# THE UNINVITED GUESTS: REFLECTIONS ON THE BRIEF HISTORY OF POOR PEOPLE SEEKING THEIR RIGHTFUL PLACE IN EQUALITY JURISPRUDENCE

Bruce Porter

The new equality rights provisions in section 15 of the Charter became, in the 1980's, the central text for an emerging equality movement in Canada. To some extent, the text reflected the stage of evolution of various equality seeking constituencies at that time. The women's movement had emerged from the seventies as a cohesive political force, and was able to play a decisive role in determining the wording of section 15. The disability rights movement, in its early stages of development, was able to mount a significant lobby to win the inclusion of disability as an enumerated ground of discrimination. Anti-racism and advocacy on behalf of religious minorities had an established jurisprudence under Canadian human rights legislation.

Poor people, however, were essentially absent from the discussions regarding the framing of our Charter of Rights. The attitude of their legal advocates, the practitioners of "poverty law", tended to range from scepticism to outright hostility toward the Charter.

During the debate on the Charter there were some suggestions of constitutionalizing certain social and economic rights such as the right to adequate food, clothing and housing. The idea was raised by the New Democratic Party but was quickly dismissed by the then Minister of Justice, the Hon. Jean Chrétien, who quipped that "you might as well put in the constitution the right to my Aunt Mathilde's apple pie."

Though Canada, unlike the United States, had ratified the International Covenant on Economic, Social and Cultural Rights in 1976 and had affirmed on a number of occasions that civil and political rights and freedoms were inter-dependent with social and economic rights such as the right to an adequate standard of living, social security and adequate food, clothing and housing, our Charter borrowed only from the International Covenant on Civil and Political Rights. The "other half" of the international human rights movement was simply ignored.

Ignored, however, does not necessarily mean excluded. The fact that the Charter was framed without any consideration of poverty issues and how they fit with protections of the right to equality and security of the person simply means that the issue becomes one of interpretation. Given Canada's international commitments to recognizing the right to an adequate standard of living as a fundamental human right, it was a reasonable hope that the courts would interpret the right to security of the person in section 7 and the equality rights in section 15 as including substantive rights to welfare and access to certain basic necessities for the most vulnerable groups in society. A number of commentators wrote optimistically in the early days of the Charter that this was a winnable argument.

Charter cases on behalf of poor people, however, remained largely in the realm of academic speculation for the first few years of the Charter. Poor people were as absent from the first decade of Charter litigation as they had been from the legislative debate over the Charter's wording. Early

Charter jurisprudence emerged with little input from poor people, either as plaintiffs or as intervenors. Poor people often felt and were often treated like uninvited guests at the table of Charter claims. From their advocates and their opponents alike, they heard the same refrain: The Charter and the courts are not for you.

It was not until 1989 that a group of us met to bemoan the dearth of Charter cases addressing the issues of Canadians living in poverty and the voicelessness of poor people in the growing debate over equality rights in Canada. On the initiative of the Court Challenges Program, the National Anti-Poverty Organization and the Public Interest Advocacy Centre, a founding meeting was held in June, 1989 for the Charter Committee on Poverty Issues (CCPI), a national coalition which would bring together low-income activists and advocates to ensure that poor people are able to make more effective use of their rights under the Charter, human rights legislation and other law. As the litigation voice of the poor, CCPI would attempt to ensure that anti-poverty litigation under the Charter is advanced strategically and in a manner that is directed by and accountable to low income people themselves.

Our organizational structure ensured that our board had a majority of low income representatives and that in each litigation initiative, strategy would be developed through a national "project team" consisting of a balance of low income activists and advocates with relevant expertise.

This model of accountable litigation has proven essential to getting the violations of the rights of poor people properly before the court. Poor people have taught advocates some of the complexities of poverty, ensured that sterile legal strategy does not distract us from what our movement is really about, and ensured that low income plaintiffs do not feel unsupported in venturing into the hostile terrain of the judiciary. Our major limitation in making the model work has been a severe scarcity of resources or administrative support. That may sound like a common refrain among equality seekers, but CCPI is somewhat unique in co-ordinating litigation nationally without ever having been able to secure organizational funding for an office, a staff person or even a telephone number. We have survived with minimal organizational support from member organizations, all of which have themselves become progressively more stretched by fiscal restraint.

