1989

What's Your Favourite Right - The Charter and Income Maintenance Legislation

Reuben Hasson

Osgoode Hall Law School of York University

Follow this and additional works at: https://digitalcommons.osgoode.yorku.ca/jlsp

Citation Information


This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Journal of Law and Social Policy by an authorized editor of Osgoode Digital Commons.
WHAT'S YOUR FAVOURITE RIGHT?
THE CHARTER AND INCOME MAINTENANCE LEGISLATION

Reuben Hasson*

In the years following the enactment of the Charter, demands have been made by various commentators that the Charter be used to improve legal aid,1 welfare rates,2 homelessness,3 education,4 and indeed, virtually any social problem that anyone can think of.5

In asking the courts to undertake this agenda, the proponents seem to be unaware that no judiciary anywhere in the world has undertaken such a task. If this is so, one must ask why these demands are being made.

* Copyright © 1989 Reuben Hasson. Reuben Hasson is a professor of law at Osgoode Hall Law School.

I am greatly indebted to my research assistant, Ms. Jamie Mason (O.H.L.S. Class of '91) for her extraordinary wisdom, humour and insight. I am also indebted to my colleagues Harry Glasbeck and Judy Fudge who not only read the paper, but who have furthered my education in the Charter over the last five years.


In the first place, the legislatures (both Federal and Provincial) have launched a sustained attack on the unemployment insurance system and the welfare systems. These systems were never particularly generous, so that when cuts came, there was an increase in homelessness, and a rise in the number of food banks. In addition, an inadequate minimum wage combined with high rental costs in the major cities, has contributed to an increase in social dislocation. Since the politicians are, rightly, seen as having contributed to this state of affairs, reformers are tempted to turn away from political activity and to seek judicial salvation. The Charter makes this option seem particularly attractive since the reformers see themselves leaving the ugly world of politics for the pure world of law. Unfortunately, one cannot turn an intensely political question such as the level of welfare benefits into a legal question simply by so deeming it. This attempt to "judicialize political questions" is doomed to fail.

Secondly, judicial decisions assume an exaggerated importance in legal education and in legal practice. Many lawyers will subscribe to a case reporting service but will not keep track of statutes in their area. It is significant that both Universities and Bar Associations

6. See L. A. Pal, "Revision and Retreat: Canadian Unemployment Insurance 1971-1981" in J. S. Ismael, ed., Canadian Social Welfare Policy: Federal and Provincial Dimensions (Kingston: McGill-Queen's University Press, 1985) 75. In the 1980's, the administration of Unemployment Insurance was tightened up so that more claimants were disqualified or disentitled - see Reuben Hasson, "Discipline and Punishment in the Law of Unemployment Insurance - A Critical View of Disqualifications and Disentitlement" (1987) 25 Osgoode Hall L. J. 615 at 635. The government has plans for legislation, which would increase the qualifying period and increase the number of weeks on disqualification.


8. For the situation in Toronto see Parkdale Study, supra, note 3.


will tend to honour judges rather than a retired Minister or a politician who guided a piece of legislation through Parliament.11

The third reason why judges appear attractive to reformers of the kind described above is indicated by Professor Terry Ison in his article on the “Politics of Personal Injury Compensation.”12 Ison makes the point that whereas business groups tend to be strident in their demands, groups representing the disabled tend to be meek in making their demands.13 This less aggressive stance on the part of the reformers inclines them to seek out the judicial process where no voices are raised and cool, rational argument is supposed to prevail. This factor also tends to draw reformers to the courts.

I. PRE-CHARTER LITIGATION
In all the writings advocating the use of the Charter to improve welfare levels, there is no serious consideration given to the case law before the Charter. I think it is essential to do this because some of the judges who decided some of the leading cases in the 60's and 70's are still on the bench (e.g. Chief Justice Dickson and Chief Justice Monnin of the Manitoba Court of Appeal). Many other judges who have recently retired or died (Chief Justice Laskin, Mr. Justice Spence, Mr. Justice LeDain and Mr. Justice Freedman) were among the judges who heard these cases.

Ms. Kathleen Ruff in her article, “The Canadian Charter of Rights and Freedoms: A Tool for Social Justice?”14 suggests that judicial attitudes have changed since 1979 when the Bliss15 case was decided. To prove her point, Ms. Ruff cites two human rights cases – Robichaud v.

---

11. Even at law schools, judges of the Supreme Court and “eminent” practitioners will be given preference over academics, other than those who achieved high judicial office. Thus, neither Osgoode nor the University of Toronto Law School has any kind of tribute to Frank Scott, one of the great figures in Canadian legal education.


13. Ibid. at 396. Writing of a group of disabled claimants, Ison points out that “their approach to politicians was in the style of applicants for charitable relief rather in the style used by other organizations of citizens demanding a right to be heard”.

14. Supra, note 4 at 19

The Queen\textsuperscript{16} where a claim for sexual harassment was upheld and Quebec Human Rights Commission v. Brossard\textsuperscript{17} in which case Mr. Justice Beetz indicated that the Bliss decision would not be followed in a human rights case\textsuperscript{18}

There is, however, a world of difference between a human rights complainant and a social security recipient. Social security recipients are subject to a vast number of degrading rules and practices from which the ordinary citizen is free\textsuperscript{19} To take but one example; someone who is on welfare is not entitled to a student loan. Recently, a welfare claimant dishonestly obtained a student loan. Although she obtained her degree, she was sentenced to a year's imprisonment\textsuperscript{20} In the same issue of the paper that reported this case, a poll reported that 74\% of Canadians thought that people on unemployment used their benefit period to go on holiday\textsuperscript{21}

It is time to examine the cases. Two welfare cases reached the Supreme Court in the 70's and one unemployment insurance case. In Alden v. Gaglardi\textsuperscript{22} the claimant was locked out following a labour dispute. He claimed welfare benefits. The critical section was Section 3 of the British Columbia Social Assistance Act, which provided:

\begin{quote}
“(3) Social assistance shall be granted out of funds appropriated by the Legislature for the purpose to individuals, whether adult or minor, or to families, who through mental or physical illness or other exigency are unable to provide in whole or in part by their own resources, necessities essential to maintain or assist in maintaining a reasonably normal and healthy existence.”
\end{quote}

\textsuperscript{17} [1988] 2 S.C.R. 279.
\textsuperscript{19} For a brief description of some of these rules and practices, see Reuben Hasson, “The Cruel War: Social Security Abuse in Canada” (1981) 3 Canadian Taxation 114.
\textsuperscript{20} The [Toronto] Star (12 June 1989) 2.
\textsuperscript{21} Ibid. at 3.
The Supreme Court unanimously, but inexplicably, held that a lockout was not an exigency. "I cannot find that the language of the section requires the granting of social assistance to individuals who are fit and able to provide through their own efforts the necessities essential to maintain a reasonably normal and healthy existence but who have been temporarily deprived of their source of income by reason of a labour dispute," wrote Mr. Justice Ritchie for a unanimous court. Unless the claimant is extremely wealthy, a deprivation of income will jeopardise the claimant's "normal and healthy existence". Further, a prolonged lockout may endanger the physical and mental health of the claimant.

