. 509 at 566-574; Jackman, supra, note 178 at 330-337 addresses concerns that have been expressed regarding both the

do not possess the resources in terms of time and technical expertise to fully appreciate complex situations, and what the impact of their decisions will be. It is very likely that large numbers of people who might be affected by the court's decisions would not participate in decisions affecting them. This is especially serious if, as it is believed to be the case, the frequent result of extending a benefit to one person is to take it from another.²⁴¹ A sensitivity to this concern is rendered more acute in periods of private and public budgetary restraint. As is often the case, demands for a fairer, more equitable and generous social assistance system arise at times the economy is suffering a downturn, and government faces the predicament of having to give to more people with less revenue being generated.

Institutional incompetency in social-policy matters, institutional deficiency in empathy to the large portions of society most in need of social rights advancement, and not to

institutional competency (the technical ability) and the institutional legitimacy (respect gained by the court's apparent traditional neutrality, and separation from the legislative branch of government) of the courts in their protection of social and economic rights. In regard to concerns of institutional competency she responds at 335: "[that if] the current judicial model is inadequate for the task of interpreting and applying constitutionally entrenched rights, the response should be to improve the process, rather to arbitrarily restrict the types of rights which the courts are encouraged to recognize."

²⁴¹See Petter, supra, note 229 at 478. He considers the conferral of rights and entitlements under a charter to be "zero-sum game." As will be discussed infra at 180 ff., one of the key factors influencing the Supreme Court of Canada in the McKinney case, was the perception that equal employment opportunities in the university context was one determined by the characterization of the university context as being a "closed system with fixed resources."

forget the Charter's essential focus on political and civil rights and already-effected political compromise²⁴² are the pillars of the arguments against the use of the Charter to affect positive social change.

Yet, in a very important way, what underscores to some extent all these arguments is the conviction that more important than the slim possibilities for success in Charter litigation, the use of the Charter is fundamentally and insidiously undemocratic.²⁴³ The people most affected by the denial in the Charter and then by the legislature to recognize their human dignity through the recognition of economic and social rights, have to then suffer the further indignity of being usurped of their right and practical capacity for self-expression and self-definition by well-intentioned lawyers and the legal process²⁴⁴:

A cette conception, qui trouve son

²⁴²Vandycke, supra, note 229 at 169-172 believes the Charter to have created a hierarchy of rights with the traditional political liberties at the top, rights resulting from political compromise in the middle and social, economic and cultural rights at the very bottom. He recognizes that section 33 of the Charter which does not allow for the notwithstanding clause to be applied to the rights of political compromise in fact inverses the top two layers of the rights' pyramid.

²⁴³See Bakan, supra, note 229 at 442-443. He finds it to be ironic that those committed to progressive social change and equal participation in self-government, and attempt to realize this commitment through Charter litigation, find themselves in the position of "defending and legitimating either explicitly...or implicitly...the power and authority of undemocratic institutions - the judicial and legal elites - which have throughout history, expressed little sensitivity or responsiveness to the needs of disempowered people...."

²⁴⁴See Hasson, supra, note 229 at 34; Glasbeek, supra, note 229 at

aboutissement logique dans le rejet de la clause de dérogation, nous préférons celle de l'humanisme républicain, et de l'importance qu'il accorde à la participation des citoyennes et des citoyens à la direction des affaires publiques, laquelle rejaillit à son tour sur l'autonomie des acteurs sociaux et leur capacité de choisir.

La démocratie ne peut être réduite à un ordre juridique et constitutionnel. Aucun mécanisme juridique, aucun organe de l'État ne pourra remplacer cette garantie suprême de nos libertés: la participation active du plus grand nombre à la vie de la cité et à la définition du bien commun.²⁴⁵

c) Resolution

On first consideration, these arguments for and against the use of the Charter to secure the recognition of social rights are easily resolved by a certain mootness - the Charter is being used to a certain extent with this intention. The results have been mixed, depending on one's point of view, due to the hesitancy of the courts to intervene with remedies other than completely striking down legislative schemes, and due to the legislature's mean-spiritedness in its practice of effecting "equality with a vengeance".²⁴⁶ However, Charter claims will continue to be made

²⁴⁵Vandycke, supra, note 229 at 183.

²⁴⁶See Re Phillips and Lynch (1986), 27 D.L.R. (4th) 156, affirmed Reference Re Family Benefits Act (1986), 75 N.S.R. (2nd) 338, 26 C.R.R. 336. The Nova Scotia Supreme Court, after finding the statute's exclusion of male sole support parents from a scheme which provided social assistance to female sole support parents as an infringement of section 15(1) (and section 28 at the Appeal Division) of the Charter which could not be justified under section 1 of the Charter, struck down the entire statute rather than extend benefits to male sole support parents. The Court stated at 159 that it was "reluctant to assume the role of

by disadvantaged groups, because they have no choice but to knock on every door:

These commentators contend that women and other disadvantaged groups would be wiser to put their efforts into the democratic system, trying to change conditions of disadvantage through political rather than legal means...Because women's disadvantage is so entrenched, women do not have the luxury of choosing one forum over the other [government over the courts]. The full support of both governments and the courts is needed for women to take their rightful place in Canadian society. Women must press for change in both arenas.²⁴⁷

The proposition made above was that the factor of empathy could serve as a principle that was the foundation for the arguments made against the use of the Charter in the effort to secure the economic and social rights of the disadvantaged. As Professor Petter has suggested, one of the dangers of equality-based litigation is that blatant discrimination has been removed from the books and what remains are the remaining systemic principles which nevertheless result in major manifestations of

the legislator."; Silano v. R. in Right of British Columbia (1987), 42 D.L.R. (4th) 407, [1987] 5 W.W.R. 738 (B.C.S.C.). The British Columbia Supreme Court ruled that a distinction in social assistance benefit levels based upon the age of 26 infringed section 15(1) of the Charter and could not be saved by section 1 of the Charter. Those under 26 were to receive a lower amount than those over 26. As a result of the judgment all were to receive the over 26 rate. Shortly thereafter the British Columbia government reduced the benefit level that was set for those over 26 years of age; Hasson, supra, note 229 at 12-20 provides a fuller discussion of these and other cases he considers to be "losers".

²⁴⁷Brodsky & Day, supra, note 228 at 3-4; see also Jackman, supra, note 178 at 36.

social and economic inequality.²⁴⁸ In order for underlying systemic discrimination to be brought to the surface and challenged, only those suffering therefrom can offer an understanding of it with authenticity. The desire of disadvantaged groups is to be listened to:

Focusing on the problem of substantive inequality means listening to women's descriptions of their experience of disadvantage. As Kathleen Lahey states: "Judges will have to begin to listen to women, to what they have to say - as witnesses, as experts, as lawyers - and they will have to ascribe as much validity and importance to that viewpoint as they do to the men's voices they are used to hearing."²⁴⁹

So, Charter claims to social assistance, and challenges to social assistance legislation will come forth. The questions remain of whether their claims will be understood, and if so, what Charter precedents will bind those asked to listen. In the discussion which follows the section 15 cases decided upon by the Supreme Court of Canada will be analyzed with the purpose of: a) identifying the terms into which to translate a vision of substantive equality that can be understood by a perhaps less than empathetic judiciary; b) to identify the extent to which the elements of section 15 interpretation discriminate in a systemic manner to the detriment of those most socially and economically

²⁴⁸See Petter, supra, note 229 at 502-503. He contends one of the great dangers is that what will be challenged are those programs that propose inequality in favour of disadvantaged groups in order to ultimately promote equality.

²⁴⁹Brodsky & Day, supra, note 228 at 150.

disadvantaged - persons in need; and, c) to identify elements of a new social assistance scheme that would make it most amenable to section 15 scrutiny.

One final note must be made before proceeding to this discussion on the very fundamental issue of the remedies to be fashioned by the courts under section 24 of the Charter and section 52 of the Constitution Act, 1982 in social and economic matters. The factors involved in the judicial determination of whether or not to order (or to withhold) the payment from public funds to individuals without the consent of the freely-elected legislatures have been the essential subject matter of the recent decision by the Supreme Court of Canada in the case of Schacter v. Canada²⁴⁰. These factors have also recently been fully discussed elsewhere.²⁴¹

At the Federal Court of Appeal the majority decision was to uphold the trial judge's decision to extend unemployment insurance benefits to a previously excluded class of persons. Justice Heald, speaking for the majority, considered section

²⁴⁰(July 9, 1992) 21889, on appeal from the Federal Court of Canada, (1990), 66 D.L.R. (4th) 635, [1990] 2 F.C. 129 (F.C.A.D.) [hereinafter Schacter cited F.C.A.D. to D.L.R.].

²⁴¹See N. Duclos & K. Roach, "Constitutional Remedies as 'Constitutional Hints'" (1991) 36 McGill L.J. 1; J. Frémont, "Les tribunaux et la Charte: le pouvoir d'ordonner la dépense de fonds publics en matières sociales et économiques" (1991) 36 McGill L.J. 1323; A. Lajoie, "De l'interventionisme judiciaire comme apport à l'émergence des droits sociaux," (1991) 36 McGill L.J. 1338; F. Morrisette, "Le droit à l'égalité de la Charte appliqué à certains programmes sociaux fédéraux" (1991) 22 R.G.D. 509 (the articles of Duclos & Roach and Lajoie were cited in the Schachter decision by the Supreme Court of Canada).

15(1) of the Charter to guarantee not only a comparative but also a "positive right to equality" for which a declaration of invalidity is insufficient.²⁵² Of interest, as well, is the dissidence of Justice Mahoney in which he expresses his contention regarding the constitutionally fundamental nature of the constitutional principle found in the English Bill of Rights, 1688²⁵³ whereby only the legislature can appropriate and disburse public funds. He concludes that the "appropriation of public moneys by a court is as offensive to the principle as is its appropriation by prerogative."²⁵⁴

The focus at the Supreme Court of Canada was in providing a theoretical framework concerning the operation of the remedial powers of the court under s. 24 of the Charter and s. 52 of the Constitution Act, 1982 particularly in cases involving government benefits schemes.²⁵⁵ Schachter's claim of a s. 15 infringement based upon a differential treatment of adoptive and natural parents under the Unemployment Insurance Act, 1971²⁵⁶ had been conceded by the government. It was left to the court to decide upon the appropriate remedy. However, before proceeding to this

²⁵²Schachter, supra, note 250 at 644.

²⁵³1 Will. & Mary, Sess. 2, c. 2.

²⁵⁴Supra, note 250 at 660.

²⁵⁵Although the Supreme Court of Canada effectively extended benefits to a previously excluded group in Tétreault-Gadoury, discussed infra, in Schachter the Court articulates a more theoretical approach to this process.