Problems securing funding for particular cases has also presented a barrier. The Court Challenges Program was restricted to challenges to federal legislation. Since social assistance, housing and other poverty-related issues almost invariably fall within provincial jurisdiction, most of our cases were ineligible for funding, even before the Conservative government cancelled the program in February, 1992. Rather than being free to choose cases from the provinces where the facts would be the most compelling, we have been restricted to provinces with organizations which could take on Charter cases.

CCPI has gone through two stages of litigation strategy. The first stage, from 1989 to 1992, could be called the case development stage. During this period, we felt that the major problem we had to address was the absence of Charter and human rights cases addressing poverty issues. Our primary task was to research various issues, find appropriate plaintiffs and advocates, secure funding, establish project teams and direct the litigation. During this period, we were able to secure some minimal funding for case development from the Court Challenges Program.

In the second stage we have put less emphasis on case development and more emphasis on trying to create a more favourable interpretive milieu, particularly at the Supreme Court of Canada. We have focused more on intervening in cases which will have an impact on equality jurisprudence, and on trying to defend a paradigm of equality rights in which poor people would have their

rightful place. We have also worked outside the courts, participating in the constitutional discussions in 1992 to press for improved constitutional protection of the rights of poor people and learning to use international human rights instruments more effectively.

Our change in strategy two years ago was motivated, to some extent, by a change of climate and prevailing winds at the Supreme Court. The newly appointed Justice Major provided the tie breaking vote against us in the Finlay case. The first hearing of that case apparently ended in an evenly divided Court over whether the Canada Assistance Plan Act guarantees social assistance recipients a level of income adequate to provide necessities. Although this was not a Charter case, it gave us some indication of the new balance on the court when deciding the rights of poor people.

When CCPI began its work, we had inherited from the Dickson court a jurisprudence which, although not addressing poverty issues directly, clearly left interpretive room for establishing important rights for poor people. It seemed, at that time, that the problem was not so much in the Supreme Court's approach to the Charter but rather in the fact that poverty issues had not been placed before it and that advocates for the poor had not been using the arguments that were clearly available under the Charter.

The Dickson Court had, on occasion, gone out of its way to leave room for poverty issues. In the Irwin Toy decision, for example, the court decided that economic rights of corporations and property rights were not within the ambit of the Charter but noted that social and economic rights recognized in international law should not be excluded at so early a stage of Charter jurisprudence:

This is not to declare, however, that no right with an economic component can fall within "security of the person" ....[T]he rubric of "economic rights" embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property-contract rights. To exclude all of these at this early moment in the history of Charter interpretation seems to us to be precipitous.

In Slaight Communications Chief Justice Dickson turned to Canada's obligations under the Covenant on Economic, Social and Cultural Rights to interpret the meaning of the Charter. Citing his earlier dissent in Reference Re Public Service Relations Act (Alta)) he established, this time for the majority, that the courts must consider international law that is binding on Canada and interpret the Charter consistently with its provisions:

The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of the 'full benefit of the Charter's protection.' 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 ratified.

In Andrews and Turpin the Supreme Court established an interpretive framework for applying section 15 which seemed to hold promise for anti-poverty litigation. Groups which have experienced social, historical and legal disadvantage were identified as the object of the protections embodied in section 15, and the guarantee of equality for these groups "applies to and supports all other rights guaranteed by the Charter." Thus, a purposive reading of section 15 would focus on ameliorating social and historical disadvantage and this interpretive framework could also be read into other Charter rights such as the right to security of the person in section 7.

The characterization of the right to equality in Andrews as a "positive" right to substantive equality rather than as a "negative" right to formal equality of treatment is a cornerstone of equality rights claims regarding poverty. While some poverty issues may fall within the rubric of what have been characterized as "negative" rights, requiring the government to refrain from, for example, invading the privacy of social assistance recipients or from discriminating against the poor in certain programs, it is clear that the majority of rights claims from those living in poverty will require a more "positive" remedy in the form of government action, legislation, social programs or expenditure.