The second welfare case to reach the Supreme Court was Re LeBlanc v. City of Transcona. In this case, a welfare tribunal had given the welfare claimants an additional amount to meet payments required under the Bankruptcy Act to meet payments previously incurred. On the face of it, this seems a beneficial use of money for two reasons. In the first place, if the additional grant is subtracted from the welfare payment this would mean that the claimants would be living below the provincial and municipal welfare rates. The matter was put cogently by counsel for the claimants before the Manitoba Court of Appeal:

"It would not be possible for either the Appeal Board or those who administer social assistance in the first instance to determine an applicant's needs in the realistic subjective manner contemplated by the legislation without taking the applicant's financial obligations into consideration. If they were to disregard these obligations, and the creditors chose to exercise their legal rights, the applicants would be left without enough to meet their basic necessities and the purpose of the legislation would have been frustrated. There might be some justification for disregarding debts incurred for frivolous reasons, but even if that were so, the decision... would have to be made by the welfare authorities."

23. Ibid. at 764.

24. Claimants who are locked out will also be denied unemployment insurance. See Hasson, supra, note 19 at 142-3.


The second reason why the discretionary payments are desirable, is that we know that the reason why many welfare recipients are "workshy" is because they have accumulated large debts. These claimants are afraid to work lest the creditor get a wage garnishment (or other similar) order for twenty or thirty years. The majority of the Manitoba Court of Appeal did not see things this way. Mr. Justice Monnin, giving the majority decision, stated:

"Inclusion of moneys for payment of legitimate debts as a matter of public assistance is such a new idea — without mentioning anything about its propriety — that had the legislature intended such a payment it ought again to have distinctly so provided. Abuses could creep in very easily and obviously safeguards must be placed in the legislation or there is a strong possibility of drain on the tax funds. A greedy applicant could incur substantial debts of all kinds in contemplation of his application for assistance. An overly generous appeal board could tax the scheme to no end." This passage displays a shocking lack of knowledge of how the welfare system works. In the first place, paying the claimant's debts in this kind of case is probably cheaper for the welfare authorities than keeping the claimants on welfare indefinitely. Once the claimant feels that she is being freed from the shackles of debt she will begin to search for a job more vigorously and with greater confidence. Second, if a welfare authority suspects that the claimant might have incurred debts with a view to getting on to welfare, she will be disqualified. Third, a claimant for welfare in Manitoba will have to undergo probably the severest means test in the country. The claimant may be required to give up her car and even her work tools. It only remains to point out that the decision of the Manitoba Court of Appeal was affirmed by the majority of the Supreme Court. Mr. Justice Spence stated that "to

28. Supra, note 26 at 704.
29. For a discussion of these powers, see Hasson, supra, note 19 at 134–6.
31. Supra, note 25. Mr. Justice Spence gave the decision of the Court, with which Fauteux C.J., Abbott, Martland, Pigeon, and Ritchie J.J. concurred; Laskin J. dissented.
provide for the payment of debts in a social assistance statute would
turn the purpose of the statute, at any rate in part, from social assis-
tance to creditor's relief and provide for the payment out of public
funds of the debts due to various creditors, such as banks, finance
companies, credit unions and the like”.32 The majority's view of wel-
fare seems to consist merely of essentials, such as food and shelter.
But in modern times, a welfare claimant may get a grant enabling her
to go to university33 or to get a wheelchair.34

These two decisions might no longer be good law. In part, they turn
on the legal principle that any violation of the Canada Assistance Plan
did not give the claimant any legal rights.35 These decisions might be
redundant as a result of the decision in Finlay v. Minister of Finance.36
In that case, the court found that Manitoba was in breach of the
Canada Assistance Plan in that the rate of overpayment charged against
Mr. Finlay's social allowance deprived the recipient of his basic needs.
Mr. Justice Teitlebaum noted: “It is undue hardship that is caused to
the person who may not have sufficient funds to feed himself or at
least look after himself with the basic necessities that one requires”.37

How will this principle of "undue hardship" affect cases such as Alden
v. Gaglardi38 and LeBlanc v. City of Transcona?39 It is impossible to be
certain. It would be infinitely better if the Canada Assistance Plan laid
down exactly those classes of persons who are entitled to welfare and
those who are not. Already, actions are being prepared on the basis of
the Finlay case. Their success is as problematic as success under the
Charter. The Government for its part has decided to appeal Finlay, if
necessary all the way up to the Supreme Court of Canada.

Finally, in the one important unemployment case heard before the

32. Supra, note 25 at 555-6.
33. See, for example, Re Noble (1973), 2 (no.2) Bull. Can. Wel. Law 44.
34. For a full discussion of discretionary grants, see Marilyn Ginsburg, “Discre-
& Social Pol'y 1.
35. See also, Re Loftsrom and Murphy (1971), 22 D.L.R. (3d) 120 (Sask. C.A.).
37. Ibid. at 228.
38. Supra, note 22.
Charter, Bliss v. A.G. of Canada,\textsuperscript{40} the Supreme Court held that a claimant who was not eligible for regular maternity benefits, could not claim regular unemployment benefits. This was held not to be sexual discrimination but discrimination on grounds of pregnancy. Fortunately, this bizarre piece of sophistry has now been overruled by statute.

The decisions of the Courts of Appeal and High Courts are no better than the trilogy of cases mentioned above. Thus, in \textit{Re Fawcett}\textsuperscript{41} the infant son of Mrs. Fawcett, aged five, was awarded $5000 in a personal injury case. Mrs. Fawcett sought to put the money in trust for her son until he reached the age of twenty-one. Mr. Justice Brooke, giving the decision of the Ontario Court of Appeal, held that these assets were "liquid assets" which had to be liquidated. The infant was not a defendant since he had means of his own which could be used for his support on his mother's application to court. Why the boy should want some of the trust money when he had not asked for any in eight years, it is not easy to understand. In any event, the effect of the decision, as Professor Beck points out, is to perpetuate the cycle of poverty.\textsuperscript{42} Fortunately, the position of infants in this situation has been improved by regulation.\textsuperscript{43}

The courts have not required a hearing before unemployment insurance\textsuperscript{44} or welfare benefits\textsuperscript{45} are terminated. The principle of fairness was applied in \textit{Re Webb and Ontario Housing Corporation}.\textsuperscript{46} In that case, the Ontario Court of Appeal held that the beneficiary of a public housing scheme was entitled to a hearing before being evicted.\textsuperscript{47}

\footnotesize

\textsuperscript{40} \textit{Supra}, note 15.
\textsuperscript{41} (1973), 1 O.R. (2d) 772 (Ont. C.A.).
\textsuperscript{42} See his comment: "$\textit{Re Fawcett and Board of Review}$" (1973) 3 (no.2) Bull. Can. Wel. Law 1.
\textsuperscript{43} Under the \textit{Family Benefits Act} R.R.O. 1980 Reg. 13, (41) an infant plaintiff may be allowed to keep up to $25,000 as damages in a personal injury action.
\textsuperscript{44} See the decision of the Federal Court of Appeal in \textit{Letourneau v. C.E.I.C.} (1985), 24 D.L.R. (4th) 688.
\textsuperscript{45} \textit{Re Wood} (1972), 1 (no.1) Bull. Can. Wel. Law 8. This was a decision of the Ontario Court of Appeal handed down on September 9, 1971.
\textsuperscript{46} (1978), 93 D.L.R. (3d) 187 (Ont. C.A.).
\textsuperscript{47} The hearing granted in this case was very informal.
Some will point to the long line of cases beginning with Re Proc\textsuperscript{48} in which the Ontario Courts quashed decisions of the Social Assistance Review Board in co-habitation cases. Elegant and eloquent as those decisions are, they break no new ground. These decisions simply quashed outrageous decisions of the Review Board where there was not a scintilla of evidence that a relationship of husband and wife existed.

