Enforcing the Human Rights of the Poor

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"The law in all its majestic equality forbids the rich
as well as the poor to sleep under bridges, to beg
in the streets and to steal bread"[1]

I. INTRODUCTION

Human rights concerns have in recent years taken a much more prominent place in our jurisprudence and in the attention of the public directed to legal issues. There seem to be at least four inter-related reasons for this. The first is the developing recognition that Canada is a culturally, racially and ethnically diverse country and that practices which interfere with the opportunities of members of minority communities to participate fully in the life of the country are unacceptable. The second is the influence of the *Canadian Charter of Rights and Freedoms*[2] and in particular (though not exclusively) section 15[3] of the *Charter*. The third, also a "legal" influence, is the recent series of decisions in the Supreme Court of Canada dealing directly with various human rights laws in Canada.[4] A fourth troubling influence has been the extent of resistance to and, in some cases, public backlash against, the recognition of these important rights and attempts to extend their reach.

These influences inform, in a general way, our understanding of the role played by human rights issues in weaving a part of the fabric of Canadian life. They do not, however, offer immediate or self-evident understandings of the ways in which such issues are relevant to the poor. At this early point, a disclaimer is required. I recognize that the application of human rights laws to issues of poverty is, at best, a modest and limited prescription for the problem. My thesis, however, is that such applications can make contributions which have largely gone unpursued. Such understandings require a greater effort at extracting meaning from these influences and concentrating them in specific areas of inquiry. I attempt some of this extraction and concentration in this paper.

I propose to address three aspects of the relationship between human rights law and poverty. The first is the apparent lack of congruence between the structure of human rights laws, on the one hand, and poverty on the other. Within this discussion I will attempt to identify ways in which the situation of Canada's poor, in fact and in spirit, can be seen to correspond with the situation of those who are disadvantaged and liable to be exposed to discrimination. This aspect is addressed in Part II — Who are the Poor?

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1. By Anatole France, quoted in J. Cornos, *A Modern Plutarch* (London: Butterworth, 1928) at 27.

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

3. This has become even more evident since the decision of the Supreme Court of Canada in *Law Society of British Columbia* v. *Andrews*, [1989] 1 S.C.R. 21.

4. The most significant of these decisions have been *Ontario Human Rights Commission and Theresa O'Malley (Vincent)* v. *Simpson Sears Ltd.,* [1985] 2 S.C.R. 536, *Bhinder and the Canadian Human Rights Commission* v. *Canadian National Railway,* [1985] 2 S.C.R. 561, *Janzen and Govereau* v. *Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, and *Brooks* v. *Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219.

Second, I will address some important distinctions between the general philosophy of enforcing human rights and a philosophy more relevant to the poor. This discussion appears in Part III — Human Rights Law as a Vehicle for Addressing Poverty Issues.

Finally, I will review two areas of law where some recent developments offer the prospect that a more relevant philosophy is emerging — the potential application of "adverse effect" discrimination to aspects of poverty, and the importance of the extension of human rights coverage to the delivery of government services. This discussion appears in Part IV — The Reach of Human Rights Law to Poverty Issues. I conclude with a brief and, by then, self-evident, agenda for poverty lawyers and human rights agencies and a tentative orientation for decision-makers.

I add this caveat. Much of what is addressed in this paper deserves consideration from the perspective of the *Charter*. Some of that consideration appears in portions of the paper where approaches to human rights issues are substantially informed by (or have informed) approaches developed in *Charter* litigation. It will be evident that the reach of the *Charter* sometimes coincides with (though hardly comfortably), and, in some cases, exceeds the reach of human rights laws. In other respects human rights laws are more pervasive. Consistent with my mandate, however, I have left to others, at least for now, the *Charter* perspective on these important questions.

II. WHO ARE THE POOR?

Much has been written on the criteria to be used in determining who are Canada's poor. Economic criteria are most commonly used. Statistics Canada produces a "poverty line"[5] or "low income cut-off" using primarily budget-based criteria. It is commonly regarded as the "official" poverty line in Canada.[6] Other poverty lines are developed by the Canadian Senate and the Canadian Council on Social Development (CCSD), using what are known as "relative income" criteria.[7]

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5. While Statistics Canada does not refer to a "poverty line", this is the common phrase and the one used by the National Council of Welfare when referring to Statistics Canada's cut-offs. See, for example, *1987 Poverty Lines: Estimates by the National Council of Welfare* (Ottawa: Department of Supply and Services, 1987) at 1.