The substantive approach to equality articulated in Andrews generally reinforced earlier rulings in Singh, and in the Manitoba Language Reference case which had made it clear that cost implications are not a valid justification of an infringement of Charter rights and that the courts would be prepared to require positive government action to remedy infringements of rights. This approach to remedies under the Charter was consistent with the Court's decision in Andrews to adopt in its section 15 analysis "the expanded concept of discrimination being developed under the various Human Rights Codes." The Andrews and Turpin decisions signalled that the "remedial" approach to human rights legislation articulated by the Supreme Court in O'Malley, Robichaud and Action Travail des Femmes would be incorporated in Charter jurisprudence, encouraging affirmative remedies to ameliorate the disadvantage of equality seeking groups.

Thus, when CCPI began its litigation, we thought we had in place three fundamental components of equality jurisprudence fundamental to poverty claims:

i) a purposive approach to section 15 and to the Charter as a whole focused on remedying inequality suffered by socially historically and legally disadvantaged groups;

ii) an affirmation that social and economic rights recognized in international law are relevant and persuasive sources for the interpretation of Charter rights;

iii) a recognition that equality rights and other Charter rights are not merely negative rights but impose positive obligations on governments which may require expenditure of funds.

Armed with this jurisprudence from the highest court, CCPI and our members became involved in a number of litigation initiatives aimed at developing some favourable applications of the new Charter jurisprudence to poverty issues. What we learned, however, was that either the lower courts had not quite grasped what the Supreme Court had laid out for them about Charter interpretation, or there was a significant judicial resistance to applying the new paradigm of equality to the issue of poverty.

The strongest judicial resistance was encountered in cases which raise the issue of positive obligations of governments to ensure some level of adequacy for members of vulnerable groups. Our greatest losses were on what would appear to be the most obvious argument in poverty claims, that the right to security of the person in section 7 prohibits governments in Canada from denying citizens access to basic necessities of food, clothing, housing and medical care or at least from depriving citizens of benefits such as welfare without affording them the protections of due process and fundamental justice. The lower courts seemed unprepared for the remedial implications of this argument. Further, the judiciary revealed prejudices against the poor and insensitivities to issues of dignity and equality which would clearly need to be addressed more directly.

Louise Gosselin, for example, challenged a workfare program in Québec which slashed welfare rates for single employable persons under 30 to $170 per month, one fifth of the poverty line and one third of the level available to those over thirty. The evidence of what she had to do to survive included living in a sexual relationship with a man in order to have a place to live. She argued that her rights under sections 7 and 15 of the Charter had been violated. She also invoked social and economic rights protections in both the Québec Charter and in the International Covenant.

The court pronounced that the right to security of the person in section 7 is a legal right, not an economic or social right and that economic and social rights, in general, are mere policy objectives rather than enforceable rights. The judge went on, however, to berate poor people for smoking at twice the average rate of Canadians, for being under-educated, psychologically vulnerable and for having a weak work ethic.

Similarly, when Eric Fernandes, a person with a muscular disease requiring attendant care, challenged a decision to deny him special assistance under Manitoba's Social Allowances Act to cover the cost of community-based care, without which he was forced to live full time in a hospital, the Manitoba Court of Appeal ruled harshly that "the desire to live in a particular setting does not constitute a right protected under s.7 of the Charter." As for the rights of persons with disabilities living in poverty, the Court rejected any notion of the remedial approach suggested in Andrews in favour of a rigid notion of differential treatment.

Fernandes is not being disadvantaged because of any personal characteristic or because of his disability. He is unable to remain community-based because he has no caregiver, because he must rely on public assistance and because the facilities available to meet his needs are limited.

Lorraine Conrad experienced a judiciary similarly insensitive to the equality and dignity of people living in poverty when she challenged the Municipality of the County of Halifax for terminating her welfare payments without providing any kind of pre-termination hearing or interim assistance. Again, the court adopted the position that section 7 does not include economic rights. However, the trial of the constitutional issue became an occasion for Ms. Conrad herself to be virtually put on trial regarding an issue which had not been pleaded - whether she had lived with her estranged husband when her welfare had been terminated and subsequently reinstated - providing the occasion for a judicial affirmation of prevailing prejudices against poor people.