It is legitimate to ask why the courts were so conservative in the 60's and 70's. In the first place, the Canadian welfare state dates from 1966-71. It is true that there was a national unemployment insurance scheme covering 80% of workers dating from 1940, and workers' compensation statutes. But medical insurance, the extension of unemployment insurance to cover 96% of the workforce and the national welfare scheme, in the form of the \textit{Canada Assistance Plan}, came into being between 1966 and 1971.

I do not think this welfare package was particularly generous. I share Professor Buchbinder's assessment of the schemes.

"If one considers provincial health insurance premiums, premiums for unemployment insurance, and contributions to the Canada/Quebec pension plans as taxes, then the total picture is one of exacerbating inequality among workers through the social and welfare and taxation programs."\textsuperscript{49}

These programs were regarded with suspicion by a section of the Press. Thus, the \textit{Globe and Mail} called the 1971 reforms to the unemployment insurance system "stupid and immoral".\textsuperscript{50} Numerous

\null

\textsuperscript{48.} (1974), 53 D.L.R. (3d) 513 (Ont. Div. Ct). The decision was affirmed by the Ontario Court of Appeal in an unreported decision; see "Proc in the Ontario Court of Appeal" (1976) 4 Bull. Can. Wél. Law 44. In Re Warwick and Minister of Community and Social Services (1978), 91 D.L.R. (3d) 131 (Ont. C.A.), an unsuccessful attempt was made to argue that the "spouse in need" was entitled to welfare in her own right. If this had been accepted, it would have effected a revolutionary and, in my view, beneficial change.


economists were investigating whether the Unemployment Insurance system produced malingering. Finally, the Government began making cuts in the scheme in the mid-seventies and began a million dollar advertising campaign against unemployment insurance fraud.

In this environment, judges would have to have had something of a radical disposition to buck this tide. Now, Canadian judges have never had a reputation for being progressive. Most of them are male, middle-aged and have worked for corporate interests. Even the academics among them (Laskin, LeDain, Beetz and McLaughlin) showed little interest in income maintenance law, during their scholarly careers. It is doubtful if the situation is any better today. Students all over the country will learn the details of the formation of contracts, the minutiae of real property law and the technicalities of civil procedure. Only a few will learn about unemployment insurance and welfare law. It is significant that the Canadian Bar Review, in its long history, and the University of Toronto Law Journal have never seen fit to deal with these subjects. Other Canadian law journals, fare little better. Very few Canadian law students and teachers will obtain publications of say, the National Council of Welfare, despite the fact that these may be obtained free and despite the fact that these publications contain material that is of general social importance.

II. THE CHARTER AND SOCIAL POLICY
A. WELFARE

In her excellent paper for the Thomson Commission, Sandra Wain showed that the question of putting welfare benefits in the Charter had been debated at the time the Charter was drafted but this idea


52. See Pal, supra, note 6.

53. See statement of Mr. Bud Cullen, then Minister of Employment and Immigration in Canada, House of Commons Debates (23 January 1978) 2301.

54. 1923-

55. 1933-

56. See, for example, their reports on The Hidden Welfare System (1976 & 1979) and Bearing the Benefits, Sharing the Burdens (1978).

57. See Wain, supra, note 5.

58. Ibid. at 28.
was rejected. Even if a right to welfare and well-being had been included as it is in the New York State Constitution, it is doubtful if this would have made any difference. In New York, the State Constitution provides, in Article XVII, Section 1, that the “aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions and in such manner as the legislature may from time to time determine...”

Despite these high sounding words, we know from reading Jonathan Kozol’s brilliant book, *Rachel and Her Children*, that many of New York City’s homeless are dependent on charity.

Despite the fact that welfare benefits were thought to be unaffected by the Charter, most provinces used s. 28 and later s. 15 to equalize benefits. How much of this activity took place cannot be known. It would also be wrong to think that reformers won every battle. Joan Dawkins describes how in Nova Scotia an amendment was passed to the *Family Benefits Act* eliminating support for teenage mothers with dependent children. There were also severe limitations in using the Charter. It was not used, for example, to stop the 100,000 welfare searches that took place in Quebec between the spring of 1986 and the winter of 1987.

Another string was added to the litigator’s bow when the Supreme Court of Canada decided in *Reference Re s.94(2) of the Motor Vehicle Act*, that it could strike down laws on substantive as well as on procedural grounds. Despite these weapons, Charter litigation has produced virtually no gains but has produced some losses in the welfare field.

The most astonishing series of cases occurred in Nova Scotia in a trilogy of cases where single fathers, who were not eligible for Family Benefits attempted to obtain those which were available for women. In

59. The reason for the exclusion is that the Charter was meant to act as a brake on power.

60. This provision has been used in a few cases but has not any great effect.


64. [1985] 2 S.C.R. 486.
Boudreau v. Family Benefits Board, an unemployed divorced father with three children applied for assistance under the Family Benefits Act. The Nova Scotia Supreme Court Appeal Division held that the claim failed because s. 15 of the Charter had not yet come into force and s. 28 did not make every kind of discrimination illegal.

In Phillips v. Social Assistance Board a single father with a dependent child born out of wedlock argued that the denial to him of welfare benefits constituted a violation under s. 15 of the Charter. Mr. Justice Nunn found that there was a violation of s. 15 but then denied both the claimant and women Family Benefits! This amazing decision was affirmed by the Nova Scotia Supreme Court, Appeal Division. Mr. Justice Jones, giving the decision of the court, referred to Chief Justice Dickson's judgement in Hunter v. Southam and stated:

"The interpretation of the Charter should be, as the judgement in Southam emphasizes, a generous rather than a legalistic one."

But the judgement in this case is legalistic in the extreme and there is not a shred of generosity in the opinion. In Basile v. A.G., the same court displayed great generosity to door to door sellers who were relieved of the obligation of being permanent residents of Nova Scotia. It might be argued that although the decisions are absurd, the Charter litigation must be given credit for giving Family Benefits to men, as eventually happened by legislation in Nova Scotia. But several provinces (including Ontario) originally denied Family Benefits to men. This restriction was removed by lobbying and it does not appear that this tactic was tried in Nova Scotia. The Charter litigation, although no welfare claimant lost materially by it, was fraught with danger. The Legislature might have lowered benefits of all single parents' Family Benefits to the level of general welfare. If this had been done, it might have further endangered the health of women and children.

69. Supra, note 67 at 346.
71. See Mandel, supra, note 10 at 264.
In the following year, welfare claimants seemed to have achieved victory. In *Silano v. Queen in the Right of British Columbia*, Mr. Justice Spencer held that a difference of $25 paid to single persons under the age of 26 for a period of eight months was unconstitutional. The decision came out on August 5, 1987. By August 13, the Provincial Government had reduced benefits for all welfare recipients over 26. Since there are more welfare recipients over the age of 26, than under that age, the result of the litigation was that welfare claimants in British Columbia were worse off than before the litigation.

In *Re Shewchuk v. Ricard* the complainant gave birth to a child born out of wedlock. She took proceedings under the *Child Paternity and Support Act* claiming maintenance for the child. The putative father argued that the *Child Paternity and Support Act* was unconstitutional by discriminating on the grounds of sex. The British Columbia Court of Appeal held that there was a violation of s. 15(1) of the Charter but the law was reasonable in a free and democratic society under s. 1.

Nemetz C.J.B.C. gave the crux of the court's opinion:

"Women bear children not men. Many women bear children out of wedlock. These women ordinarily have the primary responsibility for rearing the children. Most of these women are young and without the economic means to support these children adequately." 