6. It is based on a determination of the number of households in Canada estimated to have been required to spend more than 58.5% of their income on the basic necessities of food, clothing and shelter. This is known as the "budget" approach. The method by which this line is established is described in "Revision of Low Income Cut-offs", in Statistics Canada, *Income Distributions by Size in Canada,* 1980 (Ottawa: Minister of Supply and Services Canada, 1982) at 120ff.

7. These organizations estimate the number of households whose income falls below an amount which is a portion of the average income for a household in Canada. For example, the CCSD poverty line is set at 50% of the average of all household incomes in Canada. Because of the different approach taken by these latter organizations, their estimates of the number of people in Canada who live in poverty traditionally exceed the Statistics Canada estimates. These approaches are described in clear terms in D.P. Ross, *The Canadian Fact Book on Poverty* (Toronto: James Lorimer, 1983) at 2-11. Other measures of poverty based on income inequality may be found in M. Gunderson, *Economics of Poverty and Income Distribution* (Toronto: Butterworths, 1983) c. 4.

The criteria used by Statistics Canada and these other agencies are relatively easy to apply, provide a basis for comparison over a period of years and across various categories of the Canadian population, and address the key economic aspect of poverty. The data have revealed significant information about the features of poverty in Canada. I propose to extract, from analyses of the data, certain features relevant to issues of human rights law.

It must be emphasized, however, that economic issues are not the only ones which are important to the issues of poverty and the situations of Canada's poor. Some argue that this emphasis is itself a major part of the problem. Hathaway introduced a recent article by saying:[8]

> *It is argued here that the legislative characterization of poverty as an economic condition is a pernicious effort to disguise the structural causes of poverty.*

Despite its own considerable orientation toward the measurement of poverty by an income criterion, the Canadian Council on Social Development was reluctant to define poverty in economic terms alone. In 1973 the CCSD identified four criteria or anti-poverty policy objectives. These were: (1) eradicating wide disparities in living standards; (2) equalizing opportunities that permit people to improve their quality of life; (3) increasing work options; and (4) increasing the participation of people in the decisions that affect their lives. These objectives taken together define the dimensions of poverty; low-income status is only one dimension.[9] This orientation is important, and bears a remarkable similarity to the aspirational features of human rights laws in Canada.[10]

As Miller and Roby introduced it in an important work in 1970: "Poverty has become the acceptable way of discussing the more disturbing issue of inequality ..."[11] While this may be true in a general sense, its relevance to this inquiry depends on the extent to which this "more disturbing issue of inequality" displays itself in the language and concepts of human rights laws. The short answer is that beneath the poverty line and beneath the surface of poverty, even identified in the economic terms referred to above, patterns of inequality emerge which are directly relevant to human rights categorizations.

In his most recent analysis of the characteristics of low income families, Ross sought to identify the characteristics which were associated with a higher incidence of poverty.[12] The incidence of poverty is the likelihood that a person or family with a certain characteristic or characteristics will have an income below the poverty line. For 1979, the overall incidence

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8. J. Hathaway, "Poverty Law and Equality Rights — Some Preliminary Reflections" (1985) 1 J.L. & Soc. Pol. 1.

9. *Ross, supra* note 7 at 1, 45. These non-economic measures of poverty have been recognized by others, although the measurement problems make them unusable statistically. See B.R. Schiller *The Economics of Poverty and Discrimination,* 4th ed. (Toronto: Prentice Hall, 1984).

10. This similarity is highlighted *infra* at 10-11.

11. S.M. Miller, 14 P.A. Roby, *The Future of Inequality* (New York: Basic Books, 1970) at 3.

12. *Ross, supra* note 7, c. 2. This analysis includes 1969 and 1979 statistics, but the extracts in the text relate to the 1979 data. An analysis of the same data by Gunderson, *supra* note 7, produced virtually identical observations.

of poverty for Canada, according to Statistics Canada, was 10.4% for a family and 32.3% for an unattached individual. Ross found that there was a greater likelihood (as shown by the bracketed probabilities) of being a low income family or a low income unattached individual in 1979 (that is, with an income below the poverty line) if the family or individual was:

(a) resident in the Atlantic provinces (13.3%, 37.8%), or Quebec (11.4%, 39.3%);

(b) living in an area whose population was between 15,000 and 99,999 (12.0%, 36.0%);

(c) or where the household head was:

(1) between the age of 65-69 (15.5%, 44.3%) or over 70 (14.4%, 52.6%);

(2) not in the labour force (26.6%, 59.6%); or

(3) female (36.0%, 38.7%).