²⁵⁶Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48, s. 32.

discussion the Court considered it necessary to express its dissatisfaction that this concession had been made. The Court was not at all certain that s. 15 had been infringed, and further without the benefit of a s.1 argument the Court found itself "in a factual vacuum with respect to the nature and extent of the violation, and certainly with respect to the legislative objective embodied in the impugned provision. This puts the Court in a difficult position in attempting to determine what remedy is appropriate in the present context."²⁵⁷

In the decision of Chief Justice Lamer, the conclusion is reached after finding that "reading in " is as valid a remedy as the technique of "severance" that "the question is not whether courts can make decisions that impact on budgetary policy, it is to what degree they can appropriately do so."²⁵⁸ This degree of appropriateness relates to the clarity of the legislative objective, the equivocal nature of the choice of means used by the legislature, and the magnitude of the budgetary impact.²⁵⁹ As well, after a criticism of the Phillips case²⁶⁰, the Chief Justice suggests that the temporary suspension of a declaration of invalidity would be appropriate where "the legislation was deemed unconstitutional because of underinclusiveness rather than overbreadth, and therefore striking down the legislation would

²⁵⁷supra, note , per Lamer C.J.C. at 11.

²⁵⁸ibid. at 30.

²⁵⁹ibid. at 41.

²⁶⁰supra, note 246.

result in the deprivation of benefits from deserving persons without thereby benefitting the individual whose rights have been violated."²⁶¹

Although the Court allowed the appeal and decided not to effect the extension of benefits in the case it did further this eventuality in other benefit cases by the positive recognition of rights which if not mandated by the constitution are nonetheless "encouraged" by the constitution.²⁶² In separate but concurring reasons Justice La Forest writes that, in "social assistance schemes, there is perhaps more room (and certainly more temptation) for judicial intervention...where the remedy is obvious and Parliament would clearly enact it rather than have the whole scheme fall."²⁶³ He indicates clearly that it is the protection of the individual which is the duty of the Courts under the Charter.

Given both the critique on the less than truly representative nature of Parliament (which hearkens back to the concerns of John Stuart Mill) and the constitutional principle regarding the exclusive direction of public funds by the legislature, it is interesting to find in comments on both sides of the issue of judicial activism with regard to the extension of

²⁶¹ibid. at 42.

²⁶²ibid. at 36; cited and regarded favourably by Lamer C.J.C. at 34 is the article by Duclos and Roach, supra, note 251 wherein it is suggested that "the Constitution may encourage particular kinds of remedies even if it does not directly mandate them."

²⁶³Decision of La Forest J. at 4.

benefits a claim that their⁴ exists in the opposing position the danger of the exclusion of the disadvantaged from the process of the decision-making that affects their lives.²⁶⁴

III Section 15 and The Supreme Court of Canada

At the time of writing, the Supreme Court of Canada has rendered seventeen decisions in which they have found it necessary to rule upon the application and interpretation of section 15 of the Charter.²⁶⁵ Only one of these cases has

²⁶⁴See Duclos, supra, note 251 at 16. She considers that the invalidation of a legislative provision, will have a negative impact on the disadvantaged - "whose ability to influence either judicial or political processes is poor" - without having had a chance to participate in the judicial process; Frémont, supra, note 251 at 1337, believes that quite to the contrary, the judicial imposition of economic solutions will be unfavorable to the disadvantaged because of the high costs of access to the courts.

²⁶⁵Andrews v. Law Society of British Columbia, supra, note 10; Re Workers' Compensation Act, 1983 (Nfld.) (1989), [1989] 1 S.C.R. 922, 56 D.L.R. (4th) 765 [hereinafter Workers' Compensation Act cited to S.C.R.]; R. v. Turpin (1989), [1989] 1 S.C.R. 1296, 48 C.C.C. (3d) 8 [hereinafter Turpin cited to S.C.R.]; Rudolf Wolff & Co. v. Canada (1990), [1990] 1 S.C.R. 695, 69 D.L.R. (4th) 392 [hereinafter Wolff cited to S.C.R.]; R. v. Dwyidag Systems (1990), [1990] 1 S.C.R. 705, 68 D.L.R. 147 [hereinafter Dwyidag Systems cited to S.C.R.]; R. v. S.(S.) (1990), [1990] 2 S.C.R. 254, 57 C.C.C. (3d) 115 [hereinafter S cited to S.C.R.]; R. v. P.(J.) (1990), [1990] 2 S.C.R. 300, 57 C.C.C. (3d) 190; R. v. T.(A.) (1990), [1990] 2 S.C.R. 304, 57 C.C.C. (3d) 254; R. v. B.(J.) (1990), [1990] 2 S.C.R. 307, 107 N.R. 226; R. v. Hess and Nguyen (1990), [1990] 2 S.C.R. 906, 59 C.C.C. (3d) 161 [hereinafter Hess cited to S.C.R.]; Mckinney v. University of Guelph, supra, note 32; Harrison v. University of British Columbia (1990), [1990] 3 S.C.R. 451, 77 D.L.R. (4th) 55 [hereinafter Harrison cited to D.L.R.]; Stoffman v. Vancouver General Hospital (1990), [1990] 3 S.C.R. 483, 76 D.L.R. 700 [hereinafter Stoffman cited to D.L.R.]; R. v. Swain (1991), [1991] 1 S.C.R. 933, 63 C.C.C. (3d) 481 [hereinafter Swain cited to S.C.R.]; Tétreault-Gadoury v. Canada (EIC) (1991), [1991] 2 S.C.R. 22, 81 D.L.R. (4th) 358 [hereinafter Tétreault-Gadoury

dealt with the possibility of distinctions within a government benefits' scheme constituting an infringement of the equality rights of section 15. However the issues before the Court have nonetheless evoked discussion concerning the purpose of the Charter's equality guarantee, and the nature of law and government, which are useful in understanding some of the factors which will have an impact on the process and the substance of litigation involving the relationship of social assistance and section 15 of the Charter.

The Court's first section 15 case, Andrews v. Law Society of British Columbia²⁶⁶ did not result in a unanimous judgment. However, there appeared to be substantial agreement over the interpretation of section 15(1). The differences could be dismissed perhaps as the reflection of different aspects of a prism through which light had been shone. In later cases, particularly the case of McKinney v. University of Guelph²⁶⁷, the discord of the Court reflected a seriously flawed prism.

There is a profound division over the meaning of section 15 and the extent to which equality is guaranteed by the Charter in relation to the ease with which its infringement can be justified under section 1 of the Charter. Of equal importance is the apparent validity of the concerns expressed above regarding the

cited to S.C.R.]; R. v. Généreux (1992), [1992] 1 S.C.R. 259; R. v. Chiarelli (March 26, 1992) 21920 (S.C.C.).

²⁶⁶supra, note 10.

²⁶⁷supra, note 32.

Court's capacity for empathy. In McKinney, the Court was split along gender lines. In spite of different processes of legal reasoning, the two female justices arrived at the same conclusion regarding the offensive nature of mandatory retirement provisions because of their understanding and compassion for the disadvantaged groups most likely to be adversely affected by the offending provisions - and these groups were not even part of the court process! Further, even where there was substantial agreement between the majority and the dissenting justices on a course of judicial reasoning, (reference being made here to the relaxation of the "minimal impairment" requirement of section 1 justification) their vision of the world was so radically different that their agreement on the rule was not determinative.

In order to assess the extent to which the Court's interpretation of section 15 gives substance to the equality guarantee as it would relate to social assistance, and in particular to the issues of conditionality and assistance based on need, the following discussion examines the section 15 jurisprudence of the Supreme Court of Canada in two steps.

The first step consists of a case by case analysis which, borrowing from the approach to equality cases suggested by Professor Bayefsky²⁶, examines the interests affected and the

²⁶supra, note 95. For Professor Bayefsky's own (somewhat critical) comments on the Supreme Courts of Canada's first section 15 decisions, see A. Bayefsky, "A Case Comment on the First Three Equality Rights Cases Under The Canadian Charter of Rights and Freedoms: Andrews, Workers' Compensation Reference, Turpin" (1990) 1 S.C.L.R. (2d) 503.

classifications concerned by the challenged distinctions in treatment. To be identified in this first step as well, will be the elements of these decisions which most evidently validate the taking of an "empathy approach" to section 15 analysis - the extent to which the justices seem to identify with the impact of the interests of the case, or the divisions of the Court reflect different world views.

The "world view" of concern here has to do both with the general scope of vision regarding the country's social classes, and the seemingly related choice in the principal attribution to the function of government and law of either coerciveness or beneficence. With regard to the latter component, it appears that the Court's propensity not to intervene in a manner which would extend social rights would be magnified if the Court perceives government action as essentially restrictive of liberty, and is in the case at hand performing the function of effecting a balance between claims made upon fairly fixed and limited resources. It is in these circumstances in which the justification of an infringement of section 15 takes place in a less stringent section 1 requirement.

This analysis also examines the formal line of reasoning in these cases, i.e., the different approaches suggested for section 15 adjudication. The "similarly situated" test is clearly and formally rejected, although perhaps only in a formal sense. It is very clear that to appreciate the guarantee of equality

offered by the Charter, and the process of adjudication, the dynamics between the interpretation given to section 15 and the greater or lesser stringency in the application of section 1 of the Charter requires close examination. It appears that the current trend and the majority tendency is to find in a fairly automatic fashion that an infringement of section 15 has occurred once a distinction is made that serves to the detriment of a group based upon a ground enumerated in section 15. However, easy come, easy go - a right to equality so recognized or rather, judicially recognized to be so easily infringed upon, is relatively easy, it would appear, to justify under a "relaxed" section 1 of the Charter. It is suggested that, in an almost paradoxical fashion, an automatic finding of an infringement of section 15 works against the interests of the disadvantaged.

The second part of this section then puts the Court's definition of "discrimination" under the microscope. It will be suggested that the definition of discrimination, due to its natural initial development in the context of employment, is overly protective of individual merit and capacity and seems to exclusively define these terms in relation to employment. The Court's definition of discrimination owes much to the work of Judge Rosalie Abella. Reference will be made to her work in order to facilitate the adaptation of this definition to the social assistance context in a manner suggested to be consistent with the intentions of the Court. If this is not accomplished, equality claims made by a person whose disadvantage and

aspirations do not allow employment to serve as their vehicle to participation in society, might not find an understanding ear. The constitutional guarantee of equality could thus prove to be itself a source of systemic discrimination.

a) Cases described by interests, classification, and empathy

The first judgment of the Supreme Court of Canada that dealt with the application of section 15 of the Charter was Andrews v. Law Society of British Columbia²⁶⁹. The distinction that was successfully challenged was that made by provincial statute in the prohibition of non-citizens from membership in the Law Society of British Columbia.

The prohibition was considered by all justices to have infringed section 15(1) of the Charter. There was general agreement expressed for the approach to section 15(1) that was contained in the reasons of Justice McIntyre. Justice McIntyre rejected the "similarly situated test" - the "restatement of the Aristotelian principle of formal equality"²⁷⁰ - because it excluded consideration of the nature of the law. He recognized in the language of section 15 the desire to remedy the shortcomings of the right to equality in the Canadian Bill of

²⁶⁹supra, note 10.

²⁷⁰Ibid. at 10. This "rejection" has been the object of sharp criticism, see Brunelle, supra, note 92 at 378-382; D. Proulx, "L'égalité en droit comparé et en droit canadien depuis l'arrêt Andrews" in G. Beaudoin, ed., Vues canadiennes et européennes des droits et libertés (Cowansville: Les Éditions Yvon Blais, 1989) 145; infra, note 291.