Thus, in return for taking care of the child, the mother is provided with legal aid so that she can sue the putative father for maintenance. But, as the Finer Commission demonstrated in 1973 women on welfare and poor women generally will only be able to recover a fraction of their welfare benefit. People in the position of Ms. Shewchuk (many of whom will be on welfare) are being used by the relevant authorities to act as unpaid debt collectors. It is only when the puta-

---

73. (1986), 28 D.L.R. (4th) 429 (B.C.C.A.) [hereinafter *Shewchuk*].
tive father cannot be found (a not uncommon occurrence), prefers to
go to gaol rather than pay maintenance, or has very little money with
which to pay maintenance, that someone in Ms. Shewchuk's position
will be able to claim welfare. As Judy Fudge has rightly pointed out,
an attempt is being made to turn a public responsibility into a private
one.77

A case that is reminiscent of Shewchuk, is Re Clifton and Director of In-
come Maintenance.78 The applicant sought family benefits as a sole
support mother to a 13 month old child. The applicant refused to give
any information as to the identity of the father. The Social Assistance
Review Board filed a statutory declaration stating that Ms. Clifton was
unaware of the father's identity. The Board, however, denied her
benefits on the grounds that she had failed to provide information
necessary to enable the Board to reach a decision. In at least one case,
the Social Assistance Board of Ontario, a tribunal not known for its
progressive decisions, held that a mother who refused to name a father
was entitled to welfare benefits.79 Mr. Justice Steele giving the decision
of the Divisional Court held that the claimant had not done every-
thing in her power to obtain her benefits. This provision is used in
cases where the claimant sells (or has sold) her property at an under-
value.80 Its use in the present case is bizarre.

The second ground for the decision was:

"This invasion into the privacy of the applicant is authorized by
statute because she applied for a benefit. The director had the right
to refuse the application for lack of information."81

The reference to the claimant's privacy should have alerted counsel for
the applicant's mind to the decision in Hunter v. Southam82 which had
been decided only eighteen months previously. In that case, it will be
remembered, the Supreme Court bestowed the gift of privacy on cor-

77. See her article, "The Public/Private Distinction: The Possibilities of and the
Limits to the use of Charter Litigation to Further Feminist Struggles" (1987) 25
Osgoode Hall L. J. 485 at 518-9.

78. (1985), 53 O.R. (2d) 33 (Ont. H.C.) [hereinafter Clifton]

79. See "Re Unwed Mother who Refuses to Name Father" (1973) 2(no.2) Bull. Can.
Wel. Law 41.

80. See Hasson, supra, note 19 at 134-5.

81. Ibid. at 36.

82. Supra, note 68.
porations. To have made this argument in *Clifton* would not have meant certain success as cases involving humbler citizens than large corporations have been lost. But it is an argument that should have been made.

The one mildly bright spot in the welfare area is the decision of Kelly J. in *R. v. Hebb*. Mrs. Hebb was a welfare recipient in receipt of between $450 and $500 a month of which $300 was spent on rent. She had a long history of mental illness and suffered from slight mental retardation. Mrs. Hebb was a smoker and she was caught stealing a packet of cigarettes. She was prosecuted and convicted under the *Criminal Code* and fined $500 or sentenced to 30 days imprisonment. Kelly J. quoted from the Law Reform Commission Working Paper No.6 on "Fines" which pointed out:

"...that judges be prohibited from imposing a fine and simultaneously imposing a sentence of imprisonment in case the fine is not paid."

It was argued before Kelly J. that before someone aged 16–22 could be imprisoned, there had to be issued a report as to the offenders ability to pay. There was no similar requirement for persons over the age of 22. Kelly J. held that this age discrimination violated the Charter. Consequently, in cases such as Mrs. Hebb's there had to be an inquiry as to her ability to pay the fine.

It is impossible to say as yet, how important the *Hebb* decision will be. If one takes the facts of the case, it is of little importance because most – if not all – provinces would refuse to prosecute in such circumstances. In Alberta, there were many more serious cases and no prosecutions were brought. On the other hand, if a welfare recipient was guilty of fraud in the amount of, say, $1000, would a court be entitled

---

83. See *Re Canadian Union of Postal Workers* (1987), 40 D.L.R. (4th) 67, in which Dixon J. of the Alberta Court of Queen's Bench upheld the right to search postal employees lockers and any item carried in and out of any postal facility. *Hunter v. Southam* was not applied.

84. (1989), 89 N.S.R. (2d) 137 (N.S.S.C.) [hereinafter *Hebb*].

85. (October 1974).

to make an order ordering the welfare recipient to pay $5, $10 or $20 a month? Such a deduction might run foul of the principle in Finlay\textsuperscript{87} that deductions will not be permitted because the deductions might lead to an inequitable result for the claimant. Alternatively, the courts might hold that the Finlay principle does not apply to criminal fines. One will have to wait and see.

What is needed in this area of the law are the kind of guidelines laid down by the English Court of Appeal in \textit{R. v. Stewart}.\textsuperscript{88} Lord Lane C.J., giving the judgement of the court, pointed out:

\begin{quote}
"Policy with regard to prosecuting has undergone a marked change during the 1980's. Social Security cases, for example, prosecuted in 1980-1 totalled 30,116. In 1983-4 the corresponding figure was 11,000 due to a change of policy. Nowadays, the policy is for cases involving small amounts, except where there are special features such as repeated fraud... It follows that the most common method of enforcement is warning and recovery. Unlike the situation between fraudster and victim in other spheres, here the fraudster is in a very vulnerable position vis-à-vis his victim, the department. A warning as to the consequences of any future offending coupled with recovery of the sum overpaid may often be enough, so it seems, to prevent any re-offending, by that individual."\textsuperscript{89}
\end{quote}

One may have some disagreement with these guidelines\textsuperscript{90} but they seem infinitely preferable as a way of dealing with the problem of welfare fraud than the approach exemplified by \textit{Hebb}.

Thus, the Charter saved Mrs. Hebb from serving 30 days in prison and this must be regarded as a boon. However, the other cases (\textit{Silano},\textsuperscript{91} \textit{Shewchuk},\textsuperscript{92} \textit{Phillips}\textsuperscript{93} and \textit{Clifton}\textsuperscript{94}) must be regarded as los-

\begin{thebibliography}{99}
\bibitem{87} Supra, note 36.
\bibitem{88} (1987), 1 W.L.R. 559 (C.A.).
\bibitem{89} Ibid. at 560-1.
\bibitem{90} In many of the small cases of fraud I would favour merely a warning.
\bibitem{91} Supra, note 72.
\bibitem{92} Supra, note 73.
\bibitem{93} Supra, note 66.
\bibitem{94} Supra, note 78.
\end{thebibliography}
Enormous time and expenditure were put into these cases. This time could have been better spent lobbying politicians and/or forming welfare coalitions. Kathleen Ruff argues that it is possible to litigate as well as to lobby. But, if the losses outweigh the gains, what is the point of litigation? Tony Prosser in his excellent study of test case litigation in England concluded that that strategy failed in that country as well. Finally, no one in their right mind, would urge a policy of welfare test litigation before the Reagan Supreme Court.

Second, unless one has the resources of a mega-law firm, legal clinics do not have the financial or human resources to mount Charter challenges.

B. UNEMPLOYMENT INSURANCE

Undoubtedly, the most important decision in unemployment insurance is *Schacter v. R.* In this case, a father wanted to share his 15 week maternity benefit with his wife so that he could stay home while his wife went out to work. Such sharing of the 15 week period was not

95. Professor Andrew Petter quotes a newspaper report in 1985 estimating that the cost of taking a criminal case to the Supreme Court of Canada "can be more than $34,500" and the cost of a civil case to be in excess of $200,000. See his article, "Canada's Charter Flight: Soaring Backwards into the Future" (1989) 16 J. of Law and Society 151 at 155. It is appropriate at this point, to acknowledge Professor Petter's pioneering role in criticising the Charter. All critics of the Charter have built on his work, in particular, on his seminal article, "The Politics of the Charter" (1986) 8 Supreme Court L. Rev. 473.

