

Charter Equality at Twenty: Reflections of a Card-carrying Member of the Court Party

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

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

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1. INTRODUCTION

For those of us who see the *Canadian Charter of Rights and Freedoms* as a potential catalyst for progressive social change, the twentieth anniversary of the *Charter's* equality rights guarantees provides an important opportunity to reflect on what we have accomplished over the past two decades, and what remains to be done. For my part I remain convinced, after more than 15 years of *Charter* activism, that the *Charter* provides an important and legitimate avenue for challenging growing inequities within Canadian society. I began my scholarly career in the late 1980s by asserting that the *Charter* includes an absolute right to an adequate level of social assistance.¹ I have since suggested that the *Charter* guarantees access to health care, housing and other basic social and economic rights set out under international human rights treaties ratified by Canada.² I have argued that the right to equal protection and benefit of the law under s. 15 of the *Charter* prohibits discrimination based on poverty, and renders systemic inequalities in social programs and fiscal policies unconstitutional.³ I have been directly involved in *Charter* litigation, advancing positive rights claims at the trial, appellate

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- 1 M. Jackman, "The Protection of Welfare Rights Under the *Charter*" (1988) 20 *Ottawa L. Rev.* 257-338.
 - 2 M. Jackman, "Section 7 of the *Charter* and Health Care Spending" in G.P. Marchildon, T. McIntosh & P.-G. Forest, eds., *The Fiscal Sustainability of Health Care in Canada* (Toronto: University of Toronto Press, 2004) 110-136; M. Jackman, "From National Standards to Justiciable Rights: Enforcing International Social and Economic Guarantees Through *Charter of Rights* Review" (1999) 14 *J. L. & Soc. Pol'y* 69-90; M. Jackman, "Separate but not Apart: The Role of the Courts in Canada's Post-*Charter* Democracy" in D. Magnusson & D. Soberman, eds., *Canadian Constitutional Dilemmas Revisited* (Kingston: Queen's University/Institute of Intergovernmental Relations, 1997) 31-42; M. Jackman, "Rights and Participation: The Use of the *Charter* to Supervise the Regulatory Process" (1990) 4 *Can. J. Admin. L. & Prac.* 23-56.
 - 3 M. Jackman & B. Porter, Women's Substantive Equality and the Protection of Social and Economic Rights Under the *Canadian Human Rights Act*, in Status of Women Canada, *Women and the Canadian Human Rights Act: A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, 1999) 43-112; M. Jackman, "Women and the Canada Health and Social Transfer: Ensuring Gender Equality in Federal Welfare Reform" (1996) 8 *C.J.W.L.* 371-410; M. Jackman, "Constitutional Contact With the Disparities in the World: Poverty as a Prohibited Ground of Discrimination Under the *Canadian Charter* and Human Rights Law" (1994) 2 *Rev. Const. Stud.* 76-122; M. Jackman, "Poor Rights: Using the *Charter* to Support Social Welfare Claims" (1993) 19 *Queen's L.J.* 65-94.

and Supreme Court of Canada levels, most recently as co-counsel for the Charter Committee on Poverty Issues in its challenge to NAFTA's Chapter 11.⁴ And I have participated in continuing legal and judicial education initiatives on all of these issues.

From this perspective I have reacted with bemusement, incredulity, and sometimes outrage, to claims made over the years by *Charter* critics of the right in relation to the "Court Party",⁵ of which I would undoubtedly qualify as a card-carrying member. These have included Ted Morton and Rainer Knopff's insistence that the "Court Party's project ... is deeply and fundamentally undemocratic, not just in the simple and obvious sense of being anti-majoritarian, but also in the more serious sense of eroding the habits and temperament of representative democracy."⁶ Peter Russell has described recourse to the *Charter* as a "flight from politics" and a turning away from "the procedures of representative government ... as a means of resolving fundamental questions of political justice."⁷ To advocate for judicial recognition of social rights, John Richards argues, is to "trivialize a political foundation of civilized public life, namely that ... the people's representatives – and not judges – spend public monies."⁸ Under the *Charter*, Ted Morton again warns, "the clientele groups of Canada's bloated welfare state will be able to retreat to the courts and effectively obstruct attempts to reform health, welfare, or labour policies" and, "unless or until this unaccountable, judicial law-making is reined in", Canada's economic competitiveness and Canadians' standard of living will continue to deteriorate.⁹

2. HOW IS IT REALLY GOING?

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

4 *Council of Canadians v. Canada (Attorney General)*, [2005] O.J. No. 3422.