Experiences like these taught us that unless the courts come to understand the equality dimension of poverty and the nature of prejudice and stereotypes against poor people which may taint both the legal and the political process, they are unlikely to apply the more favourable Charter jurisprudence to poverty issues. It is only when they appreciate the political disadvantage of poor people that the courts are persuaded of the legitimacy of judicial intervention in the social and economic domain to protect the interests of this vulnerable minority. Our few victories have occurred in cases where the equality dimension of poverty issues has been more translucent.

In 1990 the Federated Anti-Poverty Groups of British Columbia (FAPG) challenged the requirement that social assistance recipients transfer any rights to claim or enforce maintenance payments to the Crown. They argued that these provisions violated their right to security of the person under section 7 of the Charter and also their right to equality under section 15, discriminating both on the enumerated grounds of sex and age and on the analogous ground of social and economic status. The

crown applied to strike out the statement of claim as disclosing no reasonable cause of action. The court ruled in favour of FAPG, with particularly strong reasons on the issue of analogous grounds.

Applying the test under s. 15 of the Charter, it is clear that persons receiving income assistance constitute a discrete and insular minority within the meaning of s. 15. It may be reasonably inferred that because recipients of public assistance generally lack substantial political influence, they comprise "those groups in society to whose needs and wishes elected officials have no apparent interest in attending."

Irma Sparks and her lawyer Vince Calderhead succeeded in convincing the Nova Scotia Court of Appeal to reverse an earlier ruling in Bernard v. Dartmouth Housing Authority regarding the constitutionality of denying residents of public housing security of tenure under the Landlord and Tenant Act by focusing the second appeal on an equality analysis based on the Supreme Court's decision in Andrews. The court held that since blacks, and single mothers are disproportionately represented among public housing tenants, and since low income is a characteristic shared by all residents of public housing, the impugned provisions of the Act discriminated on the grounds of race, sex and income. It also found that public housing tenants are an analogous group under section 15.

Hallet, J.A. resisted any firm differentiation between a so called "adverse effects" analysis based on poverty as a characteristic of enumerated grounds, and a "direct discrimination" analysis based on recognizing poor people or public housing tenants as a protected group themselves. The fact that poverty is so obviously a part of the social and historical disadvantage of single mothers, blacks and public housing residents suggested to him that a policy denying public housing tenants benefits accorded other tenants cannot be described as neutral on its face. Rather it discriminates against single mothers and other groups on the basis of a personal characteristic that constitutes a prohibited ground of discrimination:

Single mothers are now known to be the group in society most likely to experience poverty in the extreme. It is by virtue of being a single mother that this poverty is likely to affect the members of this group. This is no less a personal characteristic of such individuals than non-citizenship was in Andrews. To find otherwise would strain the interpretation of "personal characteristic" unduly.

Following on the Sparks decision, Kelly, J. of the Nova Scotia Supreme Court found the "man in the house" rule denying benefits to single mothers living with a man to be a violation of section 15 of the Charter, both on the ground of sex and poverty.

We are therefore faced with a situation where the regulations specifically authorized under the Act provide that a special group, "single parents otherwise eligible for family benefits", can be determined ineligible to receive these benefits if they contravene the man-in-the-house rule, however it is applied. Moreover, this "group" is overwhelmingly female single mothers who are, with their children, a group in society "most likely to experience poverty in the extreme". I find in these circumstances, as was found in Sparks, that poverty is likely a personal characteristic of this group, and in this instance poverty is analogous to the listed grounds in s. 15. As well, of course, the group encompasses a listed ground, "sex", as it is most likely that members of this group are female.

Johanne Drouin, a single mother on social assistance in Montreal, won a similar victory under Quebec's Charter of Human Rights and Freedoms in challenging discrimination in private apartment rental on the basis of income level. Ms. Drouin alleged that income qualifications for apartments contravened the Charter's prohibition of discrimination because of social condition and

civil status. Noting that it does not matter whether or not the landlord had the intention to discriminate, the court found that income level is a component of social condition and that poverty is a shared characteristic of most single mothers. It thus found the landlord's policies to discriminate directly on the ground of social condition and indirectly, or through adverse effect, on the ground of civil status.