96. See supra, note 5.


98. Law firms in the large metropolitan areas are growing bigger and they are merging with large law firms in other provinces. These mergers have been sustained in the teeth of provincial bar rules. The 'open sesame' in these cases has been the guarantee of freedom of association; see *Black v. Law Society* (1989), 58 D.L.R. (4th) 317.

99. For an extreme example of what happens to a legal clinic which engages in Charter litigation, see the frightening experience of the Dalhousie Legal Aid Clinic which was very active in Charter litigation, as illustrated by Joan Dawkins article, *supra,* note 62. Even if the calamitous results that followed in Nova Scotia do not occur elsewhere, Charter litigation (or even ordinary litigation) will have the effect of turning away clients and/or restricting the amount of lobbying.

permitted by the maternity provisions but was permitted by the adoption provisions of the Act which allowed the 15 weeks to be split between both parents. The Schacters argued that the difference between natural birth and adoption violated section 15. Mr. Justice Strayer seems to have embraced this argument with some passion. The Schacters had asked to divide the 15 weeks; as Professor Mandel has observed, the Schacters got more than they asked for.\textsuperscript{101} Both of them got 15 weeks leave. The evidence in the case was that the increased cost of such a ruling could be between ten and fifty million dollars. Because of the financial cost of the decision, Strayer J. postponed his decision until there had been an appeal. Strayer J. left it to Parliament to either abolish the adoption benefits or it (Parliament) must provide benefits of equal duration to both adoptive and natural parents.\textsuperscript{102}

The Government has responded in its policy paper – \textit{Success in the Works}\textsuperscript{103} – which sets up (at page 10) a tier of maternity and parental benefits that runs as follows:

"Fifteen weeks of maternity benefits are available at the birth of the child; ten weeks of parental benefits are available to natural or adoptive parents, either mother of father or shared between them."

These provisions are not particularly generous, but they represent a step forward. However, it is important to amend the provincial \textit{Employment Standards Act} so as to provide protection in provincial law for a father’s job security. At present, only mothers enjoy the benefits of the Act – in brief, they may not be dismissed for taking maternity leave and their return to their jobs is guaranteed.

It would be churlish to deny Strayer J. credit for these reasonable provisions, but some credit must go to the Government, which, having made enormous cutbacks in other areas of unemployment insurance, felt the need to provide some kind of offsetting benefit.

\textit{Re Tetreault-Gadoury and Canada Employment and Immigration}\textsuperscript{104} is an unhappy decision. In this case, the provision denying unemployment insurance benefits to claimants over 65 (s. 31(1)) was struck down as

\textsuperscript{101} See \textit{supra}, note 10 at 265.

\textsuperscript{102} The Government has appealed.

\textsuperscript{103} Released 11 April 1989. (Employment and Immigration, Canada)

being in violation of s. 15 of the Charter. In the present case, the claimant was entitled to a minimum of 25 weeks benefit (in addition to her regionally extended benefits which were not calculated). The applicant was able to claim only 3 weeks benefit.

Lacombe J., giving the judgement of the court, stated:

"The most harmful and singular aspect of s.31 of the Act is that it permanently deprives the applicant and any other person of her age, of the status of a socially insured person by making her a pensioner of the state, even if she is still looking for a new job. Regardless of her personal skills and situation, she is as it were, stigmatized as belonging to the group of persons who are no longer part of the active population." 

The court seems to have overlooked one of the cardinal features of sound social policy – that it is undesirable to stack benefits. At age 65, a worker will usually obtain Old Age Security and Canada (or Quebec Pension) Plan benefits. It is entirely reasonable for the state to prevent cumulation of benefits even though the number of potential claimants is small. If the argument is that Old Age Security and the Canada Pension Plan provide inadequate benefits, then the answer is to improve them by having – as Harry Glasbeck has argued – a National Superannuation Scheme providing flat-rate benefits to all citizens at retirement age.

It only remains to mention Re Goldstein v. R. In that case, Ms. Goldstein challenged the provision disqualifying a spouse from claiming unemployment insurance benefits. In a careful judgement, Potts J. upheld the exclusion:

"...person working for his spouse is likely to be in a position to affect his term of employment and thereby control his eligibility for benefits... both spouses would be in a position to benefit monetarily from the unemployment of the spouse. Clearly this is not so

105. The Government has announced its intention of codifying this decision; see text, supra, note 103 at 10.

106. Supra, note 104 at 403-4.

107. In 1986, 4,000 unemployed workers over the age of 65 were still actively looking for work; ibid. at 406.107

108. See his article, "A Proposal for a Non-Earnings Related Retirement Scheme" (1980) 2 Canadian Taxation 186.

where the parties are at arm's length. Finally, abuse and manipulation is [sic] virtually impossible to ascertain.\textsuperscript{110}

Although the judge does not mention "tax avoidance", it would be very surprising if the judge did not have that consideration in mind. In \textit{Re A.G. of Canada v. Druken},\textsuperscript{111} a claimant brought an unsuccessful challenge to s. 31 by using the \textit{Human Rights Act}.

Of the two major unemployment insurance decisions, \textit{Schacter}\textsuperscript{112} is strangely constructed but seems to have led to a reasonable result. The decision in \textit{Tetreault-Gadoury},\textsuperscript{113} however, shows no understanding of elementary principles of social policy and is a most unfortunate decision.

C. OTHER SOCIAL BENEFITS

The record of the courts in dealing with other income maintenance programmes has been lamentable.

In \textit{Bregman v. A.G. of Canada},\textsuperscript{114} The claimant sought benefits under the \textit{War Veterans Allowance Act}. Section 31(4) of the Act required War Veterans to be a veteran of World War I or World War II and either (a) domiciled in Canada or (b) having had resided in Canada for a least 10 years before combat. The claimant served in the Russian army with distinction between 1941 and 1945. He came to Canada in 1976 and took out citizenship in 1980. In 1983, he applied for War Veterans Benefits but was denied them because he had not been in Canada for 10 years. He died on January 11, 1986. Irene Bregman was added as a party. It was agreed that if her husband qualified for an allowance in his lifetime, his widow might now apply. Mr Justice Saunders rejected the claim:

\begin{quote}
"In the context of the legislation, in my opinion, persons domiciled in Canada at the time of enlistment are more closely related to members of the Canadian Forces and to Canada."
\end{quote}

\textsuperscript{110} \textit{Ibid.} at 588.
\textsuperscript{112} \textit{Supra}, note 100.
\textsuperscript{113} \textit{Supra}, note 104.
\textsuperscript{114} (1986), 55 O.R. (2d) 596 (Ont. H.C.) [hereinafter \textit{Bregman}].
\textsuperscript{115} \textit{Ibid.} at 601.
This is no doubt true but the effect of the decision is to create a second-class type of veteran - something s. 15 is supposedly designed to prevent. The foreign veteran who comes to Canada and spends ten years here would appear to be making more of a contribution to Canadian life than the Canadian-born war veteran who, after the war, lives in the Bahamas and never returns to Canada. The foreign veteran would seem to be more “Canadian” than the exile in the Bahamas. Yet, it is the latter and not the former, who will receive War Veterans Benefits. This decision was affirmed by the Court of Appeal which repeated Saunders J.’s “Canadianess” rationale. The Court then reviewed the history of the legislation and found that Parliament had found it to be satisfactory. But under a system of judicial review, the courts are supposed to review critically the decisions made by Parliament.