5 F.L. Morton & R. Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000); see also I. Brodie, *Friends of the Court: The Privileging of Interest Group Litigants in Canada* (Albany: State University of New York Press, 2002).

6 Morton & Knopff, *ibid.* at 149.

7 P.H. Russell, "The Effect of a Charter of Rights on the Policy-Making Role of Canadian Courts" (1982) 25 *Canadian Public Administration* 1 at 32.

8 J. Richards, "William Shabas v. Cordelia" (2000) 11 N.J.C.L. 247 at 259-60.

9 F.L. Morton, "Activist Judges Attack Common Sense Revolution" (October 2002) *Fraser Forum* 7 at 9.

of Canadian society.¹⁰ Governments in all parts of the country have been elected on, and have thrived on, poor and welfare-bashing platforms.¹¹ Poverty has been characterized by our political leaders not as a serious and systemic economic problem, but an individualized phenomenon blamed on the poor themselves, who are depicted as fraudulent, lazy, and responsible for their own misfortunes.¹² In this political context, *Charter* litigation has been taken up by low income people and their advocates not as a means of bypassing democratically elected governments, or of undermining Parliamentary democracy, but rather as a mechanism for calling the legislative and executive branches to account for their failure to respect the basic rights and interests of a group which has been totally marginalized within our current political system.

What has been the record of success of *Charter* litigation as a means of redress against legislative choices having a disproportionately adverse impact on the poor? There have indeed been notable successes. For example, in the 1993 *Dartmouth / Halifax (County) Regional Housing Authority v. Sparks*¹³ case, the Nova Scotia Court of Appeal found that denying public housing tenants security of tenure and other protections

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- 10 B. Porter, "ReWriting the *Charter* at 20 or Reading it Right: The Challenge of Poverty and Homelessness in Canada" in W. Cragg & C. Koggel, eds., *Contemporary Moral Issues*, 5th ed. (Toronto: McGraw-Hill Ryerson, 2005) 373; W. Wieggers, *The Framing of Poverty as "Child Poverty" and Its Implications for Women* (Ottawa: Status of Women Canada, 2002); M. Hurtig, *Pay the Rent or Feed the Kids: The Tragedy and Disgrace of Poverty in Canada* (Toronto: McLelland & Stewart, 1999); S. Day & G. Brodsky, *Women and the Equality Deficit: The Impact of Restructuring Canada's Social Programs* (Ottawa: Status of Women Canada, 1998).
- 11 J. Swanson, *Poorbashing: The Politics of Exclusion* (Toronto: Between the Lines, 2001); Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Canadian Human Rights Act Review Panel, 2000) 108-110; P. Capponi, *The War at Home: An Intimate Portrait of Canada's Poor* (Toronto: Viking, 1999); National Council of Welfare, *Another Look at Welfare Reform* (Ottawa: Public Works and Government Services Canada, 1997).
- 12 M. Little, "A Litmus Test for Democracy: The Impact of Ontario Welfare Changes on Single Mothers" (2001) 66 *Studies in Political Economy* 9-36; J. Mosher, "Managing the Disentitlement of Women: Glorified Markets, the Idealized Family and the Undeserving Other" in S.M. Neysmith, ed., *Restructuring Caring Labour: Discourse, State Practice and Everyday Life* (Toronto: Oxford University Press, 2000) 30 at 43-46; M. Philp & R. Mackie, "Beer Gibe Earns Harris a Blast" *The Globe and Mail* (17 April 1998) A1, A6; G. York, "Foes Jump on Remark by Chretien" *The Globe and Mail* (22 April 1994) A4.
- 13 (1993), 1993 CarswellNS 89, 101 D.L.R. (4th) 224 (N.S. C.A.).

under provincial residential tenancies legislation violated s. 15 of the *Charter*. The Court held that this exclusion, which permitted Irma Sparks and her two children to be evicted from their apartment after 10 years residence, without notice or any explanation of the reasons for the eviction, was discriminatory on the basis of poverty, single motherhood, race, and the fact of being a public housing tenant.