Rights, and to reflect the recent expansion of the concept of discrimination. The "evil" against which section 15 is to provide a guarantee is that of discrimination "having the force of law."²⁷¹

Discrimination is defined as follows:

I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits or capacities will rarely be so classed.²⁷²

He insists that not every distinction upon an enumerated ground will constitute an infringement, it must impose a burden or withhold a benefit. Impact and not intent is the focus. He comments that the enumerated grounds "reflect the most common and probably the most socially destructive and historically practised bases of discrimination" and therefore must receive "particular attention".²⁷³ However, protection under section 15 is offered not only to irrelevant personal characteristics identifiable by the enumerated grounds but also to those, as was the case in

²⁷¹ Ibid. at

²⁷² Ibid. at 174-175.

²⁷³ Ibid. at 175.

Andrews, identifiable by "analogous grounds".

Although there was agreement on this general approach, Justices Wilson and La Forest, in their separate reasons, both seemed to place much greater emphasis on the powerlessness and the disadvantage of the "discrete and insular minorities" who are to be protected by section 15, than did Justice McIntyre.²⁷⁴

As well, Justice La Forest took the time to cautiously suggest a broader approach to the scope of the section's application than did Justice McIntyre. Although warning against the courts' incursion into economic and social policy-making "beyond the institutional competence of the courts", Justice La Forest seemed to invite the consideration of infringements made in ways other than the application of the law, and for grossly unfair or irrational distinctions not covered in the interpretation suggested by Justice McIntyre.²⁷⁵

The unanimity of the Court broke down over the application of section 1 of the Charter which allows for the infringement of

²⁷⁴Ibid. at 195, La Forest J.: "Moreover, non-citizens are an example without parallel of a group of persons who are relatively powerless politically, and whose interests are likely to be compromised by legislative decisions."; per Wilson, J. at 152: "Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked ... They are among 'those groups in society to whose needs and wishes elected officials have no apparent interest in attending'." and at 157, she defines the purpose of the section to be "to protect 'discrete and insular minorities' in our society."

²⁷⁵Ibid. at 194, cited supra at 53. The possibility of extending section 15 protection to grossly unfair distinctions that are not necessarily discriminatory, would depend on the extent of their incompatibility with fundamental values.

section 15 if it can be shown, the burden of its demonstration which rests upon the government, that the limit is reasonable and justifiable in a free and democratic society. The importance of this division of the Court resides not in a different appreciation or application of the evidence brought by the government, but rather in the desire to establish a more flexible, or lower standard of justification than precedent would seem to have had required. It is important to note that there was unanimity with regard to section 1 insofar as it was solely under that section, and not under section 15, that a justification for discrimination was to be given consideration.

Although in agreement with Chief Justice Dickson and Justices L'Heureux-Dubé and Wilson, that the equality infringement was not demonstrably justifiable, Justice La Forest agreed with the idea expressed in the dissenting opinion of Justices McIntyre and Lamer (as he then was) that the proper approach to section 1 should be more "flexible" and "functional" than had previously been the case²⁷⁶.

²⁷⁶Ibid. at 153-154, Wilson J. referred to the Court's decisions in Oakes, supra, note 221 and R. v. Edward Books and Art Ltd. (1986), [1986] 2 S.C.R. 713, 35 D.L.R. (4th) 1, for the proper approach to section 1 of the Charter. In order to justify an infringement of a Charter right, there is a two part test to satisfy. The first test requires the objective to be achieved by the impugned provision to be "pressing and substantial" in a free and democratic society. The second test examines the means chosen to achieve this objective, and requires that it be appropriate and proportional to the ends. This test has three aspects, or mini-tests. The first mini-test evaluates if there exists a rational link between the means chosen and the desired objective. The second seeks to measure if the means chosen impairs the right as little as possible. The final test is a final balance between the importance of the objective and the

The interests upon which the challenged distinction had a negative impact can be considered as having been either the individual's capacity to find employment or his ability to find employment in a field for which he was trained. For a trained and otherwise qualified lawyer not to be able to practise law to have been considered by a group of lawyers to constitute a serious disadvantage for the individual is not surprising. The classification of citizenship upon which the distinction was based was considered as analogous to one of the enumerated grounds because non-citizens constitute a "discrete and insular minority." The empathy interest at play is in the emphasis in the separate reasons of Justices Wilson and La Forest on the vulnerability and disadvantage of those falling into the classification in question, while the emphasis of J. McIntyre's reasons for a section 15 infringement appears to be on the irrelevancy of a citizenship criteria for the adequate performance of the functions of a lawyer. The interests of the government, or rather the purpose for their exclusion of non-citizens from the practice of law was to ensure that lawyers have a substantial understanding and commitment to Canada's democratic institutions.

extent to which a right(s) is infringed. La Forest J., *ibid.* at 198, speaks of a "functional" analysis. McIntyre J. *ibid.* at 184, suggests that the requirement for a "pressing and substantial objective" might be too stringent, and that there is no single section 1 test. For a discussion of the subsequent development of the Court's approach to section 1, see L. Huppé, "Quelques objectifs législatifs suffisamment importants aux fins de l'article 1 de la Charte" (1991) 51 R. du B. 294

The "analogous grounds" approach established in Andrews was followed in the Court's second section 15 judgment of Re Workers' Compensation Act, 1983 (Nfld.)²⁷⁷ In the unanimous judgment delivered by Justice La Forest, the preclusion of rights and actions to which a worker or dependent might otherwise be entitled by the right to compensation provided by the workers' compensation scheme did not constitute discrimination within the meaning of section 15(1) of the Charter. "The situation of workers and dependents ...is in no way analogous to those listed in s. 15(1)".²⁷⁸

The reasons were exceptionally brief in this case and therefore the perceptions of the justices regarding the interests at stake cannot be ascertained. Whether the classification of "worker or dependents" was considered so widely shared that it could not possibly constitute a minority, or whether either in addition, or alternately, it was considered that workers were not as powerless or as immutably members of their classification as were non-citizens, can only be speculated upon.

In R. v. Turpin²⁷⁹, claims concerning the infringement of section 11(f) and section 15 of the Charter in instances where an accused charged with murder did not (outside of the province of Alberta) have the option of choosing to be tried by judge alone, were rejected in reasons given by Justice Wilson for a unanimous

²⁷⁷supra, note 265.

²⁷⁸Ibid. at 924.

²⁷⁹supra, note 265.

court. With regard to section 15, although a harsher treatment for those accused with murder outside the province of Alberta than inside the province was considered to create a situation of inequality before the law, section 15 was not infringed because such inequality was not operating "with discrimination".

In order to determine if a distinction is indeed unfavourable, and whether the classification is that of a discrete and insular minority, the "personal characteristics" of the classification upon which the challenged distinction is based are to be evaluated in the larger social and political context. For the latter purpose, a search for previous disadvantage that exists independently from the challenged distinction is suggested. The distinction operating in this case was not one which operated upon a discrete and insular minority. Although this finding was the essential conclusion leading to the rejection of the claim of section 15 infringement, Justice Wilson was careful to categorize the "discrete and insular" classification as an analytical tool which was to serve the purposes of section 15, which is in

remedying or preventing discrimination
against groups suffering social, political
and legal disadvantage in our society.²⁰⁰

Again, it is hard to determine in this case the interest in question, or rather the court's evaluation of this interest except to say that although the ability to choose to be tried by judge alone was viewed as a benefit, it did not possess the same

²⁰⁰Ibid. at 1333.

constitutional stature conferred upon the right to be tried by judge and jury which was found to have historically discharged the function of defending individual liberty in the past."¹

The fourth section 15 case to be decided was Rudolf Wolff & Co. v. Canada², in which it was found that the statutory provisions which conferred exclusive jurisdiction upon the Federal Court for claims made against the Federal Government did not infringe upon section 15. The appellant, a commercial enterprise, found its claim of relative disadvantage vis-a-vis the Crown dismissed as irrelevant to the equality of section 15, because the Crown represents the State, i.e., all members of Canadian society, and cannot be assimilated for the purposes of comparison in its "governmental" actions to an individual. Justice Cory, in his judgment for the court, left the door open for a section 15 challenge in matters in which the government engages in commercial activity in a manner indistinguishable from other litigants.

Justice Cory dismissed any notion of discrimination in the matter by stating that neither the distinctions created by the provisions granting exclusive jurisdiction to the Federal Court, nor the characteristics possessed by the litigant in the case, are those - and he cited the words of Justice Wilson in Turpin - of a "discrete and insular minority" or of a "disadvantaged

¹Ibid. at 1311.

²supra note 265.

group."²⁸³

As a final note to this case in which one is unable to find what would be commonly considered an issue of social injustice, the description of the historical context of the impugned provisions foreshadows a problematic basis for judicial deference to the legislator in cases where the issue is very much one of social injustice:

The impugned provisions do not seek to limit or restrict rights in any way, rather they confer rights which did not exist at common law and designate the court in which these rights may be exercised. That is the historical context in which the impugned sections of the Acts must be considered."²⁸⁴

Hinted to above is an allowance for the imperfections in "newly" conferred rights.

It begins to become more difficult to assess the nature of the section 15 right to equality with the Court's decision in R. v. S.(S.)²⁸⁵ This case raises the issue, in a more substantial way than Turpin, that the nature of Canadian federalism will have to be factored into an equality analysis. The equality question raised in this case was whether the failure by the province of Ontario to designate "alternative measures" within Ontario pursuant to s. 4 of the Young Offenders Act, R.S.C., 1985, c. Y-1, and it was the only province which failed to do so, violated equality rights guaranteed within section 15(1). The questions

²⁸³Ibid. at 702.

²⁸⁴Ibid. at 700.

²⁸⁵supra, note 265.

were also raised, and answered in the negative, of whether the impugned provision creating alternative measures was ultra vires Parliament's power of criminal law, and of whether allowing the provinces to have discretion over their implementation was not an unconstitutional delegation of power to the provinces.

The equality issue of the province's decision was dismissed swiftly. This decision was not "law", understood as the qualifier of equality in section 15(1), because the province was under no obligation to implement alternative measures. The Court, in Chief Justice Dickson's decision for the Court, did not wish to "open to Charter scrutiny every jurisdictionally permissible exercise of power by a province solely on the basis that it creates a distinction in how individuals are treated in the provinces."²⁸⁶ The issue of what is "law" with regard to section 15 surfaces in an important way in the Court's later decision of McKinney. An element of the definition of law made in this case again "hints" at subsequent developments in the interpretation of section 15. Leaving aside the issue of federalism, it was the failure to provide something provided everywhere else - as opposed to the positive imposition of a burden imposed nowhere else - that did not constitute "law" for the purposes of section 15(1).

The Court nevertheless takes the opportunity to consider, and then reject the proposition of whether the "law" itself, being section 4 of The Young Offenders Act, infringes the

²⁸⁶Ibid. at 285.

guarantee of equality in section 15. As is to become the custom in what will constitute for still another few years the "early" adjudication of section 15 claims by the Court, the apparent desire to provide for the clarity of its interpretation (and a certain insistency upon particular interpretations), outweighs the judicial restraint often suggested and exercised by dealing with matters germane only to the outcome of the case at hand.