In two family allowance cases, the Federal Court of Appeal avoided the constitutional issues on spurious grounds. In A.G. of Canada v. Vincer, the claimant-husband signed a separation agreement with his wife. The parents had joint custody of the children. Under s. 7 of the Family Allowances Act, family allowances are to be paid to the mother. The review committee held s. 7 unconstitutional and gave half the benefit to the father and half to the mother. Incredibly, the Federal Court of Appeal held that the review committee had no jurisdiction to apply the Charter. If Mr. Vincer wants to bring his claim he must do so before the Federal Court. Mr. Vincer might wonder how it is that certain labour arbitrators have jurisdiction to apply the Charter, whereas a review committee, set up by Parliament, does not have such jurisdiction.

The Federal Court of Appeal also avoided the constitutional question in A.G. of Canada v. Bibi Alli. Mrs. Alli and her husband came to Canada from Guyana in 1980. Both claimed to be convention

116. 57 O.R. (2d) 409 (Ont. C.A.) at 411.
118. In Tetreault-Gadoury, supra, note 104, the Federal Court of Appeal held that the Board of Referees under the Unemployment Insurance Act had jurisdiction to make rulings on the Charter. In so doing, it overruled previous decisions. It may be now that review committees can apply the Charter.
119. See cases cited by Fudge, supra, note 77 at 508 (note 80).
refugees. In 1981, they were joined by their two young children. In 1983, a third young child was born. As refugee claimants, they had been given employment authorization. They also paid taxes. In February 1983, Mrs. Alli submitted an application for benefits. Two and a half years later, Mrs. Alli was told she was not eligible.

Mrs. Alli appealed to a review committee\textsuperscript{121} arguing that s. 2(3) of the Family Allowances regulations was unconstitutional. This regulation provided for payment of a Family Allowance — "the prescribed circumstances", referring to visitors or permit holders, were such that persons must have been admitted to Canada for a period of not less than one year and have had income which is subject to the Income Tax Act.

The review committee, by a vote of 2-1, held s. 3(1) and s. 2(3) of the Family Allowance regulations unconstitutional. Since visitors to Canada for a year were entitled to Family Allowances, the majority felt that the Allis, who had been lawful visitors for eight years, should be entitled to Family Allowances. The Federal Court of Appeal held that the review committee had no jurisdiction to hear the Charter issue. The Allis have now begun an action in Federal Court. This action will be infinitely more expensive than if the Allis had been allowed to proceed by the review committee. Professor Petter estimates that the cost of a civil action will be at least $200,000.\textsuperscript{122} It should be pointed out that Mr. Vincer and Bibi had no conceivable way of finding out that the review committee had no jurisdiction. Indeed, in Bibi Alli,\textsuperscript{123} the Government did not argue that the tribunal had no jurisdiction. It might be that after the decision in Re Tetreault-Gadoury and Canada Employment and Immigration\textsuperscript{124} — in which case the Federal Court of Appeal reversed previous decisions which had held that the Umpire and the Board of Referees could not apply the Charter\textsuperscript{125} — Vincer\textsuperscript{126} and Bibi Alli\textsuperscript{127} might be decided differently today, but claim-

\textsuperscript{121} I should disclose that I chaired this committee.

\textsuperscript{122} See \textit{supra}, note 95.

\textsuperscript{123} \textit{Supra}, note 120.

\textsuperscript{124} \textit{Supra}, note 104.

\textsuperscript{125} See, for example, Zwarich v. A.G. of Canada [1987] 3 F.C. 253.

\textsuperscript{126} See \textit{supra}, note 117.

\textsuperscript{127} \textit{Supra}, note 120.
What's Your Favourite Right?

ants might not be prepared to take the chance.

In *R v. Powell and Powell*,128 an Alberta provincial court judge seemed to break new ground. In that case, the parents were charged with two counts of truancy contrary to s. 180 of the *School Act*. The accused could not provide a lawyer and legal aid would not grant one. The accused argued that his right to a fair trial was being jeopardised under s. 7 and s. 11 of the Charter. Litsky P.C.J. upheld this argument and directed that counsel be appointed to represent the Powells.

But it turns out that the courts have long exercised a power to order that counsel be appointed to represent an accused. In *R v. White*,129 the accused had been denied legal aid because the offence was a summary one. McDonald J. ordered counsel to be appointed after taking into account a number of factors: (a) the financial position of the accused; (b) the educational level of the accused; (c) the complexity of the case; (d) the difficulty of marshalling relevant evidence; and (e) the likelihood if imprisonment in event of conviction.130

A minor breakthrough occurred in *Mullaly v. Younggreen*,131 where the British Columbia County Court held that someone who intended to appeal a decision of the Small Claims Court was not required to pay the full amount of the judgement plus $50 as security for costs. This provision violated s. 15(1) of the Charter since it discriminated against the indigent. This is a small but welcome victory.132

Finally, I want to contrast two cases on day care. In *R. v. King*,133 the appellants were charged with operating a day nursery without a licence as required by the *Day Nurseries Act*. The trial judge concluded that the law infringed the parents rights under the Charter. The trial judge concluded that the law deprived poor parents of the right to pursue a livelihood. The Court of Appeal reversed. It held that there was no infringement of the right to work.

Dubin A.C.J.O. also found that the *Act* was not discriminatory. Indeed,

---

132. Remarkably, the decision was given in Chambers.
he pointed out that the argument was not pursued on appeal. The court rightly pointed out that "[p]ublic funding of day care is a social problem which is beyond the reach of the Court."\textsuperscript{134} The Courts can do no more about inadequate day care than they can about homelessness or poverty.

This case must be compared with\textit{ Symes v. R.},\textsuperscript{135} in which Cullen J. gave a remarkable judgement with far reaching implications. The plaintiff, then a partner in a law firm, had her expenses in the form of a salary paid to a nanny disallowed as a business expense between 1982 and 1985. Revenue Canada took the view that these were personal and living expenses.

After 1985, the plaintiff was able to use section 15 of the Charter and she did so. She argued: (a) that the disallowance as a business expense of child care expenses incurred to permit a parent to earn income from a business drew an invidious distinction between parent employers and other employers who are allowed to deduct from business income the salaries paid to employees; (b) that the disallowance as a business expense of child care expenses incurred to permit a parent to earn income from a business has a disproportionate impact on women who remain primarily responsible for child care in our society; and (c) that wages or salaries paid to spouses or children, were also in certain cases expenses deductible as business expenses.\textsuperscript{136}

Cullen J. was greatly impressed by the evidence of Dr. Patricia Armstrong, a sociologist at York University. Cullen J. summarized her evidence thus:

"Armstrong's evidence reveals that the influx of women of child bearing age into entrepreneurship and the workplace, especially in the 1970's and after, has effected a major change in the landscape and in the very conduct of business. Thus, the question of the deductibility of Simpson's salary must be interpreted in view of the social and economic realities of the time."\textsuperscript{137}

\textsuperscript{134} \textit{Ibid.} at 569.

\textsuperscript{135} (31 May 1989), Case T-1989-152 [unreported].

\textsuperscript{136} \textit{Ibid.} at 4.

\textsuperscript{137} \textit{Ibid.} at 11.
It is a "reality" that since World War II, more women have gone out to work. The reasons for this are many and need not be analyzed in detail here. What is not a reality is that women have entered the workforce by hiring nannies. The overwhelming majority of women who go out to work use daycare, baby sitters or grandparents to look after the child. In any event, Cullen J. held that the plaintiff was entitled to claim the expenses for her nanny after 1985. The result of this decision is first, to favour the rich self-employed at the expense of poor employees. It is this group who will have to pay for the rich persons' nannies.