In the 1999 *New Brunswick (Minister of Health & Community Services) v. G. (J.)*¹⁴ case, the Supreme Court of Canada held that the failure to provide publicly funded legal aid in child protection proceedings infringed a low income parent's security of the person rights under s. 7 of the *Charter*. Jeannine Godin had been threatened with loss of custody of her children based on evidence of her parental fitness contained in 15 affidavits presented by three lawyers acting for the Crown, over the course of a three day hearing, after she had been turned down by legal aid and had resorted to bake sales and other unsuccessful efforts to raise money to hire her own lawyer. Chief Justice Lamer concluded that: "Without the benefit of counsel, the appellant would not have been able to participate effectively at the hearing ... thereby threatening to violate both the appellant's and her children's s. 7 right to security of the person."¹⁵

In the 2001 case of *Dunmore v. Ontario (Attorney General)*,¹⁶ the Supreme Court of Canada found that the exclusion of agricultural workers from the province's labour relations regime was a violation of their s. 2(d) right to freedom of association. Evidence showed that agricultural workers in Ontario had suffered repeated attacks on their efforts to unionize, compounding their historic vulnerability to social isolation and economic exploitation. As Justice l'Heureux-Dubé put it: "[I]n the case of agricultural workers in Ontario, the freedom to associate becomes meaningless in the absence of a duty of the state to take positive steps to ensure that this right is not a hollow one."¹⁷

In the 2002 case of *Falkiner v. Ontario (Director of Income Maintenance, Ministry of Community & Social Services)*,¹⁸ the Ontario Court of Appeal held that the "spouse-in-the-house" rule under the province's

14 1999 CarswellNB 305, 1999 CarswellNB 306, [1999] 3 S.C.R. 46 (S.C.C.).

15 *Ibid.* at para. 81.

16 2001 CarswellOnt 4434, 2001 CarswellOnt 4435, [2001] 3 S.C.R. 1016 (S.C.C.).

17 *Ibid.* at para. 146.

18 (2002), 2002 CarswellOnt 1558, 59 O.R. (3d) 481 (Ont. C.A.), leave to appeal allowed (2003), 2003 CarswellOnt 1025, 2003 CarswellOnt 1026 (S.C.C.).

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

While low income *Charter* litigants have achieved some important victories, they have also suffered significant defeats. For example, in the 1996 *Masse v. Ontario (Ministry of Community & Social Services)*¹⁹ case, a challenge to the over 20% cut in provincial social assistance rates by the newly elected Conservative government was rejected by the courts. While the trial Court accepted evidence that the cuts would have severe effects for all welfare recipients, including increases in hunger and homelessness, it found that the *Charter* did not guarantee a minimal level of public welfare assistance. The Court also concluded that s. 15 had not been violated because receipt of social assistance was not a prohibited ground of discrimination, and because setting social assistance rates was a matter of social and economic policy which should not be subject to second-guessing by the courts.

While the appellants in *Dunmore* were successful in their freedom of association argument before the Supreme Court of Canada, the trial court rejected the equality claim raised in the case, and the majority of the Supreme Court did not disturb this finding.²⁰ The trial judge accepted that agricultural workers were poorly paid, faced difficult working conditions, had low levels of skill and education, low status and limited employment mobility. However, he concluded that they were a "disparate and heterogeneous group", whose economic disadvantage was not sufficient to establish discrimination on an analogous ground within the meaning of s. 15 of the *Charter*.²¹

19 (1996), 1996 CarswellOnt 338, 134 D.L.R. (4th) 20 (Ont. Div. Ct.), leave to appeal refused (1996), 1996 CarswellOnt 1453, 40 Admin. L.R. 87n (Ont. C.A.), leave to appeal refused (1996), (sub nom. *Masse v. Ontario (Lieutenant Governor-in-Council)*) 97 O.A.C. 240 (S.C.C.).

20 *Supra*, note 16 at para. 70.

21 *Dunmore v. Ontario (Attorney General)* (1997), 37 O.R. (3d) 287, [1997] O.J. No. 4947, 1997 CarswellOnt 4871 (Gen. Div.) at 308.