We learned a couple of important lessons from our first experiences with poverty issues before the courts. We learned that poor people face extreme prejudice within the judicial system itself and that the equality dimension of poverty must be emphasized in order for the courts to be willing to find in favour of poverty claims under either sections 7 or 15. And we learned to expect, in respond to any claims requiring a "positive" remedy of ensuring an adequate standard of living, the courts to jettison all of the fundamentals of equality jurisprudence and its remedial focus in favour of a rigid formalism. Our successes were in cases which did not focus primarily on adequacy issues but rather with "regulatory" remedies, regarding eligibility for assistance, extension of security of tenure protections, litigation rights or anti-discrimination provisions in housing.

It was clear that we needed to do some work to strengthen some of the interpretive principles established in earlier equality decisions, particularly regarding the application of international human rights provisions dealing with adequacy, the applicability of equality rights in the social and economic domain, and the nature of positive obligations flowing from substantive equality protections.

Two of our initiatives to secure a more favourable interpretive milieu were outside of the courts. The first was to press for constitutional recognition of social and economic rights during the constitutional discussions leading up to the Charlottetown Accord. CCPI rallied major equality seeking constituencies in Canada behind an alternative social charter which recognized the right to an adequate standard of living and other rights which Canada has affirmed internationally. The proposed social charter ensured that these rights would inform the interpretation of the existing Charter. However, if we thought the judicial system was excluding of poor people, our experience with the political process of constitution-making suggested that the political system is at least as bad.

The drafters of the constitutional proposals had their own agenda for a "Social and Economic Union" which would affirm the kind of reasoning applied in Gosselin, that social and economic rights are not rights at all but mere policy objectives of governments. Under the terms of the Charlottetown Accord, these "policy objectives" could not even be used as an interpretive aid to the Charter. Thus, the Charlottetown Accord aimed at a constitutional betrayal of the principles established in international law and affirmed in Slaight Communications to the effect that the Charter and domestic law must be interpreted consistently with Canada's international human rights obligations with respect to social and economic rights. Our singular victory in our social charter initiative was found in the defeat of the Charlottetown Accord.

Our second initiative outside of the Canadian courts, however, met with considerably more success. CCPI, along with the National Anti-Poverty Organization, was granted intervenor status before the U.N. Committee on Economic, Social and Cultural Rights in May, 1993 during their review of Canada's Compliance with article 11 of the Covenant, guaranteeing the right to an adequate standard of living, including adequate food, clothing and housing. This was the first time the Committee had agreed to hear oral submissions from non-governmental organizations during its review of a report of a State party.

The first section of the NAPO/CCPI submissions focused on the violations of the rights of young families, single parent families, aboriginal people and people with disabilities in terms of access to an adequate standard of living and adequate housing. The second section concentrated on judicial protections of the right to adequacy in Canada, reporting on the positions taken by governments and adopted by the courts in cases such as Gosselin, Fernandes, Conrad and Finlay, as well as the more favourable decisions such as Sparks.

The U.N. Committee's concluding observations expressed serious "concerns" regarding the implementation of social and economic rights in Canada. No State party as affluent as Canada had previously been criticized so harshly by the Committee. Media attention was focused on comments regarding the levels of poverty among vulnerable groups in Canada. Equally important from the standpoint of equality litigation on poverty issues, however, were comments regarding the Canadian judiciary. The Committee was clearly concerned that the judiciary had failed to live up to its obligations under international law, to apply and interpret domestic law in a manner that is consistent with the provisions of international law. With reference to the decisions in Gosselin, Fernandes and Conrad, and to the Federal Government's constitutional proposals, the Committee stated the following:

21. The Committee is concerned that in some court decisions and in recent constitutional discussions, social and economic rights have been described as mere "policy objectives" of governments rather than as fundamental human rights.

The Committee commented favourably on earlier equality jurisprudence under section 15 of the Charter and on the Supreme Court of Canada's affirmation in Slaight Communications that domestic law must be interpreted in a manner that is consistent Canada's obligations to respect social and economic rights.