It was five times more likely that a poor family would be headed by a female (36.0%) than a male (7.6%).[13] As well, two thirds of unattached individuals were female.[14]

When certain of these features or characteristics are combined, the disparity is even more dramatic. For example, Ross found that in the case of elderly unattached females (over 70 years of age), there is a 66% chance that they will have had an income below the Statistics Canada poverty line.[15] He also found that 38% of all poor families are single parent families,[16] and that 75% of all single parent poor families are headed by women.[17]

Gunderson observed these features as well and concluded in these rather offensive terms:

> *This highlights the poverty problem among the aged and among unattached females. The latter problem is particularly interesting; unattached females have a high incidence of poverty, as do female-headed families, raising the spectre of marriage as a necessary vehicle for families to escape poverty!*[18]

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13. *Ibid.* at 13.

14. *Ibid.* at 27.

15. *Ibid.* at 20.

16. *Ibid.* at 27.

17. *Ibid.* The use of CCSD criteria would cause many of these figures to be even higher.

18. *Ibid.* at 65. I regard this as an offensive passage, not only because it seems to offer as a solution to the plight of these women an undignified forced choice as to marital status, but also because it ignores the consideration and hopefully the redress, of the characteristics of a society in which such a degree of economic disparity can be visited upon so large a portion of the population.

Gunderson found virtually no difference either among families or among unattached individuals, in the incidence of poverty of Canadian born when compared with immigrants.[19] He did, however, note the incidence of poverty among individuals and families where the household head had achieved a level of education which did not exceed elementary school (51% of individuals, 16% for families).[20] Overall, 40% of Canada's families and unattached individuals fell into this category in 1979.[21]

The pattern which emerges is that Canada's poor are concentrated among the elderly, women, the poorly educated and, particularly, among single parent families headed by women. When these characteristics are combined, the outcome, in terms of the likelihood of being impoverished, is staggering.

III. HUMAN RIGHTS LAW AS A VEHICLE FOR ADDRESSING POVERTY ISSUES?

The emphasis on economic criteria as the determinants of who are Canada's poor has at least two implications relevant to human rights laws. The first implication is that other "non-economic" aspects of both poverty and human rights are made secondary considerations to "economic" aspects of poverty and human rights. Associated with this implication is the fact that, as with poverty, human rights orientation is substantially focussed on the economic consequences of discrimination.

The second implication, flowing from the first, is that this emphasis has the potential to direct our attention, primarily if not exclusively, to economic aspects of human rights laws as a potential source of redress of poverty. Further consideration of this economic emphasis discloses the extent to which human rights laws are modelled on traditional liberal notions of equality of opportunity, an approach to equality which is poorly suited to the situations of a vast number of Canada's poor.

As to the first implication, there is a surprising irony. A reading of the introductory words of many of the human rights acts promulgated in Canada[22] would give the reader an impression that the emphasis in the legislation will be related to all aspects of the human

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19. *Ibid.* at 62-3.

20. *Ibid.*

21. *Ibid.*

22. Some, though not all, human rights statutes in Canada include a Preamble or an "Objects" or "Purposes" section. See *Canadian Human Rights Act*, S.C. 1976-77, s. 2, as amended by S.C. 1980-81-82-83, c. 143, s. 1 and S.C. 1980-81-82, Sch. IV, s. 1; *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2 (Preamble); *Saskatchewan Human Rights Code*, S.S., 1979, c. s-24.1, s. 3; *Charter of Rights and Freedoms,* R.S.Q. 1977, c. C-12 (Preamble); *Human Rights Act*, R.S.N.B. 1973, c. H-11; *Human Rights Act,* S.N.S. 1969, c. 11, (Preamble) as amended by S.N.S. 1979, c. 65, s. 1 and S.N.S. 1980, c. 51, s. 1; *Prince Edward Island Human Rights Act*, S.P.E.I. 1975, c. 72 (Preamble); *Newfoundland Human Rights Code,* R.S.N. 1970, c. 262 (Preamble); *Northwest Territories Fair Practices Ordinance,* R.O.N.W.T. 1974, c. F-2; *Yukon Territory Fair Practices Ordinance,* Y.O. 1963 (2nd) c. 3.

person in the same way that the Canadian Council on Social Development statement of objectives sought a broader definition of poverty.[23] A typical example is the Preamble to the Ontario Human Rights Code:

> *WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;*
>
> *AND WHEREAS it is public policy in Ontario that every person is free and equal in dignity and rights without regard to race, creed, colour, sex, marital status, nationality, ancestry or place of origin;*
>
> *AND WHEREAS these principles have been confirmed in Ontario by a number of enactments of the Legislature;*
>
> *AND WHEREAS it is desirable to enact a measure to codify and extend such enactments and to simplify their administration;*[24]

The preamble to the 1981 revision of the Ontario Code is even more striking. It reads in part:

> *AND WHEREAS it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province.*[25]

This concept of the "inherent dignity and equal and inalienable rights of all members of the human family" is, however, a limited one. In the 1980 Preamble the limitation is imposed by a list of grounds, set out in the Preamble as well as in the Code, on the basis of which discrimination is prohibited. In the 1981 Preamble these "inalienable rights" are limited to such discrimination as is "contrary to law".

