WHERE JUDGES FEAR TO TREAD:
The Analogous Ground of Poverty?

BY Derek J. Bell



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POVERTY AND THE CHARTER – CAN THE FEDERAL OR PROVINCIAL GOVERNMENTS TREAT CANADIANS AT DIFFERENT INCOME LEVELS DIFFERENTLY? CAN WEALTHY CANADIANS BRING A *CHARTER* CHALLENGE TO THE *INCOME TAX ACT*, BECAUSE IT IMPOSES A HIGHER TAX RATE ON HIGHER INCOMES? CAN INDIVIDUALS IN A POORER COMMUNITY CHALLENGE THEIR LOCAL GOVERNMENT FOR FAILING TO MAINTAIN THEIR ROADS AT THE LEVEL OF A RICHER COMMUNITY? DO ALL CANADIANS HAVE A RIGHT TO ATTEND UNIVERSITY OF TORONTO'S LAW SCHOOL? AND, PERHAPS MOST IMPORTANTLY, DO GOVERNMENTS HAVE CONSTITUTIONAL OBLIGATIONS TO PROVIDE SOCIAL SERVICES TO POORER CANADIANS?

These are not easy questions, and whenever they have been posed to Canadian courts, the courts have tended to answer them in the negative. The reasons are likely rooted in policy: the courts fully understand the political ramifications of extending constitutional protection to groups on the basis of income status, especially if the *Charter* would impose a positive obligation on the government to provide certain services to low-income groups.

The question has most recently been posed to the Supreme Court in *Gosselin v. Quebec*, a case that asks whether it was unconstitutional for the government of Quebec to require persons from the age of 18 to 30 to work or receive training in order to receive social assistance. The thought of an appointed judiciary forcing fiscally-conservative governments to provide social services is perceived to be abhorrent to some: one Calgary journalist described Gosselin as a hero "to hundreds of thousands of chronically unemployed Canadians lying on their couches, waiting for the cheque to arrive, [who will] raise a beer to her name if she claims supreme victory". To others, recognizing a constitu-

tional right to a certain standard of living is no more than a recognition of Canada's existing obligations under international law.

I propose to examine the legal framework for a claim to constitutional recognition of rights by low-income individuals, and assess whether such rights would be available under

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Canadian law. The conclusions I reach are based on precedent, policy and pragmatism: it is unlikely that section 15 provides constitutional protection on the grounds of 'income status', and for the Supreme Court to rule otherwise would require a substantial re-engineering of the Court's equality jurisprudence. And, perhaps most importantly, the Court is fully cognizant that it has no legitimate role in reviewing the budgets of elected governments; for this reason alone, the Court would be unlikely to find "poverty" as an analogous ground under the *Charter*.

"GROUNDS-BASED" RIGHTS UNDER THE CHARTER

The equality rights contained in section 15 of the *Charter* are both general and specific. On the one hand, the rights guaranteed are very broad: "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." However, the drafters realized the dangers in leaving the text this broad, and consequently gave the judiciary some direction by adding: "and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

Two aspects of section 15 are immediately apparent. First, the "enumerated" grounds of distinction relate to a characteristic, rather than a group: it refers to the characteristic "age" rather than the group "elderly people". Section 15 does not cloak groups of Canadians with constitutional protection; rather, it prevents governments from discriminating against Canadians on the basis of certain physical or otherwise significant characteristics. Drafted in this way, the protection would extend to the young as to the old, men as to women, whites as to blacks. In this way, section 15 was drafted to be the height of egalitarianism, rather than a tool of mobilized groups of people.

Second, the drafters did not close any doors. The list of constitutionally impermissible grounds of discrimination was not closed; rather, the enumerated list is only provided for "particularity". Employing age-old techniques of statutory interpretation, the Supreme Court quickly realized that this same constitutional protection should be extended to laws that differentiate in *other* ways that are analogous to the enumerated list. If the drafters intended to *only* extend protection to these particular groups, why would they have used the words "in particular"? The text demands a broader interpretation.

The Supreme Court has been unwavering in its willingness to find "analogous" grounds, under this broader interpretation, even where such analogous grounds were expressly rejected by the drafters of the *Charter*. Notwithstanding a clear vote by the drafters to remove "sexual orientation" from the enumerated list, the Court found in 1995 that sexual orientation constitutes an analogous ground of discrimination. Since then, a handful of other analogous grounds, ranging from the obvious (marital status) to the curious ("aboriginality-residence") have been identified by the Court.