The claim that poverty is an analogous ground of discrimination was also rejected in the 1999 case of *Polewsky v. Home Hardware Stores*,²² where the Ontario Superior Court found that barriers created for poor litigants by small claims court tariff fees did not violate the *Charter*. In the 2001 *Federated Anti-Poverty Groups of British Columbia v. Vancouver (City)*²³ case, the B.C. Supreme Court dismissed a *Charter* challenge to a municipal panhandling bylaw on similar reasoning. As the trial judge put it:

Clearly poverty is nothing more than a proverbial handmaiden to those who seek protection under the enumerated grounds ... Poverty is an economic disadvantage that is regrettably a social condition over which those who endure it have little control, but they are not without options that can result in such a change.²⁴

The Ontario Court of Appeal also took the view, in the *Falkiner* case, that economic disadvantage *per se* was not a prohibited ground of discrimination under s. 15.²⁵

Most significantly, in its December, 2002 ruling in *Gosselin c. Québec (Procureur général)*,²⁶ the Supreme Court of Canada dismissed the claim that a provincial social assistance regulation reducing welfare rates for recipients under the age of 30 by two-thirds, to some \$170/month, offended s. 7 or s. 15 of the *Charter*. The appellants submitted evidence that Louise Gosselin had experienced profound social isolation, hunger, cold, depression, threats of violence, deplorable housing conditions and prolonged periods of homelessness while trying to live on the reduced benefit rate. Expert testimony adduced at trial showed that other young welfare recipients suffered similar physical and psychological insecurity and illness owing to the low level of provincial assistance.²⁷

In response to the argument that the inadequacy of the provincial welfare rates violated s. 7 of the *Charter*, the Supreme Court held that

22 (1999), 1999 CarswellOnt 3500, 68 C.R.R. (2d) 330 (Ont. S.C.J.) at para. 57, leave to appeal allowed (2000), 2000 CarswellOnt 72 (Ont. S.C.J.), reversed (2003), 2003 CarswellOnt 2755 (Ont. Div. Ct.), leave to appeal allowed (2004), 2004 CarswellOnt 763 (Ont. C.A.).

23 (2002), 2002 CarswellBC 607, [2002] B.C.J. No. 493 (B.C. S.C.) at para. 289.

24 *Ibid.* at paras. 275-276.

25 *Falkiner supra* note 18 at para. 88.

26 2002 CarswellQue 2706, 2002 CarswellQue 2707, [2002] 4 S.C.R. 429 (S.C.C.).

27 *Gosselin c. Québec (Procureur général)*, EYB 1992-75000, 1992 CarswellQue 1685, [1992] R.J.Q. 1647 (S.C.) at 1658.

while governments might be found to have a positive obligation to sustain life, liberty, or security of the person in special circumstances, this was not such a case. A majority of the Court likewise concluded that the differential welfare rates had not been proven to be discriminatory under s. 15 of the *Charter*, since recipients had the option of participating in work and training programs in order to top up their benefits. The majority was unpersuaded by the fact that the youth unemployment rate in Quebec at the relevant time was over 24%; that only 30,000 work and training placements were made available to 85,000 recipients; that those with low levels of education and literacy were ineligible to participate; and that a full 73% of welfare recipients under the age of 30 received only the \$170 monthly rate. Instead, Chief Justice McLachlin concluded that, because "the thrust of the program was to improve the situation of [young welfare recipients], and to enhance their dignity and capacity for long-term self-reliance",²⁸ it promoted rather than undermined *Charter* equality principles.

3. WHY HAVE THE *CHARTER* CLAIMS OF THE POOR MET WITH SUCH LIMITED SUCCESS?

The major difficulty facing low income litigants invoking the *Charter* in the social welfare context originates, I would argue, in a series of presumptions which are regularly applied by courts at all levels in welfare cases. These include the presumption that Parliamentary sovereignty remains unfettered in the social policy context; that the state is neutral in its dealings with the poor; that social welfare policies and programs are benign in their intent and their effects in relation to low income people; and that welfare recipients themselves are primarily to blame for any disadvantage which they suffer.