This limitation to the reach of equality within human rights laws imposes significant limitations on the poor. To begin with, this structure of articulated *bases* or *grounds* upon which discrimination is prohibited bears no evident relationship with the situations of the poor. The potential redress is based on unequal treatment associated with certain characteristics or association with particular groups, not on unequal circumstances.

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23. *Supra* note 10 and accompanying text.

24. R.S.O. 1980, c. 340. This preamble was quoted by McIntyre J. in *O'Malley, supra* note 4 at 546-7 and referred to as having enunciated a broad policy of the Ontario Code which could only be given effect with "an interpretation which will advance its broad purposes."

25. S.O., 1981, c. 53.

Second, the model of human rights laws in this country is largely based upon the objective of providing equality of opportunity. This orientation is specifically recognized in the preamble set out above and in the human rights legislation of other Canadian jurisdictions. This philosophy is largely reinforced by reference to the *activities*, public and private, in which discrimination is prohibited. These activities fall into four categories: (a) Notices, Signs, Symbols, Advertisements and Messages; (b) Goods, Services, Facilities and Accommodations Customarily Available to the General Public; (c) Employment; and (d) Rental and Purchase of Real Property.[26]

Some of the prohibited grounds and some of the activities in which articulated discrimination is prohibited apply to the poor. This is, in my view, largely coincidental. Human rights legislation does not focus in any direct way on the degree to which the "inherent dignity and equal and inalienable human rights" of poor people are limited or denied because of poverty.

26. These are the broad categories identified in W.F Tarnopolsky & W. F. Pentney, *Discrimination and the Law* (Toronto: de Boo, 1985).

Indeed, there is no category which prohibits discrimination on the basis of poverty.[27] This may be put more forcefully. Frank Scott said in 1949:[28]

> *We are more aware today of the foolishness of pretending that a man is "free" when he is unemployed and without income through no fault of his own, or when he cannot pay for good health or good education for his children.*

It is no less true today. Robert Samek stated in 1982:[29]

> *It is idle and obscene to talk about fundamental rights unless we acknowledge the absolute priority of fundamental needs.*

A further implication of the economic orientation to poverty is that it may result in disregard of a need for greater state involvement in the provision of these "fundamental needs". This is best seen in the way that human rights legislation constructs a model of equality based on freedom *from* a variety of destructive forms of discrimination. Poverty plays virtually no part in the formulation of the "equal opportunity" model[30] or in the ways in which this brand of equality is delivered. The opportunity to seek employment or housing without being discriminated against has little meaning when, as a prospective employee, you are so poorly educated that you qualify for only a few jobs or when, as a prospective tenant, you are too poor to pay the rent demanded by the landlord.

The point here is that the main themes of human rights law are of only tangential value in offering solutions to the serious problems of the poor. The legislation concentrates on economic aspects of human rights in areas of economic life that are only occasionally relevant to the situations of Canada's poor, using a formulation of equality which rarely reaches the needs of the poor, even in economic terms. The law largely addresses the "inherent dignity and equal and inalienable rights" of the non-poor.

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27. There are some important possibilities, which I discuss in PART IV, *infra,* and some close calls. One example is s. 11D of the *Nova Scotia Human Rights Act*, which provides:

    "No person shall deny to, or discriminate against an individual or class of individuals, in providing or refusing to provide occupancy ... because the individual or class of individuals receive income maintenance payments from any level of government or maintenance payments under the terms of a court order or separation agreement."

28. F.R. Scott, "Dominion Jurisdiction Over Human Rights and Fundamental Freedoms" (1949) 27 Can. Bar Rev. 497 at 507.

29. R.A. Samek, "Untrenching Fundamental Rights" (1982) 27 McGill L.J. 755 at 773. I am indebted to Martha Jackman for bringing together the views of these two thoughtful scholars in her extensive analysis, "The Protection of Welfare Rights Under the Charter" (1988) 20 Ottawa L. Rev. 257 at 265.

30. As Dickson C.J.C. said in *Janzen, supra* note 4 at 69: "It is one of the purposes of anti-discrimination legislation to remove such denials of equal opportunity." With respect, I would say that this is the *predominant* purpose of the legislation.