The Court finds the "absence of the benefit"²⁸⁷ to be a legal disadvantage based upon the province of residence of young offenders. Noteworthy is the absence of any discussion of the impact upon young offenders of this legal disadvantage. Rather, the Court passes right to the consideration of whether the disadvantage is "with discrimination", which is the second part of the two part section 15 test developed in Andrews. This discussion was given a framework of an inquiry as to whether the distinction by province of residence in this case related to the "personal characteristics" of the individual or group suffering from the distinction. The substance of this discussion, however, focused on the nature of federalism, federal-provincial cooperation, and how historically the diversity in criminal law has been "recognized consistently as furthering the values of federalism."²⁸⁸ Absent was any discussion of the personal characteristics of the young offender, which was in effect precluded by the classification of the distinction as being based

²⁸⁷Ibid. at 286.

²⁸⁸Ibid. at 290.

upon the province of residence.

Not wanting to dispute the interest of the Court in promoting its well-considered view of Canadian federalism, it would be suggested nonetheless that this constitutional concern totally eclipsed that of its interest in the disadvantage of young offenders who are not able to avail themselves of "alternative measures". The Court did not consider the possibility of considering the "young offenders" as a class whose personal characteristic of political powerlessness was such that the government of Ontario found it politically expedient and inexpensive to further disadvantage a segment of its youth.

If there are constitutional principles or provisions which in effect override the provisions of the Charter, it would be preferable to find this clearly stated by the courts, as was done in the case of Re: An Act to Amend The Education Act²⁸⁹. In creating an "extra dimension" of analysis to section 15³⁰, the approach to section 15 becomes mechanical and void of concern for

²⁸⁹(1987), [1987] 1 S.C.R. 1148, 40 D.L.R. (4th) 18 [cited to S.C.R.]. The question was raised as to whether the provision of full-funding for Roman Catholic secondary schools in the province of Ontario, but not for other secondary schools, contravened section 15 and section 2(a) of the Charter. Wilson J., writing for herself, Dickson C.J., McIntyre J. and La Forest J., at 1197-1199, finds the provision insulated from Charter review by the "Confederation compromise" found in section 93 of the Constitution Act, 1867. Similarly Estey J., joined by Beetz J., at 1206: "Section 93 is a fundamental constitutional provision because it is a part of the pattern of the sharing of sovereign power between the two plenary authorities created at Confederation."

³⁰⁰See S., supra, note 265 at 287: "...the approach to s. 15(1) established by this court in Andrews takes on an extra dimension when the distinction is province based."

the individual or group affected by the disadvantage. As well, the absence of attention to the impact as opposed to the mere finding of disadvantage creates an imbalance in the Court's two-step approach. Hypothetically, at that point in the jurisprudence, a distinction which would have rendered a previously non-disadvantaged group relatively powerless, or would have reflected the new powerlessness of a particular group, would not have been considered discriminatory.²⁹¹

This imbalance in the Court's two-step approach can be viewed as having been righted to some extent in the strong dissidence of Justice McLachlin (joined in her decision by Justice Gonthier and for the purposes of section 15(1) concurred with by Justice Sopinka) in the case of R. v. Hess and Nguyen²⁹². The Charter issues raised were whether the offense of statutory rape, at the time an offence of absolute liability,

²⁹¹For a very much related concern, see Proulx, "L'égalité en droit comparé...", supra, note 270 at 156: "Par conséquent, ce n'est pas parce qu'une loi établit une distinction, même très préjudiciable à l'égard d'une personne ou d'un groupe et même si cette distinction est fondée sur une caractéristique personnelle non pertinente compte tenu de l'objet de la loi, qu'elle s'avère discriminatoire au sens de l'article 15. Cet article n'est désormais plus une protection générale contre les distinctions de traitement injustifiées ou arbitraires, comme l'avait cru l'ensemble de la jurisprudence et de la doctrine, sauf exceptions isolées, jusqu'au 2 février 1989." This same concern was expressed by Bayefsky, "Case Comment...", supra, note 268 at 516-519; R. Hawkins, "Interpretivism and Sections 7 & 15 of the Canadian Charter of Rights and Freedoms (1990) 22 Ottawa L. Rev. 294 at 299-303. These authors view this development as negative and contradictory to the intentions of the framers of the Charter. For an opinion to the contrary, see P. Hogg, "Interpreting the Charter of Rights: Generosity and Justification (1990) 28 Osgoode Hall L.J. 817.

²⁹²supra, note 265.

was an infringement upon section 7 of the Charter, and whether the crime as defined only being perpetrated by men and only being perpetrated upon females thereby infringed upon the right to equality of section 15 of the Charter. Although the majority of the Court - Justices La Forest, L'Heureux-Dubé and Chief Justice Lamer subscribing to the reasons of Justice Wilson - did not stray from the Court's previous approach to section 15, there are elements in the decisions of both Justices Wilson and McLachlin in regard to section 15 which promise to have great impact on the extent to which equality rights are to be protected by section 15.

Although Justice Wilson found the absence of a mens rea component from the crime of statutory rape infringes section 7 of the Charter and cannot be saved by section 1, she nevertheless considered it "useful" to address the question of section 15(1) since she could not agree with Justice McLachlin's conclusion that section 15(1) was infringed by the provision. Justice McLachlin found it necessary to address the issue of section 15 because although finding section 7 to have been infringed, in her reasoning it was saved by section 1.

Justice Wilson's main point in her discussion of section 15, consistent with her approach in previous cases, was,

...we must not assume that simply because a provision addresses a group that is defined by reference to a characteristic that is enumerated in s. 15(1) of the Charter we are automatically faced with an infringement of s. 15(1). There must also be a denial of an equality right that results in

discrimination.”

Indeed, in all the previous cases of the Court in which it dealt with section 15 this was the first case in which a distinction was made upon an enumerated ground.

In the opinion of Justice McLachlin, based on Andrews, and not to be considered changed by Turpin, it is sufficient in order to show discrimination that a distinction is drawn on the enumerated or analogous grounds and for that distinction to cause a burden to the complaining individual or group. Consideration is then turned to section 1 for the justification of the discrimination. After having concluded that a crime which only men can commit and to which only girls can fall victim constitutes an infringement of the section 15 rights of males, without regard to the discreteness or insularity of males as a class (or their lack of such characteristics), she concludes that the infringement is nevertheless justified under section 1 given the biology of humans and the tremendous costs to society and to young females of premature sexual intercourse and pregnancy. It is generally speaking these same concerns which leads Justice Wilson to determine that in the confines of applying section 15 there is no discrimination.

It might be considered that Justice Wilson is thereby effecting a balancing test of the accused's right to equality with the societal interest of protecting young females - a test properly conducted under section 1 of the Charter. However, the

²⁹³Ibid. at 928.

analysis can equally well be seen as one referring more to the biological and psychological specificity of males and females than a balancing of individual rights with public interests. Indeed, this appears clearly to be the intention of Justice Wilson. After recognizing the inherent dangers of making distinction on the basis of "alleged sex-related factors", she writes,

Nevertheless, there are certain biological realities that one cannot ignore and that may legitimately shape the definition of particular offences. In my view, the fact that the legislature has defined an offence in relation to these realities will not necessarily trigger s. 15(1) of the Charter.²⁹⁴

Justice McLachlin bases her argument in what appears to be very much of a secondary manner on the application of section 28 of the Charter which guarantees the rights referred to in the Charter equally to male and female persons.²⁹⁵ This argument is dismissed by Justice Wilson by stating the legislator is allowed to create an offence which only males as a matter of biological fact can commit, but that it cannot deny a male accused of such an offence the rights and guarantees protected in the Charter.²⁹⁶

The importance of the differences in approach to section 15 between Justices Wilson and McLachlin bears some consideration at

²⁹⁴Ibid. at 929.

²⁹⁵See ibid. at 944.

²⁹⁶See ibid. at 932.

this point, especially as the approach of Justice McLachlin later assists in isolating the two female justices of the Court in McKinney (though more directly Justice Wilson than Justice L'Heureux-Dubé, the latter who conforms to the approach suggested in this case by Justice McLachlin). It would be suggested here the choice of approach might significantly influence the ability of the courts to frame their analysis in a manner which pays the same respect to the experience of inequality and discrimination as it does to the purposes and means of governments in infringing equality rights. This would obviously be detrimental to the interests of the disadvantaged, or those to be disadvantaged by "law" which creates inequality.

On the surface the opposite would appear to be true. The sooner an infringement of section 15 is recognized, the sooner the burden of proof switches from the complainant to the government under section 1. Yet, even leaving aside the whole question regarding the stringency of the section 1 test seeming to decrease as the section 15 test leads to a more automatic finding of infringement, which is what happens in McKinney, the "relaxed" approach to section 15 is disconcerting. In explaining her approach to section 15, Justice Wilson cites the following from her judgment in Turpin:

I observed that in determining whether there was an infringement of s. 15(1) of the Charter it was important to look not only at the impugned legislation which had created the challenged distinction but also at the larger social, political and legal context because "[if] the larger context is not examined, the s. 15 analysis may become a

mechanical and sterile categorization process conducted entirely within the four corners of the impugned legislation".²⁹⁷

Whereas under the "McLachlin approach" the "social, political and legal context" will certainly be given consideration under section 1, as she herself gives in Hess, the great danger is that the context will be framed by government rather than those suffering the disadvantage. As well, as any remedy will necessarily be informed by the social, political and legal context which is presented to the Court, those who get to define their contextual reality are favoured in the process.

Of course it can be argued that on the contrary, the courts will hear both sides, regardless of who has to prove what, weigh the evidence objectively, and apply the law to the facts. However, any bias naturally held by a member of the court due to a greater sharing of life experience with the drafters of the law than with those subject to it, cannot be confronted with the experience and the world-view of the individual or group affected by inequitable law. This was not a factor in Hess in which the authors of both the majority and minority decisions as women could easily appreciate the danger to very young females of sexual relationships with older men. As well, the men of the Court could perhaps easily understand the predatory instincts of certain males for females of a tender age.

The necessity of having to prove one is being discriminated against in a manner which requires the examination of one's

²⁹⁷Hess, ibid. at 928.

social, political and legal environment allows one the fundamental liberty and freedom to define one's experience, and to shape one's sense of dignity. Without a full presentation by one claiming an infringement of his inherent human dignity as to what that human dignity consists of and how it is being infringed, the courts will be uninformed, or ill-informed to conduct the balancing of individual versus state interests that must take place under section 1 of the Charter.

One final element of this decision which is to be noted is the proposition put forth by Justice Wilson that protecting small girls and not boys can be justified for two reasons. The first is that questions of social disapprobation regarding sexual conduct such as that of a woman with a boy goes to the "heart of a society's code of sexual morality," and are "properly left for resolution to Parliament."²⁹⁸ The second reason given, although it was not the circumstances of the case, was that section 15(1) would not be infringed if the Criminal Code provided protection to one class of potential victims of physical and psychological harm and not to another class of potential victims.

The issues of which approach to take to section 15, of what is properly considered in the political rather than the judicial forum, and of the extent to which partial protection does not infringe section 15 or can be justified under section 1, lead to the profound divisions of the Court in its next section 15 case.

²⁹⁸Ibid. at 930-931.