The presumption that social policy is beyond the legitimate purview of the courts is pervasive in *Charter* cases. In *Dunmore*, for example, the trial judge suggested: "There are many forms of injustice in our society, particularly those resulting from uneven distribution of wealth, that cannot be remedied by the courts through interpretation of the *Charter* and that must be remedied through the legislative process."²⁹ The view that the courts should defer to the legislature in the social welfare context, echoes similar conclusions of the trial court in the *Gosselin* case, where the trial judge argued:

28 *Supra* note 26 at para. 66.

29 *Supra* note 21 at 311.

La Charte ne fait pas obstacle à la souveraineté du parlement et au processus démocratique ... S'il fallait y voir des obligations positives ce serait les tribunaux qui ... viendraient ultimement déterminer les choix de l'ordre politique, soit les pouvoirs législatif et exécutif. Or, pareil rôle n'est pas donné au pouvoir judiciaire par la Charte.³⁰

The presumption that the state is neutral in its dealings with the poor is reflected in the Court's reasoning and conclusions in the *Polewsky* case. While recognizing that fees, such as the \$100 Ontario Small Claims Court fee, create significant barriers to access to justice for the poor, the Court held that the failure to provide a discretion to waive fees could in no way be seen as discriminatory. In the judge's view: "Court fees, albeit at lower levels, have been in place for some 200 years. Given the historical context, the legislation does not appear to stereotype, exclude or devalue poor persons."³¹ Rather, she concluded that "imposing a reasonable fee for use of a limited public resource such as court services is permissible and serves a useful purpose. The existence of the hearing fee ... prevents the Small Claims Court system from becoming overburdened with frivolous claims."³²

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

Much of the affidavit material filed by the defendants consists of complaints about the general thrust of current provincial social policy in Ontario; the affiants all have an obvious socio-economic and political perspective that is diametrically opposed to that of the government of the day. It is, however, frankly difficult to discern how the legislation in question in itself can be said to have a prejudicial effect on their "essential human dignity" by placing restrictions on the place and manner of solicitation.³³

The presumption that social welfare laws are benign in their intent and effects *vis-à-vis* the poor is most evident in the *Gosselin* case, where a majority of the Supreme Court repeatedly asserted, in the face of glaring evidence of the extreme degradation and misery caused by the

30 *Supra* note 27 at 1670.

31 *Supra* note 22 at para. 49.

32 *Ibid.* at para. 63.

33 (2001), 2001 CarswellOnt 2757, 55 O.R. (3d) 374 (Ont. C.J.) at para. 75, reversed in part (2005), 2005 CarswellOnt 115, 126 C.R.R. (2d) 189 (Ont. S.C.J.).

gross inadequacy of the under-thirty welfare rates, that the regime could not be held to be unconstitutional because it was intended to “help” young welfare recipients. As Chief Justice McLachlin characterized it: “The age-based distinction was made for an ameliorative, non-discriminatory purpose, and its social and economic thrust and impact were directed to enhancing the position of young people in society by placing them in a better position to find employment and to live fuller, more independent lives.”³⁴

The Court in *Masse* provided a similar justification in dismissing the welfare rate cut challenge – that the poor were being helped, rather than discriminated against by provincial welfare laws. As one judge explained: “[I]n the absence of the reduced social assistance payments, the applicants would face an even greater burden brought about by the cost of rent and food, non-governmental activity. In my view the impugned regulations do not increase but alleviate the applicants’ burden (albeit not to their satisfaction).”³⁵

A final presumption operating in the *Charter* welfare context is that those seeking to invoke the *Charter* to challenge inadequacies and inequities in social assistance policies and programs, are themselves responsible for their impoverished circumstances, and so should not be heard to complain. In the 1992 case of *Fernandes v. Manitoba (Director of Social Services (Winnipeg Central))*,³⁶ for example, Eric Fernandes, who was mobile in a wheelchair but required the use of a ventilator, challenged municipal welfare officials’ refusal to cover the cost of part-time home care, so that he could remain in his apartment rather than moving into hospital. In rejecting his *Charter* arguments, the Manitoba Court of Appeal asserted: “The particular choices of a particular individual are not generally to be considered when those choices affect the public purse.”³⁷

A similar tone suffuses the opening paragraph of the majority judgment in the *Gosselin* case. As Chief Justice McLachlin described the appellant’s circumstances: “Louise Gosselin was born in 1959. She has led a difficult life, complicated by a struggle with psychological problems and drug and alcohol addictions. From time to time she has tried to work ... But work would wear her down or cause her stress, and she

34 *Supra* note 26 at para. 70.