IV. THE REACH OF HUMAN RIGHTS LAW TO POVERTY ISSUES[31]

I do not think the prospects are quite as bleak as my conclusion to the last section would suggest. In particular I propose to discuss two "legal" themes in human rights law, in some respects potentially inter-related, which offer real prospects for redress of some of the disadvantages of the poor. They are: i) the possibilities presented by the use of "adverse effect" as a basis for establishing discrimination within the existing categories of human rights laws, and ii) the recent attention being given to the reach of human rights laws to the provision of government services and facilities.

Before discussing these areas it is important to emphasize, if only briefly, the importance which structural features of human rights laws can play in addressing, in particular, the rights of the poor. The first is the significance of human rights enforcement by public officials. As a general rule, the receipt, processing, investigation, mediation and prosecution of complaints under human rights legislation are undertaken by public officials employed by or through the human rights agency charged with jurisdiction in the matter. Access to this process of enforcement by public officials is incredibly significant for people in poor circumstances.[32]

The second feature of human rights laws which can be significant to the poor though this feature has general significance, is the potential offered by the remedial scope of the legislation. It is common for human rights statutes to authorize remedies which would not be available for other forms of civil liability and which have not commonly been awarded in *Charter* cases. These "affirmative" remedies can be of greater benefit to those who may, without a mandated action imposed upon the offender, be otherwise unable to achieve a satisfactory resolution to the dispute.

As well, recent decisions have introduced the possibility of an equivalent to "class" remedies. This is most evident in the recent decision of the Federal Court of Appeal in *Attorney General of Canada* v. *Druken et al.*[33] The Court upheld a decision of a Tribunal which had found certain Unemployment Insurance Act provisions and regulations to have discriminated against the complainants on the basis of marital status, contrary to the *Canadian Human Rights Act*. The Court refused to interfere with the Tribunal's order requiring the Canada Employment and Immigration Commission to cease applying the sections of the Act and Regulations which it found to have been a violation of the *Canadian Human Rights Ac*. In dismissing the Attorney General's argument that the Tribunal lacked jurisdiction to make such an order Mahoney J., for the Court, stated at page D/5367-8:

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31. Hathaway, *supra* note 8 presents a good introduction to this issue.

32. People who live in poverty have, at best, limited access to legal representation. Such representation is usually provided by a legal aid service or on a pro bono basis by a private lawyer. Representation provided by legal aid services is usually limited by the organization's mandate or by legislative, regulatory or organizational constraints. Given the heavy responsibilities of legal aid services to represent indigent people in the criminal justice system and, where authorized, to represent people in important family law and other civil matters, it is not often a priority of legal aid organizations to provide legal advice and representation for clients with human rights problems.

33. (1988), 9 C.H.R.R. D/5399 (Fed. C.A.).

> *In my view, such a limitation on the tribunal's power to make an order is inconsistent with paragraph 41(2)(a) of the* Human Rights Act *which expressly authorizes the tribunal to order that measures be taken "in order to prevent the same or similar practice from occurring in the future." That is not intended only to prevent repetition of the discriminatory practice* vis à vis *the particular complainant; it is intended to prevent its repetition at all by the person found to have engaged in it.*

While it will be important in any individual case to examine the legislative authority of the tribunal to grant such remedies, it is possible to litigate these issues and obtain human rights entitlements for whole classes of people, including prospective claimants similarly situated to the litigant in the specific case. This is of particular importance to the poor for at least two resons. The ability, resources and resolve of litigants to pursue case after case is limited (and is commonly more limited for poor litigants) and the opportunity to have human rights claims resolved for whole classes of litigants makes possible and meaningful the achievement of real human rights for the whole class. Second, when it is recognized that many human rights concerns for the poor are liable to be directed at the delivery of services by government agencies, the ability of a dedicated litigant to see such services required to be delivered in accordance with human rights laws, not only for herself but for others, may strengthen the commitment of a disadvantaged person to achieving fair and dignified treatment.