In McKinney v. University of Guelph²⁹⁹ the primary issue was the application of section 15(1) to the practises of mandatory retirement based on age for the teaching staff of universities, and to section 9(a) of the Human Rights Code, 1981³⁰⁰ of Ontario which excludes persons over the age of sixty-five from its (the Code's) protection.³⁰¹ In order to resolve this primary issue, the Court discussed, and was divided upon the issues of (to name but a few): whether universities fall into the definition of government for the purposes of the Charter's scope of application (section 32); to what extent a finding of discrimination within section 15(1) requires more than an unfavourable distinction being made on an enumerated ground; the establishment of a "hierarchy" in the enumerated grounds of section 15(1) once the analysis shifts to section 1 of the Charter; the definition of "law" for the purposes of section 15(1);.... Further, in the three lengthy reasons given by Justices Wilson(dissenting), L'Heureux-Dubé (dissenting) and La Forest (joined by Justice Gonthier, and Chief Justice Dickson), to which Justices Sopinka and Cory separately added brief but interesting remarks, there became evident a stark contrast between the members of the Court with regards to the scope of

²⁹⁹Supra, note 32.

³⁰⁰S.O. 1981, c. 53.

³⁰¹The Court rendered the two "companion cases" of Stoffman, supra, note 265, and Harrison, supra, note 265, in which similar facts, issues and constitutional questions were settled in a manner similar to McKinney. As such, they will not be discussed here.

their vision of society, the role of government as to whether it restricts or creates liberty, and consequently the role the Charter is to play in expediting the advancement of social equality even once the direction of social advancement appears to be evident.

There was an agreement, in a formal sense, in the nature of the interest affected by the mandatory retirement of persons based on advancing age. Justice L'Heureux-Dubé considered that the forced "removal from the work force strictly on account of age can be extraordinarily debilitating for those entering their senior years."³⁰² Justice La Forest stated,

There can be little question that, while the impact will vary from individual to individual, mandatory retirement results in serious detriment to the appellant's lives, including loss of protection for job security and conditions, economic loss, loss of working environment and facilities necessary to support their work, diminished opportunities for grants, and generally seriously diminished participation in activities both within and outside the university.³⁰³

However, there was in the Court a considerable difference in the evaluations of what the impact was of this affected interest upon the individuals, whether they be university professors or members

³⁰²Supra, note 32 at 431.

³⁰³Ibid. at 256. Regarding the importance of employment La Forest J. at 278 cites the Court's remarks in Reference Re Public Service Employee Relations Act (Alta.), supra, note 168 at 368: "Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being."

of the community at large pushed into retirement at the age of sixty-five. The reasons for this can be attributed to the differing views of the effect of age upon a person's capacities to fulfil the functions of a University professorship and other types of employment, and the differing views of the extent to which the terms of employment of a university professor reflect those found in the Canadian employment market.

Justice La Forest finds increasing age to be generally correlative with increasing incompetency after the age of sixty. In the university context a professor, once he or she gets tenure, has secured employment until the age of mandatory retirement. Mandatory retirement allows the professor to enjoy the guarantee of employment and the enjoyment of academic freedom (the society's enjoyment of which along with academic excellence constitutes the pressing and substantial objective of his section 1 test) free from what is considered by the Justice to be the humiliating experience of reviews of employee performance after the employee has reached sixty years of age. Reviews of performance are considered particularly humiliating in one's later years because of one's increasing incompetence. In this way, the unspoken assumption of incompetency is considered preferable to its proof. It is a kindness. The employment is well-remunerated, and there is a pension upon retirement, guaranteed through the process of collective bargaining. This bargain has been struck with the key elements of both tenure and mandatory retirement structuring the agreement. It is a very

good deal. Besides allowing for academic freedom, mandatory retirement opens the doors for younger academics who otherwise would not be able to find employment within the university. This is because universities are a "closed system with limited resources".³⁰⁴ Although the university was not considered "government" for the purpose of the application of the Charter, this analysis was performed by Justice La Forest. This was done largely with the view of its relative transferability to the larger employment scene, and the intervention of the state in employer-employee relations through human rights codes. It would not be wise for the courts to mess up this good deal unless specifically requested to do so by the legislator. In the case of section 9(a) of the Human Rights Code, we find what amounts to a specific request not to intervene. We are all going to be old one day - professors know that when they make their deal - and as this distinction based on age is based on competency which it would not be if any of the other enumerated grounds were the basis for the distinction, the Court does not really have to require substantial evidence that the rights of individuals were impaired as little as possible.

In fact, what appears to be the underlying basis to Justice La Forest's reasons is that in spite of the "formal" finding of discrimination under section 15, whereby a burden was imposed upon a group identifiable by the enumerated ground of age, there really is no discrimination based upon age which either a

³⁰⁴McKinney, ibid. at 248.

university has to abstain from or a legislator has to protect.

Justices Wilson and L'Heureux-Dubé differ from each other in their findings of the application of the Charter to universities (Wilson finds that it does and L'Heureux-Dubé that it does not), in their definition of whether a distinction upon an enumerated ground is sufficient to constitute an infringement of section 15 (Justice L'Heureux-Dubé finds that it does and Justice Wilson is of the opinion to the contrary) and of whether a less stringent application of the "minimal impairment" test under section 1, is appropriate in the present case. Nevertheless, they arrive to what is largely the same practical result which would be the prohibition of mandatory retirement in Ontario, both in universities and elsewhere. They find the view that increasing age and increasing incompetency are correlative to be untrue. It is therefore a view based on stereotype and prejudice, which amounts to discrimination of the worst kind. Individual testing would not be overly burdensome to the institutions, nor cause undue trauma to those few over the age of sixty or sixty-five would wish to stay at the university. The terms of employment negotiated between universities and professors are in no way representative of the larger labour market. A vast proportion of the workforce is non-unionized. They would not have been able to make such sweet deals. Even if the proposition is accepted that one can bargain away one's fundamental rights, it is quite unreasonable to allow one to bargain away the rights of another. The non-unionized are less likely to have pensions, therefore the

impact of retirement is more profound upon them than a relatively elite group of employees. The demographics of this non-unionized segment find it to be made up of a disproportionate percentage of women and immigrants. The interruption in the work histories of women due to child-bearing and child-rearing means lower pensions - as Justice Wilson points out, perhaps a case could be made for sex discrimination as well as age discrimination.

A similar vision of who was being affected by the distinction and of the serious impact of the discrimination - in spite of two different approaches in judicial reasoning - led Justices Wilson and L'Heureux-Dubé to essentially the same conclusion. In spite of an agreement on the rules to apply and the order in which to apply them, Justices L'Heureux-Dubé and La Forest ended up in opposition to one another (and in the case of Justice L'Heureux-Dubé, in vehement opposition).³⁰³ They were not at all looking at the same situation. The former focused on the disadvantage³⁰⁴ and the latter on the justification of the discrimination.

The division between Justices Wilson and La Forest is one of both form and substance. With regard to the form of the section

³⁰³See ibid. at 425-438 per L'Heureux-Dubé.

³⁰⁴In her section 1 analysis with regard to s. 9(a) of the Human Rights Code, L'Heureux-Dubé J., ibid. at 430: "The forced attrition of elderly participants in the work force should not lightly be considered an objective 'sufficient to warrant overriding a constitutionally protected right'." The "objective" was seen by others to be to ensure academic freedom and academic excellence. Mandatory retirement was the means chosen to accomplish that objective.

15 investigation, Justice La Forest is satisfied that the right to equality guaranteed in the section has been infringed once a disadvantage is created by a distinction based upon an enumerated ground. When the inquiry is shifted to section 1, in the case of the enumerated ground of age, the minimal impairment part of the test first established in Oakes, is significantly relaxed. The legislator is not required to "determine with precision where the balance is to be struck,"³⁰⁷ when mediating between competing groups, particularly when competing claims are made for the distribution of scarce resources³⁰⁸. The consent of those whose equality rights are affected can be considered a factor which minimizes the impairment to their rights. When there is competing social science evidence, all the legislator can be expected to do is to act reasonably.

Justice Wilson maintains the approach to section 15 to be one in which a search for stereotyping and prejudice takes place independent of the presence of a distinction based on an enumerated ground. Although it is harder for one to prove their section 15 rights have been infringed, once proven it is harder for the government to justify. Therefore, even though she accepts that the minimal impairment part of the section 1 test can be relaxed, it is only in circumstances where the government must mediate between competing constitutional claims, where the legislator has sought to protect the interests of the

³⁰⁷Ibid. at 285.

³⁰⁸See ibid. at 228.

disadvantaged, and where the legislator has chosen the clearly better option should one exist.³⁰⁹ Assuming that fundamental rights can be bargained away³¹⁰ for economic gain, and is a proper consideration for the minimal impairment test, surely the fact that "the majority of working people in the province do not have access to such arrangements,"³¹¹ must be taken into account. It is hard to keep considerations of substance apart from those of form.

It is in terms of substance, most visible in the contrast of the judgments rendered by Justice Wilson and Justice La Forest, and to a large extent as predicted by those arguing against the use of the Charter discussed above, that the division of the Court is most disturbing.

Justice Wilson sees the disadvantaged. She sees the

³⁰⁹See ibid. at 401.

³¹⁰See ibid. at 406, Wilson J.: "This Court has already held that some of the legal rights in the Charter may be waived but it has not yet been called upon to address whether equality rights can be bargained away. Having regard to the nature of the grounds on which discrimination is prohibited in s. 15 and the fact that equality rights lie at the very heart of the Charter, I have serious reservations that they can be contracted out of." La Forest J. at 276-277, does not rule out the possibility of a waiver of a Charter right. However given that individual employees might not agree with this policy, he prefers in the present case to view the unions' agreement on behalf of its members to be considered under section 1. Cory J., who agreed with Wilson J. regarding her finding the Charter to apply to universities and that mandatory retirement is discriminatory in the manner in which she interprets section 15, at 447, states that he does not wish to be taken as agreeing with her position regarding the contracting out of equality rights as they pertain to age.

³¹¹Ibid. at 416.

government to be the necessary ally of the disadvantaged and government action, even as it intervenes in the private sphere, to be that which creates rather than restricts liberty:

The state has been looked to and has responded to demands that Canadians be guaranteed adequate health care, access to education a minimum level of financial security to name but a few examples. It is in my view, untenable to suggest that freedom is coextensive with the absence of government. Experience shows the contrary, that freedom has often requires the intervention and protection of government against private action.

Finally, it is, I think, true that while government intervention has traditionally been acceptable to Canadians, the state has never assumed sole responsibility for economic and social welfare matters. There has always been and continues to be a broad sphere of purely private activity in Canada.³¹²

Seeing the disadvantaged, seeing an evil in discrimination that reinforces disadvantage in terms of public perception and personal dignity and self-esteem³¹³, and seeing a public and private responsibility in economic and social welfare matters for the eradication of this evil, Justice Wilson attempted to create a very broad definition of government for the purpose of the Charter's application, and a very broad definition of "law" for the purposes of section 15 protection.³¹⁴ Most importantly for

³¹²Ibid. at 356.

³¹³ibid. at 410, Wilson J.: "...the rights of the appellants which have been infringed pertain to their dignity and sense of self-worth and self-esteem as valued members of the community, which are at the very centre of the Charter."