Perhaps even more ironical is the fact that a decision which is explicitly made to help women, will almost certainly help more men than women. As Mr. Shifrin has pointed out, 3/4 of the self-employed are men and they will be the principal beneficiaries of this decision. Symes is another example of a misguided intervention. When Parliament intends to benefit the rich or men (as opposed to women), it is usually clear that this is what it is doing. In Symes, the judgement reads as if Cullen J. had no clear idea of what he was trying to do.

Before attempting a final evaluation of the Canadian jurisprudence under the Charter, it is necessary to look at the experience of the United States Supreme Court in income maintenance cases, since many Canadian commentators purport to derive authority and inspiration from that Court. It will be shown that the experience in that Court offers little comfort to those who seek to improve our income maintenance schemes by judicial action.

III. THE AMERICAN INFLUENCE – IS THERE HOPE?

Many of the commentators who want to introduce major changes through judicial review in social policy look longingly at American jurisprudence and they derive their inspiration from a few Supreme Court decisions. One very clear sign that welfare jurisprudence was of marginal importance during the period of the Burger Court (1969–1986) is that, of the two books on the Burger Court – Herman

138. Not the least important is the fact that for many families, two salaries are essential to survival.


140. See the authors quoted above, supra, notes 1–5.

141. There were almost no income maintenance cases decided by the Warren Court.
Schwartz, *The Burger Years*\(^{142}\) and Vincent Blasi, *The Burger Court*\(^{143}\) — there is a single essay on welfare rights and the constitution\(^{144}\) Professor Frank Michaelman’s well-known essay “On Protecting the Poor Through The Fourteenth Amendment”\(^{145}\) now reads like fantasy, even though it was written just over twenty years ago, and was taken very seriously when first written.

The major case is undoubtedly *Goldberg v. Kelly*\(^{146}\). This case enjoys the same status in welfare law that *Brown v. Board of Education*\(^{147}\) enjoys in civil rights law. But just as it is important to understand the limitations of *Brown*,\(^{148}\) it is vital to understand the limitations of *Goldberg v. Kelly*.\(^{149}\) In that case, the Supreme Court held, by a majority, that someone who was in receipt of Aid to Families with Dependent Children’s Benefits could not be cut off from receiving such benefits without being given a hearing. Professor O’Neil has pointed out that while the Supreme Court provided protection at the termination stage, they did nothing to guarantee a hearing to someone who had been denied welfare benefits.\(^{150}\) O’Neil recognized that some welfare authorities might seek to offset the new obligation to give a hearing before termination of welfare benefits by making it more difficult to qualify for welfare benefits at the initial stage.\(^{151}\)

Professor Richard Titmuss pointed out that although *Goldberg v. Kelly* offered admirable procedural protection, the level of benefits provided in New York State was incredibly low. Thus, he (Titmuss) pointed out that in New York City, in 1968, a male welfare recipient was entitled to

---


\(^{143}\) (London: Yale University Press, 1983).

\(^{144}\) See Robert W. Bennett, “The Burger Court and the Poor” in *ibid.* at 46.

\(^{145}\) (1969) 83 Harv. L. Rev. 7.


\(^{147}\) 347 U.S. 483 (1954).

\(^{148}\) *Ibid*.

\(^{149}\) *Supra*, note 146.


\(^{151}\) *Ibid.* at 171. O’Neil found that there were already many errors made in the eligibility process.
the following items: one pair of winter trousers at $7.50 (regular sizes), the household had a right to one can opener at 35 cents, and in the lavatory one toilet tissue holder at 75 cents but only if your landlord does not have to give you one. In January 1989, welfare benefits for a family of three headed by a mother came to $539 a month in New York State. How three people can live on this benefit in New York defies comprehension. In Mississippi the relevant amount is $120 and in Alabama it is $118.

Goldberg v. Kelly was distinguished in Matthews v. Eldridge. In that case, the Supreme Court held that a person claiming disability benefits was not entitled to a hearing before being cut off benefits. Mr. Justice Powell, giving the opinion of a six person majority, said that welfare was “given to persons on the very margins of subsistence.”

“Eligibility for disability benefits... is not based on financial need. Indeed, it is wholly unrelated to the workers income or support from many other sources, such as earnings of other family members, workmen’s compensation awards... private insurance, public or private pensions, veterans’ benefits, food stamps, public assistance...”

Mr. Justice Brennan, with whom Mr. Justice Marshall concurred, dissented. They pointed out that Mr. Justice Powell’s resources were “speculative” and that the court could not gauge need on an individual basis. Further, they indicated that in the present case there was a foreclosure upon the Eldridge home and the family’s furniture was repossessed, forcing Eldridge, his wife and children to sleep in one bed.

154. Ibid.
156. Ibid. at 340.
157. Ibid. at 340-1.
158. Ibid.
159. Ibid. at 350.
160. Ibid.
161. Ibid.
If Eldridge claims public assistance while waiting for an appeal under the disability scheme he has to undergo the indignity and injustice of a means test. The Eldridge decision has been widely criticised, but the chances of its being overruled at the present time are perilously close to zero.

In *Shapiro v. Thompson*, the Supreme Court struck down, by a majority of 6–3, legislation passed by Pennsylvania, Connecticut and District of Columbia. This legislation required one year's residence in the state or district before the claimant could claim welfare. Mr. Justice Brennan, giving the judgement of the majority, held that:

"the effect of the waiting period requirement in each case is to create two classes of needy resident families indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year in that jurisdiction".

This, in the majority's eyes was "invidious discrimination".

Chief Justice Warren dissented, as did Justices Black and Harlan, although they gave separate opinions. Chief Justice Warren stated that Congress had adopted the year's residence requirement because it recognised "the apprehensions of many States that an increase in benefits without minimal residency requirements would result in an inability to provide an adequate welfare system".

The decision in *Shapiro v. Thompson* may be to improve the lot of welfare recipients who travel from states with lower welfare levels, but there will probably be a lowering of benefits for welfare recipients in the state with higher benefit levels.

In any event, the problem is academic in Canada because the Canada

---

162. The most incisive criticism is by Mashaw, "The Supreme Court's Due Process Calculus for Administrative Adjudication in Matthews v. Eldridge" (1976) 44 U. Chicago L. Rev. 28.
164. Ibid. at 627.
165. Ibid.
166. Ibid. at 651.
167. Ibid.
Assistance Plan specifically forbids residency requirements for welfare in s. 6(2)(d) of the Act.

Section 6(b) of the Charter allows "any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided services." This provision would allow a province that set up abortion services legislation or dental care services to insist on a 6 or 12 month residency requirement. I think this is undesirable because it will be impossible to separate the bona fide emigrants from those who have just come to avail themselves of the service.

In a series of criminal procedure decisions, the Supreme Court extended protection to the accused. In 1956, in *Griffin v. Illinois*, the Supreme Court held that an accused person was entitled to a free transcript to enable him to appeal. In *Gideon v. Wainwright*, the Court held that accused persons had a right of counsel in all felony cases. In *Douglas v. California* (1963), the Supreme Court held that a state could not require a showing of merit of the defence from the poor while not requiring this showing from the affluent in providing counsel.