1. Adverse Effect Discrimination

In a unanimous decision in *O'Malley*, the Supreme Court of Canada resolved two fundamental issues of importance to human rights law in Canada.[34] The Court found to constitute discrimination those practices which, though unintended, have an adverse effect on a person on the basis that she possesses certain characteristics or is a member of a particular group with respect to which discrimination is unlawful under the relevant statute. As to the first issue, whether intent to discriminate must be proved by the complainant, McIntyre J., for the Court said at page 549-50:

> *To take the narrower view and hold that intent is a requirement under the Code would seem to be to place a virtually insuperable barrier in the way of a complainant seeking a remedy. It would be extremely difficult in most cases to prove motive, and motive would be easy to cloak in the formation of rules which though imposing equal standards, could create, as in* Griggs *v.* Duke Power Co.*, 401 U.S. 424 (1971), injustice and discrimination by the equal treatment of those who are unequal (*Dennis *v.* United States*, 339 U.S. 162 (1950), at p. 184). Furthermore, as I have endeavoured to show, we are dealing here with consequences of conduct rather than with punishment for misbehaviour. In*

34. *Supra* note 4. These developments appear to be applicable throughout Canada. In *O'Malley* the court made reference to the preamble to the *Ontario Human Rights Code* (quoted at 10-11) as laying a broad purposive basis for its interpretation. A similar interpretation was adopted in *Bhinder* even though the statute in question, the *Canadian Human Rights Act,* does not have a preamble.

> *other words, we are considering what are essentially civil remedies. The proof of intent, a necessary requirement in our approach to criminal and punitive legislation, should not be a governing factor in construing human rights legislation aimed at the elimination of discrimination.*

The second aspect of the decision relevant here is the consideration of adverse impact. McIntyre J. said at page 551:

> *On the other hand, there is adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all its employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties or restrictive conditions not imposed on other members of the work force. For essentially the same reasons that led to the conclusion that an intent to discriminate was not required as an element of discrimination contravening the* Code *I am of the opinion that this Court may consider adverse effect discrimination as described in these reasons a contradiction of the terms of the* Code. *An employment rule honestly made for sound economic or business reasons, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply.*

The court's statements that discrimination may exist without proof of intent, that the equal treatment of unequals could constitute discrimination and that apparently neutral rules having an adverse effect may constitute discrimination offer great potential to redress inequality. The relevance to poverty law is unmistakable. There is no shortage of unequal treatment meted out to the poor, much of it unintended, but no less surely and painfully suffered. Some of this unequal treatment results by virtue of the apparently equal treatment of people who are in distinctly unequal situations. Much of it is liable to appear facially neutral. Where such treatment can be identified as being delivered along lines which are prohibited by the relevant human rights law, redress becomes possible.

The cases in which this approach was developed are employment discrimination cases. While the employment context is important for people in poverty, scope for the application of the concept of adverse effect discrimination in relation to poverty issues is likely to be far greater in other areas, such as housing and the provision of services, particularly government services.[35] Indeed, where such discrimination, even though unintended, is visited on the poor in cases where the particular service is either provided by

35. In Tarnopolsky, *supra* note 26, Pentney intimates at 24 that the "adverse effect" aspect of the cases and the reasonable accommodation issue have application to the provision of services. Such a view seems well-founded given that there is no apparent distinction between discrimination in employment and discrimination in other activities which would justify circumscribing the application of adverse effect discrimination.

government or not at all, there seems to be an even more compelling basis for using the "adverse effect" criterion.[36]

The possibilities for redress of structural aspects of poverty through the prohibition of inintentional, adverse effect discrimination seem to be quite significant. Earlier in the paper I set out some categories of people who experience a greater incidence of poverty than the rest of the Canadian population. Some of these groups — women, single parents and the elderly — correspond with common categories on the basis of which discrimination is prohibited. Many government programs, neutral on their face, have an adverse impact on these groups. Where such programs attract human rights scrutiny they may be found to be in violation of the relevant human rights law. Coupled with the potential for "affirmative" and "class-based" remedies, significant and imaginative possibilities exist for the redress of discrimination presently visited on the poor.

2. The Provision of Government Services

For poor people, access to government services and programs is likely to be a more significant feature of human rights laws than the elimination of barriers to equal opportunity. Poor people rely substantially on certain government programs — the so-called social safety net of our country — such as unemployment insurance, workers' compensation, public housing, social assistance, special employment retraining programs and the like. It is, therefore, important to consider the extent to which human rights laws guarantee equality and freedom from discrimination (even on the limited terms of the human rights laws themselves), in the delivery of these services and programs.