It took favourable note of the Sparks decision, noting that "the courts have applied section 15 of the Charter to extend parental benefits and security of tenure in the field of housing." In light of some of the negative court decisions on the application of the Charter to poverty issues, however, the Committee urged the judiciary to adopt a broad and purposive approach to the Charter and human rights legislation "in order to provide appropriate remedies against violations of social and economic rights." It further recommended judicial education on Canada's obligations under the Covenant and on their effect on the interpretation and application of Canadian law.

If the courts were to apply the interpretive approach laid down in Slaight Communications, the Committee's Comments should be given considerable weight in establishing more precisely the nature of Canada's obligations under the Covenant. Observations and Comments from monitoring committees are persuasive sources in international law. We have yet to see any judicial response in Canada to the U.N. Committee's report, although it was placed before the tribunal in the Drouin case and seems to have been favourably received. We are hoping that poverty advocates will place this document before the courts whenever possible.

Closer to home, CCPI has intervened in a number of cases at the higher court level with the aim of sensitizing the judiciary to poverty issues, preserving a paradigm of equality which leaves room for poverty related claims and addressing the judiciary's reluctance to order positive, ameliorative remedies in the social and economic realm.

We intervened at the Supreme Court in Symes v. Canada to try to head off negative jurisprudence that would affect future poverty related tax cases and because the decision at the Federal Court of Appeal had done considerable damage to equality jurisprudence as it applies to poor people. The Federal Court of Appeal, in dismissing Symes' case, had ruled that the courts should be reluctant to apply equality rights analysis to social and economic issues, which of course is where poverty related claims fall. It ruled that to interpret legislation consistently with the Charter value of ameliorating inequality and disadvantage "overshoots" and "trivializes" the Charter, dismissing the entire purposive approach on which we rely. And it ruled that the Charter imposes no positive obligation on governments to ameliorate social and economic disadvantage. The majority decision in Symes rejected all of these aspects of the lower court's reasoning, so we felt our intervention was largely successful on the interpretive issues.

We also intervened at the Supreme Court of Canada in R. v. Prosper in which an aboriginal man who was denied access to counsel because of the absence of a duty counsel program in Nova Scotia argued that the right to counsel in section 10(b) of the Charter must be interpreted in light of the equality provisions in section 15. CCPI supported his argument that poverty was an analogous ground under section 15, and advocated an interpretive approach which reads into sections 7 and 10(b) the over-riding values of ameliorating the disadvantaged position of groups protected under section 15. The case also gave us another opportunity to affirm before the Court that the Charter imposes a positive obligation on governments to maintain certain programs in order to protect the rights of vulnerable citizens. There has been no decision released in Prosper yet.

This spring we intervened jointly with the Canadian Disability Rights Council at the Ontario Court of Appeal in Edwin Roberts v. Ontario (Ministry of Health) regarding the special programs exemption in Ontario's Human Rights Code for programs "designed to relieve hardship or economic disadvantage" or to promote equality for disadvantaged groups. Mr. Roberts was deemed ineligible for an assistive devices program because of his age. The Board of Inquiry decision, upheld by the Divisional Court, interpreted the affirmative action shield so broadly as to deny poor people and people with disabilities human rights protections in virtually any programs designed to serve their needs. The outcome of this case will have a major impact on the application of human rights legislation to many social programs. It will also indicate the extent to which the courts will use the affirmative action exemption in section 15(2) of the Charter to justify judicial deference in the social and economic domain. Clearly there are important implications regarding the equal benefit of equality protections themselves if these protections are deemed not to apply to programs serving disadvantaged groups.

CCPI is presently involved in preparing for a joint intervention with the Women's Legal Education and Action Fund, the National Action Committee on the Status of Women and the Federated Anti-Poverty Groups of British Columbia at the Supreme Court of Canada in Suzanne Thibaudeau v. Her Majesty the Queen. The case is being heard on appeal from a decision of the Federal Court of Appeal finding that the provisions of the Income Tax Act defining support payments as taxable income for the custodial parent violate the rights of custodial parents under section 15, on the analogous ground of family status.