35 *Supra* note 19 at 41 [D.L.R.].

36 (1992), 1992 CarswellMan 215, 93 D.L.R. (4th) 402 (Man. C.A.), leave to appeal refused (1993), 1993 CarswellMan 537 (S.C.C.).

37 *Ibid.* at 407 [D.L.R.].

would quit. For most of her adult life, Ms. Gosselin has received social assistance.”³⁸ This contrasts with Louise Gosselin’s own account of how, in attempting to survive on the \$170/month welfare payment, ill-fed, ill-dressed and often homeless, she effectively became unemployable: “...I was unable to present myself properly to an employer and to sell myself as a good worker, I was completely lacking in terms of self-esteem and in terms of self-confidence, my meals weren’t balanced, my social life wasn’t either, I had absolutely nothing to keep myself together...”³⁹

4. WHAT OF THE *CHARTER* CRITICS?

As a subject of public policy inquiry, the disproportionate focus by legal academics and constitutional lawyers on *Charter* litigation and the role of the courts is perhaps understandable. Given the mixed record of success described above, however, it is hard to fathom in political scientists and other public policy experts. It is clear that the relationship between rights and democracy is far more nuanced than the *Charter* critics present. Attempts by poor people to use the *Charter* to challenge laws and policies that adversely affect them can hardly be said to have undermined Canadian democracy, even in its current seriously malfunctioning form. As suggested at the outset of the paper, people living in poverty have resorted to *Charter* litigation because the executive and legislative branches at both the federal and provincial levels have been inaccessible to them, and willfully blind if not overtly hostile to their concerns. And, as described above, the courts have hardly greeted their claims with open arms. The real question, then, is not whether the *Charter* and the Court Party are destroying democracy, but rather how the *Charter*’s equality rights values can inform and contribute to further strengthening the underlying values of our democratic system, particularly from the perspective of the poor and other marginalized groups.

Rather than being decried as a source of democratic deficit, judicial review on *Charter* grounds should be recognized as a legitimate and necessary mechanism of accountability, particularly for those for whom alternate avenues are effectively closed. Instead of challenging the very idea of *Charter*-based scrutiny of social and economic policy-making, political scientists and other public policy experts could be providing

38 *Gosselin supra* note 26 at para. 1.

39 *Ibid.*, Appellant’s Record, Testimony of L. Gosselin, Vol. 1 at 110 (author’s translation); cited in the *Factum of the Intervener Charter Committee on Poverty Issues in Gosselin v. Quebec (Attorney General)* at para. 39.

valuable insights and direction as to how the judicial review process could be made more effective, accessible, and fair. In particular, such experts should be focusing on how financial and other resource imbalances affect potential litigants' ability to access the courts, to identify and marshal necessary evidence, and to participate on an equal footing in *Charter* review of government decision-making in the social welfare and other regulatory areas. Political scientists and other public policy experts should also be adding their voices to calls from the law reform community for systemic reform of the judicial appointments process, not to secure nominees more deferential to government spending choices, but rather to ensure a more diverse and representative judiciary—one more able and more willing to question the discriminatory presumptions about poor people and the state that underlie most poverty-related *Charter* case law to date.

More importantly, political scientists, like constitutional lawyers, must expand their *Charter* focus beyond the judicial branch itself. Section 52 of the *Constitution Act, 1982* declares that "The Constitution of Canada is the supreme law of Canada". Section 32(1) of the *Charter* states that the *Charter* applies to Parliament and the federal government, and to provincial and territorial legislatures and governments in relation to all matters within their authority. Governments are called upon by the Constitution to respect *Charter* rights and principles in their laws, policies, and practices, whether or not the courts have ordered them to do so. Instead of asking judges to remedy the results of a defective political process after the fact, as constitutional lawyers must perforce do, political scientists and other public policy experts are in an excellent position to examine how the *Charter* can be interpreted and applied to directly address the serious problems that exist within our current political and Parliamentary system.

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

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

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