Until recently this issue had received little judicial consideration.[37] A number of recent cases have, however, brought the issue more within the mainstream of human rights consideration. Two issues are raised in these cases and it is helpful to consider issuesseparately. The first issue is whether a particular government program constitutes a "service" within the meaning of the human rights law under consideration. The second is whether the "service" can be said to be one which "is offered to the public" or, in some

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36. While the issues addressed in *Andrews, supra* note 3, relate to the meaning of equality in S. 15 of the *Charter,* Wilson J. and McIntyre J. both recognized in their reasoning the plight of certain disadvantaged and powerless groups in society. Again, while the disadvantaged group in question was not the poor (it was non-citizens or, more accurately non-citizen prospective lawyers) the Court's recognition of the disadvantages of a "discrete and insular minority" (a peculiarly American turn of phrase borrowed from a decision of the U.S. Supreme Court in *United States* v. *Caroline Products Co.* 304 U.S. 144 (1938)), at least in the historical context of the phrase itself, is at least as applicable to the poor as it is to non-citizens.

37. In Tarnopolsky, *supra* note 26 Pentey indicated that by 1985 only three reported cases had considered the question. They were *Lodge et al.,* v. *Minister of Employment and Immigration,* [1978] 2 F.C. 458 (Fed. Ct. T.D.), rev'd [1979] 1 F.C. 775; (1979) 25 N.R. 437 (Fed. C.A.); *Bailey et al.,* v. *Minister of National Revenue* (1980), 1 C.H.R.R. D/193 (Cumming); and Gomez v. *City of Edmonton et al.* (1982), 3 C.H.R.R. D/882 (Alta Bd. of Inquiry).

legislative formulations, is one "to which the public is customarily admitted."[38] The particular program must satisfy both criteria before it will attract human rights scrutiny.

a) "Services"

Virtually all of Canada's human rights laws extend their scope to the delivery of "services".[39] There are important principles which justify the easy inclusion of government programs within the definition of "services" in these statutes.[40] Despite these principles the interpretive approach taken to determine whether government programs constitute "services" for human rights purposes has largely followed traditional lines. Even the traditional approaches, however, lead to a generous reach for the legislation in enveloping government programs within human rights scrutiny.

The traditional approach has begun with a consideration of the meaning of "services" in a more general, non-governmental, context and has then introduced the features of the government program into this context. In the non-governmental context "services" has generally been given a normal, natural interpretation by courts and tribunals, although restrictive definitions have been occasionally adopted. One important example is a decision of the Ontario Court of Appeal in *Bannerman* v. *Ontario Rural Softball Association*.[41] Houlden J.A. was of the view that the Association's organized softball leagues were not a "service" within the meaning of that phrase in the *Ontario Human Rights Code*. In taking this view, he relied on a comment made by Martland J. in *Gay Alliance Toward Equality (GATE)* v. *Vancouver Sun*[42] which suggested a quite limited view of the reach of human rights laws.

The *GATE* case dealt with the refusal of the Vancouver Sun to publish a classified advertisement submitted to it by the complainant. Writing for the majority, Martland J.

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38. The questions are potentially inter-related in that the provision of a program to a part of the public may be a key factor in determining whether the program is a "service". This most extensive analysis is that of Donna Grescher, 'Why Chambers is Wrong: A Purposive Interpretation of Offered to the Public' (1988) 52 Sask. L. Rev. 161. See as the approaches in some recent cases, most notably *Bailey, supra* note 38 and *Chambers* v. *Saskatchewan (Department of Social Services* (1988), 9 C.H.R.R. D/5181 (Sask. C.A.).

39. The relevant statutes are cited, *supra* at note 22. See specifically Canada, s. 5; British Columbia, s. 3; Alberta, s. 3; Saskatchewan, s. 12(1); Manitoba, s. 3(1); Ontario, s. 2(1); Quebec, s. 12; New Brunswick, s. 5(1); Nova Scotia, ss. 3(a), 11A(1)(a); Prince Edward Island, s. 2(1); Newfoundland, s. 7(1); Yukon Territory, s. 4(1).

40. In particular, the very concept of government is oriented to the provision of services to its citizens. This is emphasized in the decision of Cumming in *Bailey, supra* note 37, discussed *infra*, at note 61 and accompanying text and in Greschner's analysis, *supra* note 38 at 180-4. Indeed, the interrelationship of "services" and "offered to the public" referred to above is most evident when one discusses the provision of government services, given the obviously "public" nature of government.

41. (1979), 102 D.L.R. (3d) 303 (Ont. C.A.). This case is instructive in that the majority's reliance on the Martland illustrations is an approach which often appears in the occasional cases which propose a narrow scope for government "services".