Surprisingly, while the court found in favour of Suzanne Thibaudeau on the issue of discrimination against custodial parents, it found against an intervenor organization, SCOPE (Support and Custody Orders for Priority Enforcement) on the issue of discrimination against women. In doing so, the court made some rather disturbing comments limiting the extent to which equality seeking groups can make adverse effect arguments, particularly related to poverty.

Hugessen, J.A. suggests that one cannot successfully argue that legislation which adversely affects poor people constitutes sex discrimination merely on the basis of the disproportionate number of women who are poor. Rather, he states, the challenge to such a policy would rely on whether poverty is an analogous ground under section 15.

Accordingly, it seems to me that one cannot logically say that an otherwise neutral rule discriminates on the basis of sex simply because it affects more members of one sex than of the other. ... If legislation which adversely affects women has the same adverse effect upon men, even though their numbers may be smaller or the likelihood of their suffering be less, it cannot logically be said that the ground of discrimination is sex. This does not mean, of course, that there is no Charter breach for in such circumstances it is very likely that another ground of discrimination will be in play.

To illustrate: it is a shameful truth that far more women in Canada suffer from poverty than men. Legislation which discriminated against the poor would therefore adversely affect more women than men. It could not be said, however, to discriminate on the grounds of sex unless it also drew a distinction against poor women which did not apply to poor men or unless it created a different effect on women than on men. Otherwise, the outcome of a section 15 attack on such legislation would turn on whether poverty was a ground analogous to those enumerated.

Clearly this kind of reasoning threatens the notion of disproportionate impact that has been a cornerstone of adverse effect analysis since Griggs in the U.S. and O'Malley in Canada Not only does the Thibaudeau decision effectively banish the claims of women living in poverty from the women's equality movement, it reduces poverty claims to only one component, the challenge to discriminatory treatment based on the singular ground of poverty. It would be of less concern to us, however, if it did not follow so closely, or at least attempt to follow, the reasoning of Iacobuczi, J. in Symes.

The Court in Symes was clearly troubled by the fact that they were being asked to decide the case only on the grounds of sex discrimination rather than parental status. Mary Eberts, representing Ms. Symes, was questioned repeatedly about the fact that the group that is adversely affected by the disqualification of childcare expenses as a business expense was really self-employed parents, including some men. This led Iacobucci J. to expand on the Court's three-step section 15 analysis used in Swain to suggest that in the second stage of a section 15 inquiry, once the existence of a distinction based on a personal characteristic is demonstrated, there must be established a clear correlation between the identified group and the negative effects of the policy.

In the second s. 15(1) inquiry, however, the sex-based distinction could only be discriminatory with respect to either women or men, not both. The claimant would have to establish that the distinction had "the effect of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to opportunities, benefits and advantages available to others" (Swain, supra at p. 520) The burden or benefit could not, as a logical proposition, fall upon both sexes. Likewise, to the extent that a court might undertake a broader search for "disadvantage that exists apart from and independent of the particular legal distinction being challenged" (Turpin, supra, at p. 34.), I cannot imagine how such disadvantage could be located for both men and women at the same time.

What this may signal, I am afraid, is a strategic retreat from the implications of adverse effect analysis, particularly in the face of poverty claims. The Court seems to be adopting a more formalized approach to equality claims conceived in terms of discrete and insular groups that are precisely defined by the nature of the policy that is being challenged. It is limiting the application of disproportionate impact analysis, and leaving no room for intersecting equality claims whereby it would be recognized, for example, that certain tax provisions may discriminate simultaneously on a number of grounds, for example, against separated custodial parents, women, single mothers and people living in poverty.

Poverty is never a singular ground of discrimination isolated from others. Poor people are invariably equity-seekers on a number of grounds. As the courts confront the issue of poverty within the framework of equality analysis, the question which seems to confound them is precisely where to situate poverty.

Is it an indicia of disadvantage, a ground of discrimination or a human rights violation? In fact, all three of these aspects of poverty co-exist in equality rights claims related to poverty. It is impossible to reduce poverty to a discrete category within equality claims.