³¹⁴See ibid. at 383.

the present purposes, there are therefore found in her reasons a strong grounding for the assistance of the Charter in promoting equality in relation to social assistance as discussed above. She responds as follows to the argument of the majority that as the state had no obligation to provide protection against discrimination in the first place it could not be reproached for not going far enough in its protection:

They say that absent such an obligation there is no room for constitutional scrutiny of the state's failure to go far enough in legislating human rights protection. It is not self-evident to me that government could not be found to be in breach of the Charter for failing to act.
 ...I do, however, consider it axiomatic that once government decides to provide protection it must do so in a non-discriminatory manner.
 ...Indeed, I would have thought that, if anything, human rights legislation which is intended to preserve, protect and promote human dignity and individual self-worth and self-esteem should be subjected to more rigorous types of scrutiny than other types of legislation.³¹⁵

With the greatest of respect it would be suggested that Justice La Forest does not see the disadvantaged. As such, it is not surprising his approach to the role taken by government in providing only partial protection against discrimination is more deferential than the approach of Justice Wilson.³¹⁶

³¹⁵Ibid. at 412-413.

³¹⁶ibid. at 317, La Forest J.: "In looking at this type of issue, it is important to remember that a legislature should not be obliged to deal with all aspects of a problem at once. It must surely be permitted to take incremental measures. It must be given reasonable leeway to deal with problems one step at a time...."

On a final note to the McKinney case, the brief comments made by Justice Sopinka demonstrate an even greater likelihood of judicial deference to the government compromise of fundamental rights, particularly in the sphere where the government must intervene to secure the recognition of human rights as opposed to the restraint it must exercise in order to effect the same goal. He writes, in the context of deciding what is government for the purposes of the Charter's application, and what is law for the purpose of the application of section 15,

After all, we must bear in mind that the role of the Charter is to protect the individual against the coercive power of the state. ...This suggests that there must be an element of coercion involved before the emanations of an institution can be classified as law.³¹⁷

The next decision of the Court involving section 15, to be discussed here, is that of R. v. Swain³¹⁸. The issue before the Court was whether the common-law rule whereby the Crown is allowed in certain circumstance to raise the issue of the accused's sanity over and above the wishes of the accused

³¹⁷Ibid. at 444. La Forest J., at 276-277, takes a broader approach to the definition of "law" for the purpose of section 15(1), relying on the Court's previous discussions in RWDSU v. Dolphin Delivery Ltd. (1986), [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174 and Slaight Communications Inc. v. Davidson (1989), [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416, with regard to the exercise by the government of a statutory power or discretion, and to the inclusion in section 15(2) of the words "program or activity" which would be unnecessary if section 15(1) was confined to legislative activity.

³¹⁸Supra, note 265.

infringed the rights of the accused under sections 7 and 15 of the Charter. Finding that the accused's right under section 7 was infringed the Court then proceeded to the construction of a new common-law rule whereby the question of the accused's sanity could be raised by the Crown against the wishes of the accused, after the finding of guilt but before the conviction was entered. The Court then proceeded to inquire as to whether a basic equality right will be denied the accused under such a rule.

For the present purposes, the interest in this case is to be found in the formal process of a section 15 inquiry that is described by Chief Justice Lamer. His description of the process requires a finding of social prejudice, historical disadvantage, or negative stereotyping. This is to be the case whether the distinction is drawn upon an enumerated or an analogous ground, which is in seeming contradiction to the majority of the Court in the decisions of Hess and McKinney discussed above.³³ In this case, it was found that although a distinction would be created by the rule on the personal characteristic of insanity, which falls into the enumerated ground of "mental disability", the distinction would not impose a burden or disadvantage on the accused. Therefore, section 15 would not be infringed by the new rule. Although consideration was given to the historical disadvantage of the mentally ill, it was given in a cursory,

³³See ibid. at 992.

albeit unequivocal manner.²²²

The next decision to be discussed is that of Tétreault-Gadoury v. Canada (E.I.C.)²²¹. The primary focus of this case was upon whether under the Unemployment Insurance Act, 1971²²² a "Board of Referees", as opposed to the "Umpire", had jurisdiction to apply the Charter to its provisions. It did not. Although the discussion of the advantages of allowing administrative tribunals to decide constitutional questions, and the conditions upon which their jurisdiction to do so would be recognized, is certainly of some interest to a discussion of the application of Charter guarantees to social assistance, the discussion which follows will be restricted to the section 15 issue that was at the heart of this challenge.²²³ This is the first section 15 issue to be addressed, if not formally decided upon as a result

²²²See ibid. at 1032, Lamer, C.J.: "There is no question but that the mentally ill in our society have suffered from historical disadvantage, have been negatively stereotyped and are generally subject to social prejudice."; see also at 1035, per Wilson J..

²²³Supra, note 265.

²²⁴S.C. 1970-71-72.

²²⁵Of particular interest is the discussion by La Forest J. at supra, note 256 at 35-37, of the practical advantages of having administrative tribunals decide constitutional questions given both the greater accessibility offered, and the more specialized expertise possessed by administrative tribunals in comparison with the regular courts. He considers the issue of constitutional adjudication by administrative bodies of original jurisdiction not to be so important when the legislator offers an administrative appeal from their decisions. It is therefore to be noted that social assistance recipients in Ontario exhaust the social assistance system's appeal system at the Social Assistance Review Board.

of the aforementioned finding, by the Supreme Court of Canada that is concerned with a social safety net benefit.

The provision in question was one which removed persons over the age of sixty-five from the normal unemployment insurance benefit plan and provided them with a single, lump sum retirement benefit that was vastly inferior to the normal unemployment insurance benefits that they otherwise would have received. This distinction based upon the (section 15) enumerated category of age, and as noted by the Court later removed by Parliament once the decision in this case at the Federal Court of Appeal was rendered¹²², was found by the Court to contravene section 15(1) in accordance with its previous decisions in Andrews and McKinney.¹²³ It could not be saved by section 1 and in particular it failed to satisfy the "minimal impairment test."

The three objectives put forth to justify the contravening provision were: 1) to prevent abuse by individuals who no longer intended to look for work; 2) to prevent the double payment of benefits in the form of pension and unemployment insurance benefits; and, 3) to fit the unemployment insurance scheme within the government's legislative scheme to provide benefits for those over the age of sixty-five. The government clearly failed to impress the Court that these objectives could not be attained by much less drastic means. More important than the formal section 1 test however, the reasons given for the Court's decision by

¹²²Supra, note 256 at 46-47.

¹²³Ibid. at 40.

Justice La Forest constitute a praiseworthy display of concern for the needy:

One must not, however, lose sight of the fact that the overall objective of this particular Act is to provide a temporary sanctuary for those wishing to remain in the active labour force, but who are unable for the moment, to find employment....there was no evidence put forth to show that the government could not afford to extend benefits to those over 65. More significantly, there is also no evidence to show that any of the other Acts attempt to fill the gap by addressing the problem of sixty-five-year-olds who must keep working because their pension is insufficient or because they do not receive a pension at all. The most unfortunate aspect of s. 31 is that it has the effect of denying unemployment benefits precisely to those who need them most. The respondent in this case, who has been living on a pension of less than \$500 per month, provides a good example. I cannot accept the appellant's suggestion that the needs of the respondent and those in her position are best looked after by this co-ordinated government scheme.³⁴

This case is important indeed in that there is a concern displayed with the impact of a discriminatory provision on a poor person. Given the safety net nature of social assistance whereby all other avenues of financial support are to be pursued, it is important that the government objective of coordinating benefits was considered to be less important than the person's actual financial situation. The one significant element of the Court's analysis that is somewhat troublesome is the Court's failure to classify the interests in this case as different from those present in McKinney. One of the distinctions to be drawn,

³⁴Ibid. at 46.

according to the Court in McKinney, is between those cases where the government acts as a mediator between competing social interests and those where it acts as the "single antagonist". In McKinney the government acted clearly as a mediator. It certainly could have been argued that in the present case the government clearly was the "single antagonist". Although the practical result of this case would not have been different, the readiness of the courts to cast the government in this role will be a strong indicator of its readiness to intervene actively in social assistance system cases where Charter equality issues are at stake.

The next case to be discussed is that of R. v. Généreux³²⁷. Corporal Généreux, a member of the Canadian Armed Forces, was before a General Court Martial to face narcotics charges under the Narcotic Control Act³²⁸ and a charge of desertion under the National Defence Act³²⁹. The main issue before the Supreme Court of Canada was whether the General Court Martial, as it had then been constituted, was to be considered an "independent and impartial tribunal" for the purposes of s. 11(d) of the Charter.³³⁰ The Court ruled in favour of the corporal in its

³²⁷supra, note 265.

³²⁸R.S.C. 1970, c. N-1, s. 4(2).

³²⁹R.S.C. 1985, c. N-5.

³³⁰Charter, s. 11: "Any person charged with an offence has the right...; (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

finding that the General Court Martial was not sufficiently independent and that the proportionality requirement of the s. 1 test was not met. The Corporal also had claimed that his rights under s. 15 were infringed in not facing the charges before a non-military court. This claim was dismissed in a fairly summary fashion. Nevertheless, two interesting observations can be made with regard to s. 15 interpretation.

The first observation is that a proposition can be deduced in a manner seemingly unintended by the Court from the following remarks from the Chief Justice to which all members of the Court subscribed³³¹ :

I think that this submission equally can be dealt with briefly. In my opinion, the appellant, in the context of this appeal, cannot claim to be a member of a "discrete and insular minority" so as to bring himself within the meaning of s. 15(1) of the Charter: Andrews v. Law Society of British Columbia. For the purposes of this appeal, the appellant cannot be said to belong to a category of persons enumerated in s. 15(1), or analogous thereto.

I emphasize, however, that my conclusion here is confined to the context of this appeal. I do not wish to suggest that military personnel can never be the objects of disadvantage or discrimination in a manner that could bring them within the meaning of s. 15 of the Charter. Certainly it is the case, for instance, that after a period of massive demobilization at the end of hostilities, returning military personnel may well suffer from disadvantages and discrimination peculiar to their status, and I do not preclude that members of the Armed Forces might constitute a class of persons

³³¹Stevenson J., in a separate but concurring judgment, and L'Heureux-Dubé J., in her dissenting reasons, concurred with Lamer C.J.'s remarks on the application of s. 15.

analogous to those enumerated in s. 15(1) under those circumstances.³³²

This pronouncement is somewhat confusing. Once the military judicial proceedings are found to be independent and impartial, the accused is not disadvantaged by the proceedings irrespective of the general status of advantage or disadvantage pertaining to the group to which he belongs. The first part of the test for an infringement of s. 15 - the distinction must be disadvantageous to the person claiming the infringement- is not met. The determination of the disadvantaged status of the group, according to the Chief Justice's remarks, must take into account the change in disadvantages experienced which result from a specific change in circumstances. Therefore rather than placing the focus for s. 15 application upon the status of the group to which a person belongs, as is the apparent intention of the Court, the underlying focus is on the impact of the distinction being made.