Commentators began to urge that these decisions be extended to the civil law. This seemed to be about to occur when the Supreme Court decided *Boddie v. Connecticut* (1971). In that case, Connecticut refused to provide legal aid for a divorce. The Court held, per Mr. Justice Harlan, that the requirement of fees from the indigents effectively excluded them "from the only forum effectively empowered to settle their disputes". This case is of little or no value in Canada since most, if not all, provinces provide legal aid for divorces.

Two years after the decision in *Boddie*, the Supreme Court beat a
retreat in *Re Kras*. Mr. Kras was a life insurance agent for Metropolitan life. He was fired by Metropolitan life when premiums he had collected were stolen from his home and he was unable to pay Metropolitan the $1000 he owed. He diligently sought work in New York, but because of unfavourable references from Metropolitan, he was unsuccessful.

Kras lived in a two and one-half room apartment with his wife and two children, ages 5 years and 8 months, and his mother and his mother's 6 year old daughter. The Kras family lived off $210 per month family allowance and his mother's $156 per month public assistance. Kras now sought $50 to declare bankruptcy.

Mr. Justice Blackmun gave the opinion of the six man majority:

"However unrealistic the remedy may be in a particular situation, a debtor, in theory, and often in actuality, may adjust his debts by negotiated agreement with his creditors. At other times the happy passage of the applicable limitation period, or other acceptable creditor arrangement, will provide the answer."

Perhaps realising the extreme feebleness of this approach, Mr. Justice Blackmun pointed out that "if the filing fees were paid over six months,... the required average weekly payment is $1.92. If the payment period is extended for the additional three months,... the average weekly payment is lowered to $1.28. This is a sum less than... the price of a movie and little more than the cost of a pack or two of cigarettes". Apart from the fact that there is no evidence that Kras smoked or went to the movies, precisely the same reasoning could have been used in *Boddie*. Although welfare claimants in Canada are supposed to be able to get legal aid to declare bankruptcy, the authorities that I have been able to find deny any such authority to support such a right.

*Kras* was soon followed in *Ortwein v. Schwab* upholding Oregon's

178. Ibid. at 445.
179. Ibid. at 449.
180. Supra, note 174.
$25 appellate court filing fee for judicial review of welfare administrative hearings.

In *Warth v. Seldin*, the Supreme Court used the law of standing to block the rights of the poor. Different groups of plaintiffs in *Warth* challenged the zoning practices of a city in New York claiming that they had "the purpose and effect of excluding persons of low and moderate income". The Supreme Court held that low income plaintiffs had no standing because the practices did not injure them in "any concretely demonstrable way".

It only remains to list briefly the remaining cases in which the Supreme Court has failed to play the role of "constructive social engineer" that so many had planned for it. In *Dandridge v. Williams*, Maryland placed a maximum of $250 under A.F.D.C. regardless of the size of the family and regardless of need. It was argued, unsuccessfully, that this limitation discriminated unconstitutionally against large poor families. Mr. Justice Stewart, giving the opinion of six members of the Court, stated:

"...the constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."

In *San Antonio Independent School District v. Rodriguez*, half the financing of the Texas School system came from property taxes. The grievers argued that the property tax system made for an unequal school system, since the poor areas had a low tax base. The District Court held that wealth is a "suspect" classification and that "education" is a fundamental right. Further, the Court held that it could only uphold the system if the system showed a compelling state interest. The Supreme Court reversed.

---

183. 422 U.S. 490 (1975) [hereinafter *Warth*].
188. *Supra*, note 186 at 487.
Mr. Justice Powell, giving the opinion of five members of the court, said that "recent studies have indicated that the poorest families are not invariably clustered in the most impecunious districts". The majority also refused to treat education as a fundamental right. "Education, of course", wrote Mr. Justice Powell, for the majority, "is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying that it is implicitly so protected".

In *Maher v. Roe*, by a majority of 6-3, it was held that Connecticut Welfare Department's decision not to use medicaid funds for abortion was not unconstitutional. In *Harris v. McRae*, the Court upheld the constitutionality of the Hyde amendment which withdrew federal reimbursement for abortions performed on Medicaid. The Court characterized the right to have an abortion as a "liberty" rather than as a fundamental right.

One final case that deserves mention is *Wyman v. James*. In that case, the claimant, who was in receipt of A.F.D.C. benefits, had her benefits cut off because she refused to let social workers, who wanted to make a home visit, enter her apartment. The social workers did not have a warrant. A three judge district court held the purported search illegal. The Supreme Court reversed this decision by 6-3. Mr. Justice Blackmun, writing for the majority, held that since there was no forcible entry or snooping and the purpose of the visit was rehabilitative, there was no need for a warrant. If a genuine separation existed between rehabilitative social workers and social workers who are trying to detect fraud, the decision would make some sense, but this is a distinction we resolutely refuse to make.

190. Ibid. at 23.
191. Ibid. at 35.
There is painfully little that we can learn from the United States Supreme Court in this area. The principal lesson we should learn is that courts are not equipped to deal with social problems, such as welfare, education and the civil liberties of the poor.

IV. CONCLUSION
I propose to state my conclusions in point form.

1. Neither in Canada nor the United States has there been a major breakthrough in the field of income maintenance. *Goldberg v. Kelly*\(^{197}\) may be the strongest candidate but its limitations are severe.\(^{198}\) The cases in the U.S. beginning with *Griffin v. Illinois*\(^{199}\) seem desirable until it is remembered that the indigent may be under a financial obligation to pay for the services.\(^{200}\)

2. In Canada, the *Silano*\(^{201}\) case put welfare claimants in a worse position.

3. In the Nova Scotia trilogy,\(^{202}\) *Vincer*,\(^{203}\) *Bibi Alli*,\(^{204}\) *King*\(^{205}\) and *Bregman*,\(^{206}\) the plaintiffs were no better off after expensive hearings.

4. In *Tetreault-Gadoury*,\(^{207}\) the Federal Court of Appeal added, quite unnecessarily, to the benefits paid to persons reaching the age of 65.

5. The *Hebb*\(^{208}\) case seems unlikely to prove of great importance,

\(^{197}\) Supra, note 146.

\(^{198}\) See O'Neil *supra*, notes 150–1 and Titmuss *supra*, note 152.

\(^{199}\) Supra, note 170.

\(^{200}\) In *Fuller v. Oregon* 417 U.S. 40 (1974) the Supreme Court upheld a State scheme to recover expenses from a convicted defendant.

\(^{201}\) Supra, note 72.

\(^{202}\) *Boudreau, supra*, note 65 and *Phillips, supra*, note 66.

\(^{203}\) Supra, note 117.

\(^{204}\) Supra, note 120.

\(^{205}\) Supra, note 133.

\(^{206}\) Supra, note 114.

\(^{207}\) Supra, note 104.

\(^{208}\) Supra, note 84.
since prosecutions are not normally brought in these circumstances.

6. The Schacter\textsuperscript{209} decision is still under appeal and it is too early to offer any kind of final verdict. It must also be remembered that whatever benefits are given under the Schacter principle, these benefits will have been given in the context of massive cuts in unemployment insurance. These include the withdrawal of any payment from the exchequer, longer disqualification periods (an increase from 6–12 weeks), longer qualifying periods, etc.

7. The decision in Symes\textsuperscript{210} benefits the wealthy at the expense of those with moderate and low incomes.

But more serious than all these decisions is the fact that judicial action makes it virtually impossible for welfare recipients to participate in the judicial process. By way of contrast, when lawyers lobby politicians this is an activity in which the disadvantaged can participate. Ultimately, the exclusion of the disadvantaged from the process of demanding change is the most tragic feature of the Charter lottery.

\textsuperscript{209} Supra, note 100.

\textsuperscript{210} Supra, note 135.