ESTABLISHING AN ANALOGOUS GROUND, 1980-1999

The analytical importance of identifying an enumerated or analogous ground of discrimination has varied over the past twenty years. At one point, it could have been strongly argued that, to find an "enumerated or analogous ground of discrimination" was the end of the analysis: if the Court found that a government treated a claimant differently, and that such differential treatment was based on an enumerated or analogous ground of discrimination, section 15 would have been infringed. It was sometimes said that legislation did not violate the *Charter* if such differentiation "fell outside the scope of the enumerated (or analogous) ground of protection". As such, the courts tended to analyse a wide range of factors to determine whether a type of differentiation constituted an "analogous ground."

To many, the Supreme Court's jurisprudence on equality was bewildering: one Federal Court of Appeal judge lamented, in *Lavoie v. Canada*, "I have always felt an intellectual malaise when confronted with a case involving section 15 of the *Charter* and admit to having always had difficulty mastering the teachings of the Supreme Court." Justice Marceau was not alone, and after almost a decade of division on the proper analytical approach, the Court cleaned up its equality jurisprudence in 1999, in *Law v. Canada*.

In *Law*, the Supreme Court clearly made a finding of an "enumerated or analogous ground" to be a necessary step in the analysis, but not the only step. Additionally, the Court required a claimant to show that such differential treatment, based on an enumerated or analogous ground, constituted an affront to his or her "human dignity", by analysing a wide range of "contextual factors". In *Corbiere v. Canada*, the Court ruled that "[t]he enumerated and analogous grounds stand as constant markers of suspect decision making or potential discrimination. What varies is whether they amount to discrimination in the particular circumstances of the case."

What then, was necessary to find an "analogous ground"? In *Corbiere*, the Court cast aside decades of jurisprudence requiring a lengthy analysis of various factors to locate an analogous ground (most of these factors now being subsumed into the "dignity" analysis), and ruled quite simply:

> *It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. This suggests that the thrust of identification of analogous grounds at the second stage of the Law analysis is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law.*

IS POVERTY "IMMUTABLE"?

The underlined passage is key for answering the question about whether "poverty" constitutes an analogous ground of discrimination (it might be noted that the proper term would be "income status", as section 15 tends to be neutral with respect to the enumerated grounds, as discussed above). It would be a decidedly sad commentary on the human spirit if we were to conclude that the poor are forever doomed to their fate; the "American Dream" speaks to the contrary. Simply stated, it is difficult to say that poor people *cannot* change their economic status (that said, as discussed below, L'Heureux-Dubé J. has stated as much in one recent decision). However difficult it may be, and nobody can dispute that it is very difficult, it is certainly not impossible, as it could be said for race, national origin or sex.

IS POVERTY "CONSTRUCTIVELY IMMUTABLE"? GOSSELIN V. QUEBEC

What then, of the underlined passage: is "poverty" a characteristic which the government has no legitimate interest in expecting individuals to change? It is this question that has been posed to the Court in *Gosselin v. Quebec,* a decision that is expected from the Supreme Court shortly. *Gosselin* involved a challenge to Quebec's social assistance regulations, which required persons from the age of 18 to 30 either to work or take employment training in order to receive welfare benefits. Gosselin challenged the legislation on a number of constitutional grounds, including equality grounds. Her action was denied at the Quebec Superior Court and at the Court of Appeal, although one judge of the Court of Appeal wrote a powerful opinion in dissent, relying on a wide range of international law materials.

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It might be immediately asked how Gosselin's claim could have anything to do with establishing an "analogous ground of poverty", as the real differential treatment here was on the basis of age – people under the age of 30 must work or take training to receive training, while people over the age of 30 do not have to work or take training. The differentiation, it would seem, is on the basis of age, not on income status. Gosselin, aided by the *Charter* Committee on Poverty Issues ("CCPI"), argued at the Supreme Court, among other things, that the issue was the



failure of the Quebec government to provide a certain level of assistance to a group of people who were poor: in other words, the *Charter* imposed a positive obligation on the Quebec government to meet certain needs, and the failure to do so engaged this group of poor people's dignity interests. CCPI put the issue in its factum as follows:

> *The formal or differential treatment is between those under thirty in need of social assistance, who are denied the higher rate, and those thirty and over who receive it. However, the substantive violation of equality – "the more fundamental one" – arises from the failure to provide an adequate benefit to the younger group.*

Gosselin and CCPI argued that the interests engaged were fundamental to Gosselin's "human dignity", and section 15 was thus engaged. However, what of that pesky first step – the finding that poverty constitutes an "analogous ground"? Again, can it truly be said that the government has "no legitimate interest in expecting us to change [our economic status] to receive equal treatment under the law"? We might understand how the State has no interest in telling us what religion to practice, or

what sexual orientation to have (although others may disagree with the latter), but can it equally be said that the State has no interest in requiring individuals to change their economic status to receive equal treatment?