The second interesting element of this decision is the importance placed upon the need to refer to "context" in Charter adjudication not only to determine whether, in a particular context or set of circumstances, an individual's well-defined rights have been breached, but in actually giving substance to and in defining a particular right. Chief Justice Lamer discusses the historical importance of military law and tribunals as an important contextual component in response to the question

³³²Généreux, supra, note 265 at 310-311, Lamer C.J..

of whether a system of military tribunals is by its very nature inconsistent with s. 11(d) of the Charter.³³³ Justice L'Heureux-Dubé, agrees wholeheartedly with this approach even while recognizing that "in some circumstances it has been thought to be more advantageous to restrict consideration of context to the s. 1 analysis."³³⁴ Contextual importance is also granted to s. 11(f) of the Charter which recognizes the existence of a system of military tribunals.³³⁵ With the exception of a contextual reference to another Charter provision, the discussion of context with regard to the nature rather than to the factual infringement of a right carries with it the risk of accepting whatever situation as respectful of rights simply because that is the existing situation.

Reference to the constitutional context of a Charter right is determinative of the Court's finding of the non-infringement of s. 15 in Canada (Minister of Employment and Immigration) v. Chiarelli³³⁶, the last case to be discussed here. Mr. Chiarelli was a permanent resident of Canada who as a result of a criminal conviction was ordered deported from Canada. His right to an

³³³ibid. at 288-296.

³³⁴ibid. at 323, L'Heureux-Dubé J..

³³⁵ibid. at 296, Lamer C.J.; Charter, s. 11: "Any person charged with an offence has the right...; (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;"

³³⁶supra, note 265.

appeal based upon compassionate grounds of this deportation was removed because of a finding of his involvement with organized crime. Based upon sections 7, 12, and 15 of the Charter, he challenged provisions of the statutory scheme which set in motion his deportation and the removal of his right to appeal. At the Supreme Court of Canada, Mr. Chiarelli's counsel made no submissions on the issue of a s. 15 infringement. However the constitutional questions as framed by the Court raised the issue of s. 15, to which the present discussion will limit itself, only in relation to the provisions for the deportation of permanent residents (and not of citizens) who have been convicted of certain serious criminal offences. Justice Sopinka deals briefly and decisively with the issue:

As I have already observed, s. 6 of the Charter specifically provides for the differential treatment of citizens and permanent residents in this regard. While permanent residents are given various mobility rights in s. 6(2), only citizens are accorded the right to enter, remain in and leave Canada in s. 6(1). There is therefore no discrimination contrary to s. 15 in a deportation scheme that applies to permanent residents, but not to citizens.³³⁷

b) Summary

A number of very important questions have been answered and

³³⁷ibid. at 24; Charter, s. 6: (1) Every citizen of Canada has the right to enter, remain in and leave Canada. (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right (a) to move to and take up residence in any province; and (b) to pursue the gaining of a livelihood in any province.

a number of serious concerns have been raised with regard to both the form and the substance to be given the interpretation of section 15 of the Charter, in the section 15 jurisprudence of the Supreme Court of Canada.

The Court has proclaimed the "similarly situated" test insufficient for the purposes of section 15. Whether because it allows "bad law" to stand, or ignores the purpose of the section which is to combat discrimination, its formal rejection is clear and explicit. The Court did not wish to subject to Charter scrutiny every distinction made by the legislator whose very business it is to make distinctions.

Equally clear is the Court's general desire to allow and to limit the protection of section 15 to those considered by the Court to be disadvantaged. Who is disadvantaged and what constitutes a disadvantage concerns the justices' substantive view of equality. In Andrews, the disadvantaged, seen either to be non-citizens or to be lawyers who can't practice law, were advanced by the striking down of the citizenship requirement to practise law. In Turpin, a person accused of murder who must be tried by judge and jury is not a disadvantaged person being truly disadvantaged by the process. In both Re Workers' Compensation, and in Wolff, the comparative nature of disadvantage makes the inquiry into the state of being disadvantaged a non-starter. One cannot be disadvantaged if they are considered in the same boat as virtually everyone else in the province or the country. In S.(S.), a federalist vision of a provincial rather than a federal

boat for purposes of comparison, obstructed the view of the disadvantaged youth in the provincial boat. The Court, in Hess, did not see any disadvantage, for equality purposes, in a measure which protected relatively defenceless girls from the morally offensive, sexually predatory acts of men. In McKinney, there was clear evidence of substantive vision ruling over form. The majority of the Court which entertained a vision of well-off, unionized, full-pension, retirees saw no disadvantage for them in mandatory retirement - all part of the good deal they had made. The minority, who considered the impact of mandatory retirement on quite a different crowd - a crowd who essentially didn't get to make any deals - found these same provisions to be unjustifiably discriminatory. In Swain, the design of a new common law rule giving the accused greater control over his defense but which still serves to keep someone from going to prison if they were insane at the time of the offence was considered as a measure to remedy rather than exaggerate disadvantage. In Tétreault-Gadoury the Court could not support the disentitlement to unemployment insurance benefits of a pensioner who because of the disentitlement based on age would have had to survive on a \$500.00 a month pension. There was no discussion in Généreux of the social, political or legal circumstances of the accused.³³⁸ Finally, in Chiarelli, there

³³⁸In his summary of the decision of the Court Martial Appeal Court, Lamer C.J., supra, note 265 at 9-10 notes that the court "did not wish to deal with s. 15 of the Charter in the absence of evidence, which was not before the court in this case, concerning relevant social, political and legal circumstances." It is not

was no disadvantage to be found in a situation in which the disadvantage attached to one's status is written into the Charter itself.

As the scope of social vision, in the very simple terms of who makes up society and what are the various subjective experiences of social participation by these social participants, is determinative of the result of equality challenges, so seems to be the opinion held as to the emphasis on the coerciveness or the beneficence of government action and intervention. If government intervention is viewed as necessary to promote equality, then its partial promotion is considered inadequate and to be remedied unless such remedy risks invalidating the whole scheme of promotion. If the action by government to promote equality is considered a coercive invasion in what are considered the generally speaking smooth workings of society - where generally speaking people get a chance to make pretty good deals - then the partial promotion of equality is just fine, thank you. If government is viewed as beneficent (and perhaps even all the more so with a particular construction of section 15 of the Charter) and discrimination evil, then the eradication of evil is assisted by a broad definition of government to which is applied a process wherein the evils of discrimination are thoroughly depicted. In this "Wilsonian" scenario, the evil can only be justified if it ultimately serves to diminish a greater

clear whether any evidence of a similar nature was brought before the Supreme Court.

evil of greater discrimination.

The first objective of this discussion of the section 15 jurisprudence of the Supreme Court of Canada was to assist in the translation of the substantive vision of equality in social assistance presented above in a manner rendering it amenable to the courts' interpretation of the Charter's equality guarantee. This objective has been partially achieved, as some of the terms of the translation, which is to say which arguments are to be put forth to gain the understanding of the court, are now more apparent. The function of government in the provision of social assistance will have to be identified as that of the "single antagonist", rather than as the "mediator" of competing social claims. This identifier diminishes the argument for the constitutional acceptance of partial protection. Conditionality that does not take into account the real control an individual has over his poverty will have to be portrayed as reaffirming stereotypes and prejudice against the poor. Some understanding of the "coerciveness" of government imposed conditions, even upon the beneficiaries of government action will likely be present. With regard to the equality criteria of assistance based on need, as most distinctions that are made with regard to benefit levels are based on enumerated grounds, the section 15 issue to be resolved is what is the definition of a discriminatory burden or benefit - it can only be a distinction not based on relative need.

However, the glossary is still incomplete. The empathy

necessary for an understanding by the courts of the situation of the person in need, is undermined by the Supreme Court's definition of discrimination. This is the focus of the final part of this analysis.

c) The definition of "discrimination" and concerns of merit

The linchpin of section 15 application is clearly that of the concept of "discrimination". As discussed above, it is only distinctions in benefits or burdens that are made with discrimination which constitute an infringement of section 15. The essential definition of discrimination provided by the Supreme Court of Canada is that found in the judgment of Justice McIntyre in the Andrews case. It is cited here, once again, for convenience:

I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.³³

(my underlining)

The words underlined, of which the use of the term "merit" is the

³³Andrews, supra, note 10 at 174-175.

most disconcerting, is the focus of this discussion.

It would be suggested that although the Court has clearly done away with an approach to equality determination based on the use of Aristotle's concept of Justice and Equality, Aristotle's contention that "awards should be according to merit" has not and indeed cannot be so simply evacuated from the intellect - including that of the Court. That people should get what they merit is clear from the underlined words.

These words are nevertheless disconcerting to one wishing to find an interpretation of section 15 which would work to the advantage of persons-in-need. The source of this discouragement is two-fold. As discussed above, the inequities and inadequacies of the social assistance system have been justified in the past on the basis of perceptions regarding the various degrees of "worthiness" of the poor. Secondly, the Court's consideration of "merit", as is first hinted at in its use of the phrase "merits and capacities", appears oriented upon the award one would receive for their participation in employment in a free market economy. There does not appear to be room in this orientation for either an approach which recognizes the serious barriers to employment that exist other than those caused by the most visible kinds of prejudice, or an understanding that merit, social contribution, and social participation can take a form other than employment.

In McKinney, there was an intense, perhaps determinative disagreement regarding the capacity of older workers in general,

and older professors in particular, to perform competently.³⁴⁰ There was however no discussion as to whether other definitions of merit other than competency in employment should come into play. This was particularly apparent in the judgment of Justice L'Heureux-Dubé, who in her assault on the reasoning of Justice La Forest, first declares that "Professional calibre should be based on meritocratic rather than on a chronological basis."³⁴¹ The furthest she strays from the principle of competency-based merit is in attempting to open up the discussion of which skills may be necessary to adequately accomplish the tasks involved in employment with a university:

Declining intellectual ability is a coat of many colours - what abilities and for which tasks? The discrepancies between physical and mental abilities amongst different age groups may be more than compensated for by increased experience, wisdom and skills acquired over time.³⁴²

As cited earlier, "respect for the inherent dignity of the human person,"³⁴³ is one of the guiding principles of Charter interpretation. "Inherent" need not refer to human capacities of achievement, and indeed that would seem to be a referent which

³⁴⁰See McKinney, supra, note 32, per L'Heureux-Dubé at 428-429, per La Forest J. at 289, per Wilson J. at 393: "Are academics being required to retire at age 65 on the unarticulated premise that with age comes increasing incompetence and decreasing intellectual capacity? I think the answer is yes and that s. 15 is accordingly infringed."

³⁴¹Ibid. at 428.

³⁴²Ibid. at 429.

³⁴³Oakes, supra, note 221 at 225, per Dickson C.J..

voids the word "inherent" of meaning. Nonetheless, assuming that merit properly refers to achievement in an exclusive manner, why should achievement be judged or evaluated solely in the context of achievement in employment? Achievements of wisdom, achievements in personal relationships, artistic achievements, to name but a few, are surely human achievements to be regarded as meritorious. Why should not longevity, or long service to an employer have been regarded as merit within the context of university employment? The Court had its reasons, not necessarily bad, which because they are not explicitly stated deserve our attention so much more.