First, poverty is a shared characteristic of equity seeking groups such as women, youth, the elderly or people with disabilities. This is the basis for adverse effects claims based, at least to some extent, on the statistical or transparent link between poverty and being a member of an equity-seeking group. This is the claim that was dismissed in Thibaudeau.

Secondly, poverty is a ground of discrimination in its own right. Poor people are barred from holding political office by deposit requirements and property qualifications castigated for having the audacity to procreate and even described as genetically inferior. This aspect of poverty is the basis for claims of direct discrimination on the basis of poverty and for qualifying poor people as a protected group under section 15.

And finally, poverty is itself a violation of human rights. The right to be free from hunger and homelessness, the right to an adequate standard of living, to social security and to medical care, are recognized in the Universal Declaration of Human Rights, the International Covenant on Economic Social and Cultural Rights and many other human rights instruments which are binding on Canada. This aspect of poverty is the basis for claims to adequacy.

These three components of Charter litigation on poverty issues, of course, work in combination. Rarely have our cases fallen within only one category and rarely have we relied on only one line of argument. Certainly the third component, aimed at finding within the Charter a right to be free from the extremes of poverty, relies on the first two approaches to embed this substantive right within the existing framework of equality protections in the Charter or in human rights legislation.

It is no accident that the courts are floundering a bit about how to fit poverty into traditional paradigms of equality, and that confronting poverty issues for the first time is causing some confusion. While the amelioration of poverty should clearly find itself at the core of any purposive approach to section 15, the issue is so close to the core of the paradigm of equality itself that it tends to resist any formal or discrete categorization, or rather it can be slotted in almost anywhere to serve the purposes of the court. Thus, the majority decision in Thibaudeau rejects the adverse effect argument because poverty is a ground of discrimination in its own right. The dissenting view rejects the direct discrimination argument because poverty is the result, rather than the ground, of the alleged discrimination.

In general, poverty-related claims will be defeated by a formalized equality analysis which ignores the intersectionality of various equality-seeking characteristics and searches for discrete and insular minorities defined exclusively by singular personal characteristics. Where we have won poverty related equality challenges, as in Sparks, Rehberg, Federated Anti-Poverty Groups and Drouin, the courts have recognized the intersection of poverty with other grounds of discrimination, and avoided a formalistic approach to the definition of a singular group affected by the impugned provision. Where we have lost, as in Fernandes or Gosselin, the courts have taken a formalistic approach to equality and refused to acknowledge the connection between poverty and the nature of the disadvantage which section 15 is supposed to redress.

We are finding in all of these cases that poverty issues challenge the formal paradigms and categories of rights claims. The nature of the rights claims of poor people are, after all, unique. No other equity seeking group defines the existence of the group itself as a human rights violation. No other personal characteristic is so intertwined with the social and historical inequities which section 15 is supposed to remedy.

Poverty rights claims challenge the courts with the limits of any formalistic paradigm of equality and force reflection on the purposes and historical context of the values underlying the Charter. The ultimate effects of such challenges, however, remain to be seen. They may provoke a rethinking of the paradigm, reaffirming the basic values and purposes of equality protections of vulnerable groups and the remedial approach to equality issues. Or they may, unfortunately, provoke a defensive reaction, in which the formal paradigm is simply imposed more rigorously to defend itself against the rights claims that challenge the comfortable limits it draws around equality.

Poor people will continue to strategize with supportive advocates about the best way to present their rights claims before the courts. We will make certain compromises and try to build on small victories. But there are certain issues of rights which leave no room for legal strategizing about whether or not they are "winnable" or whether they should be abandoned because they might create bad caselaw. The claim to dignity and equality within social and economic life is not negotiable for poor people any more than it has been for other equity seeking groups. A system of equality rights which excludes the claims of the most economically disadvantaged is simply unacceptable.

Poor people are not going to wait any longer to be invited to the Charter table. They are here and they will be heard. The existence of extreme poverty in a country as affluent as Canada is a gross violation of human rights and is contrary to all of the values underlying international human rights law and the Charter. Poor people see that very clearly. When we are honest with ourselves, we all see it very clearly. The courts can never so distort our notion of equality as to avoid confronting the inequities of homelessness, desperation and hunger amid affluence.