The answer to this question is unlikely to be answered by the Supreme Court in *Gosselin*, as the case probably should be resolved on the "age" grounds of distinction (the legislation makes an active differentiation on the basis of the age, and the Court has consistently stated that one must look at the actual basis of the differentiation). Or, it is possible that the Court might resolve the question by only considering the Quebec *Charter*, which Gosselin has also raised. However, if the question were to be answered, it is difficult to see (without a substantial facelift to the *Corbiere* requirement of "immutability" or "constructive immutability") how poverty could constitute an analogous ground.

Simply stated, there are very good arguments that the government does have a legitimate interest in expecting Canadians to change their economic status in order to receive equal treatment under the law. Unless one is willing to romanticize poverty, it might be safely said that it is a reasonable governmental objective to eliminate poverty: international treaties have been signed in furtherance of that goal. It might also be said that it is reasonable to use the traditional tools of governmental action, namely, legislation that encourages or discourages certain behaviour, to help eliminate poverty. And, if the government chooses to enact legislation that discourages poverty, then such should be a laudable achievement.

Perhaps more directly in the judiciary's mind on this issue, it might be said that the very heart of politics is the allocation of resources, and the encouragement, and discouragement of certain behaviours. Smokers pay substantially more tax on cigarettes than on a can of peaches, because the government seeks to discourage smoking while remaining indifferent on the consumption of peaches. Similarly, commuters pay less than fair market value for the cost of taking a subway to downtown, because the government seeks to encourage that behaviour and discourage driving. Politics is all about making these types of choices and it is said that the courts have neither the institutional competence nor the political legitimacy to make these choices – or to second-guess them. In a case that was later overturned (on other grounds), Mr. Justice Sharpe reflected:

> *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.*

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In *Egan v. Canada*, Sopinka J., writing for himself, similarly stated:

> *[G]overnment must be accorded some flexibility in extending social benefits and does not have to be pro-active in recognizing new social relationships. It is not realistic for the Court to assume that there are unlimited funds to address the needs of all.*

On the other hand, it could be argued that it is facile to consider the "analogousness" of poverty in the abstract in this manner; rather, it is necessary to look at the particular distinction first. In other words, to determine whether the government has a "legitimate interest" in asking a person to change their status, one must first ask *why* the government is so asking. Therefore, it might be said that imprisoning an individual for being poor does not advance a 'legitimate interest' (a candidate for the leadership of the Ontario Conservative party advanced this idea recently). It could be said that such actions do not advance any legitimate interest in eliminating poverty, but rather constitutes *ex post facto* punishment for being poor (of course, such action would more likely engage section 7 of the *Charter* in any event).

However, the Supreme Court has quite clearly stated that, once a ground is found, it shall always remain an analogous ground: *Corbiere* states that a ground remains a "constant marker". Therefore, it is necessary to look at the question in the abstract, and ask, whether income-status constitutes an immutable, or "constructively immutable" characteristic. Would governmental activity that differentiates between different income groups give an immediate "whiff" of illegitimacy? If governmental differentiation on the basis of economic status constitutes an analogous ground, the door is opened for such persons to bring s. 15 claims, provided that such differentiation is also shown to be discriminatory.

The question has yet to be resolved, as the Court recently ducked the question in *Dunmore v. Ontario*. In that case, all but two members of the Court refused to consider the equality challenge brought by (mostly poor) agricultural workers who were excluded from a collective bargaining regime, instead dealing with the issue under the freedom of association provision of the *Charter*. As for the remaining two members of the Court, L'Heureux-Dubé J., writing for herself, found that agricultural workers (not "poor people") were an analogous "group", whereas Major J., writing for himself, squarely ruled that economic disadvantage does not constitute an analogous ground. Like the *Dunmore* case, it is unlikely that *Gosselin* will resolve the question either.

However, as the Court has drafted the framework for section 15 cases, it seems very difficult to establish poverty as an analogous ground, for the reasons stated above. Whether this difficulty arises as a mere consequence of the analytical framework, or whether the analytical framework was designed to create this difficulty, is a matter best left to be debated by legal historians.

Derek J. Bell is a lawyer at Osler, Hoskin & Harcourt LLP in Toronto