Professor Andrew Petter, it was noted earlier, had observed that courts make rules based on the nature of the cases before them with regard both to the parties before them and the issue (and not necessarily the underlying issue) between the parties. The language of these rules is shaped to respond to these parties and these situations. In the case of discrimination, the rules applying to this manifestation of the phenomenon of inequality, were shaped in the context of employment. This is not at all surprising given both the fact, and the cultural value attached to this fact, that social participation - with its important component of the individual's economic survival - is defined in this country by participation in the employment market. A heretofore excluded group is most likely to make their first claim for respectful treatment in this vital area of social participation.

In Andrews, (itself a case concerning one's right to gainful employment,) immediately preceding his now seminal definition of discrimination, Justice McIntyre refers to Chief Justice Dickson's reference in the Action Travail des Femmes³⁴⁴ case to the Abella Report on equality in employment.³⁴⁵ Subsequently, in McKinney, Justices Wilson and L'Heureux-Dubé refer in their separate judgments to Judge Abella's work on discrimination.³⁴⁶

The terms of reference for the Abella Report which had as its focus the inequities suffered by women, natives, visible minorities and the disabled, required the Commission to

...inquire into the most efficient, effective and equitable means of promoting employment opportunities, eliminating systemic discrimination and assisting all individuals to compete for employment opportunities on an equal basis....³⁴⁷

(my underlining)

The report's bottom line on what constitutes an "equal basis" for competition in employment is found in the following assertion:

Jobs can realistically be made available only to those who are qualified to undertake them. No strategy designed to increase the participation of particular groups or individuals in employment systems can work unless the proposed employees have the skills

³⁴⁴Canadian National Railway Co. v. Canada (Canadian Human Rights Commission) (1987), [1987] 1 S.C.R. 1114.

³⁴⁵Andrews, supra, note 10 at 174, referring to the Report of the Commission on Equality in Employment, supra, note 208.

³⁴⁶McKinney, supra, note 32 at 387 per Wilson J. and at 422-423 per L'Heureux-Dubé J.

³⁴⁷Supra, note 208 at ii.

to do the job."³⁴

The report recognizes that people could find themselves disadvantaged in terms of employment economically, socially, politically and educationally. To remedy these forms of disadvantage which arise from discrimination, understood in its systemic sense, the report suggests the systematic eradication of the impediments facing particular disadvantaged groups in a manner which is sensitive to the "actual needs of the different groups," and not to "what we think their needs should be."³⁵ It is what is found between a sensitivity to the needs of disadvantaged groups and the bottom line (presumably the bottom line of the employer) of task competence that might enable the adaptation of the definition of discrimination outside the context of employment.

The Abellla Report both recognizes that the lack of education and training contributes to the disadvantage of the groups under study, and validates at the same time this exclusion. Nevertheless, in regard to disabled persons, it most generously recommends "as full accommodation as possible"³⁶ by the employer. Though nowhere stated in the Report, the greater

³⁴Ibid. at 129.

³⁵Ibid. at 4.

³⁶Ibid. at 5. Suggested elements of this full accommodation include those of which other employment disadvantaged groups would certainly benefit - "flexible working arrangements must be available for those unable to work long hours; attendants and technical aids should be available for those who require them; and necessary tax adjustments must be available both to employers and disabled employees".

obligation to accommodate the "disabled" in employment, can only be explained by the assumption that the disadvantage inherent in a disability, is more immutable than the educational and experiential disadvantage faced by the other groups. It is not important to consider the well-foundedness of such an assumption at this point. It is important to suggest however, that underlying considerations of the immutability of personal characteristics, reflect a concern once again with the control an individual has (as both an individual and as a member of a group) over the reasons for their disadvantage.

The Report however was sensitive to the fact that barriers to education and training that are faced by disadvantaged groups are as significant as the ones to be faced by them, once educated and trained, in the "main employment arena"³⁵¹. Sensitivity was also displayed to those who might be considered to be suffering most significantly from their "own self-imposed inhibitions"³⁵². Rather than a punitive approach to these persons, what is suggested is very similar in tone and substance to views expressed in Transitions that one is to be held responsible for his disadvantage only to the extent that it is reasonable for the person to believe he has some control over the situation:

This is not to suggest that no work needs to be done on encouraging individuals in these groups to review their own self-imposed inhibitions. But the encouragement and counselling of individuals to stretch their

³⁵¹Ibid. at 175.

³⁵²Ibid. at 5.

expectations is far more likely to produce the desired confidence if there is some hope on the part of these individuals that their expectations have a reasonable chance of fulfilment."³³

How then does one explain an obvious sensitivity to the barriers facing disadvantaged groups, and a recognition of the unfairness of systems structured around a "homogeneous constituency" of "white able-bodied males"³⁴, in a manner that reconciles these factors with a "bottom-line" of task or employment-competency based merit?

One can only speculate as to the Commission's sense of moderation and appreciation of political realities. One can assume that this moderation was due to the question of who was to pay for the enormous costs associated with providing opportunities to those other than the only "attitudinally-disadvantaged" - though there certainly is a price-tag on this as well. It is this same concern for the employer's capacity to bear the financial burden of remedying disadvantage that we see in the presence of "bona fide" occupational qualification considerations in human rights statutes. Even in the absence of an explicit statutory provision of a "B.F.O.Q." defense, the Supreme Court of Canada while recognizing "adverse effect discrimination" and the employer's "duty to accommodate", at the same time found it necessary to establish a reasonable limit to this duty so as to "protect the right of the employer to proceed

³³Ibid.

³⁴Ibid. at 9.

with the lawful conduct of his business."³⁵⁵

Courts, as we know from the Mckinney case are hesitant to intervene in what they see to be essentially private relations, or the legislative attempt to affect what must ultimately be a political balance between competing claims.

However, in the case of social assistance legislation, it should be argued that the purpose of the legislation is not to create a balance between the poor and others (except of course in defining poverty given its somewhat relative nature). Its purpose is to provide for the poor in a manner which facilitates their greater participation in society. Its intervention in the labour market by the establishment of social assistance legislation, although important, is essentially of a secondary nature. This is especially so where employment incentives are established for social assistance recipients and a budget-deficit approach to eligibility is taken rather than one which excludes the employed, whatever their income from employment. That this creates a certain inequity, as the principle of assistance to be based on need is thereby deviated from has been discussed above. The political realities of the Court would probably view such incentives, as long as the gap created between the needy was not

³⁵⁵O'Malley, supra, note 207 at 552-553, per McIntyre J.. On the other hand, in the more recent case of Central Alberta Dairy Pool v. Alberta (Human Rights Commission) (1990), [1990] 2 S.C.R. 489, 6 W.W.R. 193, (reversing at least in part Bhinder v. Canadian National Railway Co. (1985), [1985] 2 S.C.R. 561, 23 D.L.R. (4th) 481), the Court ruled that even in the presence of a statutory B.F.O.Q. defense, in the case of indirect discrimination there still exists the "duty to accommodate."

too large which at present it is not, as either non-discriminatory or justifiable under section 1 as an example of minimal impairment.

It is in questions regarding discrimination amongst the poor with regard to benefit levels that the possible determination of the social assistance system to be a fixed system with limited resources and the dissidence of Madame Justice Wilson regarding the relaxation of the minimal impairment requirement applying only where the legislature seeks to promote the interests of the least advantaged carries great weight.

How then is the "discrimination" of section 15 as defined by the Supreme Court of Canada, owing so much to the employment context in which it was developed, to be adapted to the different context of social assistance? Many suggestions have already been made as to the arguments to be put forth regarding the role of government as a "singular antagonist." There are two more approaches to be suggested here. The first is a very literal application of the definition of discrimination. The second requires the consideration once more of the nature of award and merit.

The Andrews' definition of discrimination permits, in the distribution of opportunities, benefits and advantages, distinctions "based on an individual's merits or capacities". Similarly, it would permit distinctions based on an individual's relative incapacities, and not those not based on merit's or capacities. Distinctions with regard to the conditions of social

assistance must be based on capacities and incapacities. If these distinctions cannot be made, then benefit or advantage cannot be withheld. This literal application is certainly consistent with section 15(2) which permits affirmative action programs. However, the context in which this definition is understood, that is the courts' underlying philosophical bias towards an employment-competency based meritocracy, threatens this literal application. Why reward the incompetent?! Why would a court wish to reward someone it might mistakenly regard as competent, for not exercising those capabilities?! A "literal" approach is therefore inadequate in itself.

The Supreme Court of Canada characterized work as a fundamental aspect of one's life because it provides one with a means of financial support and a contributory role in society.³⁵⁶ As such the opportunity to work is considered worthy to some extent of the court's protection. Financial support, and social contribution or participation are not important because of work. They are important because they are fundamental to human dignity. For man not to be a beast, he must be part of the state. The amount of justice in the state determines whether man will be a beast. The financial support they receive enables the person to participate in the state. The definition of social contribution must be significantly broad and varied to allow as many as possible to be part of the state.

The present make-up of the Supreme Court of Canada should,

³⁵⁶Supra, note 294.

given this analysis, serve to inform the framers of new social assistance legislation of the imperative of recognizing in legislation a "presumptive right to social assistance based on need" in order to assure that the equality rights of all the poor will in fact be served by the use of section 15 of the Charter, (although admittedly one could presume that recourse to a constitutional guarantee of equality would be of much less significance and urgency if such was indeed the case).

Conclusion

As the immediately preceding pages have provided a summary and synthesis of sorts, of the issues presented in the three sections of this thesis, this final conclusion shall be kept particularly brief. Common wisdom would have the present day world to be a place of unprecedented change both with regard to the number of areas of human activity and organization in which change is occurring, and the rapidity with which these changes are taking place. Subscribing to such wisdom requires a prioritizing and focusing of energies possessed individually and collectively towards the necessary adaptation to change. After all has been said, one must therefore determine the priority to be given to the recognition of a right to social assistance as a fundamental right which Canadians are to enjoy.

In a very recently published paper, the French jurist Georges Vedel makes some interesting observations regarding the

essential nature of human rights that would be of assistance in determining priorities.³⁵⁷ In a briefer but similar vein to the discussion of equality presented above, he suggests that the essence of human rights both includes and goes beyond the mutual obligations of the "golden rule", to the recognition of man as creature possessed of a sacred image. He observes that although there are disagreements regarding the substance of various conceptions of human rights, there is universal agreement that human rights do in fact exist as universal. The only way to bridge this gap, or resolve this apparent paradox is through hope and a sense of history. The progress towards a more complete achievement of, and an agreement upon, the substance of human rights requires that past human rights achievements within a particular community be recognized as such and guaranteed. It is within this perspective that the following words of Supreme Court of Canada Chief Justice Duff, written over fifty years ago, are cited in conclusion:

It is pertinent also to observe that the subject of relief, relief of persons in circumstances in which the aid of the State is required to supplement private charity in order to provide the necessities of life, has become one of enormous importance...in all the provinces the annual public expenditure for education and the care of indigent people is of great magnitude which attests in a conclusive manner the deep, active, vigilant concern of the people of this country in

³⁵⁷G. Vedel, "Les droits de l'homme: quels droits, quel homme?" in Mélanges René-Jean Dupuy (Paris: Editions A. Pedone 1991) 349.

these matters.³²⁶

³²⁶Reference Re Authority to Perform Functions Vested by Adoption Act, etc., supra, note 17 at 403.

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