42. (1979), 97 D.L.R. (3d) 577 (S.C.C.).

dismissed the complainant's appeal on the basis that the newspaper could legitimately refuse to publish the advertisement if it could show "reasonable cause". Martland J. added this comment at page 590:

> *In my opinion the general purpose of s. 3 was to prevent discrimination against individuals or groups of individuals in respect of the provision of certain things available generally to the public. The items dealt with are similar to those covered by legislation in the United States, both federal and state. "Accommodation" refers to such matters as accommodation in hotels, inns and motels.* "Services" refers to such matters as restaurants, bars, taverns, service stations, public transportation and public utilities. *"Facility" refers to such matters as public parks and recreational facilities. These are all items "customarily available to the public". It is matters such as these which have been dealt with in American case law on the subject of civil rights. (Emphasis added)*

This set of illustrations has received attention out of all proportion to its significance, both to the decision in *GATE* and to the trends in human rights interpretation since 1979. As to the first point, Wilson J.A., in dissent in *Bannerman*,[43] pointed out that this comment was not relevant to the decision, since the basis of the decision assumes that the activity in question was a "service" under the British Columbia *Human Rights Code*. Otherwise there would have been no need to consider the issue of the newspaper's "reasonable cause" for refusing to publish the classified ad.

As well, the sentiment expressed in the Martland passage has been effectively rejected by the Supreme Court of Canada itself in *Insurance Corporation of British Columbia* v. *Heerspink*.[44] In any event, the Supreme Court of Canada has rejected the restrictive approach to the interpretation of human rights laws implicit in the Martland illustrations.[45]

It might be assumed that this would have disposed of the tendency of courts to rely to any extent on the comment of Martland J. in the passage quoted above. With respect to government programs, this is largely, but not entirely true. For example "services" have been held to include visitor facilities in hospitals,[46] unemployment insurance,[47] the federal income

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43. *Supra* note 41 at 307-8.

44. (1982), 137 D.L.R. (3d) 219. In this case the Supreme Court held, *inter alia,* that the provision of insurance was a "service" under the *British Columbia Human Rights Code.* Martland J. dissented.

45. See, for example, *O'Malley, Bhinder, Janzen and Brooks, supra* note 4.

46. *Peters* v. *University Hospital Board* (1983), 4 C.H.R.R. D/1464 (Sask. C.A.).

47. *Druken, supra* note 33.

tax assessment process,[48] social assistance programs,[49] the federal immigration service,[50] the issuance of hunting licenses[51] and the provision of police services.[52]

On occasion, however, quite limited interpretations have been adopted. For example, "services" has commonly been held not to include schools[53] and universities.[54] In a development of more significance to the central aspects of this paper two courts have recently held that workers' compensation decisions or assessments do not come within the scope of human rights scrutiny.

One case is *Jenkins* v. *Workers' Compensation Board of Prince Edward Island*[55] in which McQuaid J., for the Court, embraced the Martland illustrations.[56] The potentially more significant case is *British Columbia (Workers' Compensation Board)* v. *Khun-Khun* et al.[57] This decision poses a very real threat to the authority of provincial human rights

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48. *Bailey, supra* note 37.

49. *Chambers, supra* note 38.

50. *Re Singh* (1989), 10 C.H.R.R. D/5501 (Fed. C.A.). This was a reference to the Court on a number of questions, including the issue of whether the Canadian Human Rights Commission had jurisdiction to entertain a complaint relating to the administration of the Immigration Act. In dismissing the government's objection Hugesson J., for the Court, said at p. D/5510, "It is enough to state that it is not by any means clear to me that the services rendered, both in Canada and abroad, by the officers charged with the administration of the Immigration Act, 1976, S.C. 1976-77, c. 52, are not services customarily available to the public." See, however, *Lodge, supra* note 37.

51. *Rogers* v. *Newfoundland (Department of Culture, Recreation and Youth)* (1989), 10 C.H.R.R. D/5794 (Verge).

52. *Gomez* v. *City of Edmonton et al.,* (1982), 3 C.H.R.R. D/882 (Alta. Q.B.); *Akena* v. *City of Edmonton et al.,* (1982) 3 C.H.R.R. D/1096 (Alta. Q.B.).

53. Re *Winnipeg School Division No. 1 and MacArthur* (1982), 133 D.L.R. (3d) 305 (Man. Q.B.) and, more recently, *New Brunswick School District No. 15* v. *New Brunswick (Human Rights Board of Inquiry) et al.,* (1989), C.H.R.R. D/5800 (N.B.Q.B.). With respect, the decision of Miller J. in this case is clearly wrong. The decision reviews much of the territory on this subject and embraces the lost cause of the illustrations of Martland J. in *GATE,* as though it continued to be the governing principle in these cases.

54. See, for example, *Beattie* v. *Acadia University* (1976), 72 D.L.R. (3d) 718 (N.S.S.C., App. Div.) and very recently *University of British Columbia* v. *Berg* (1989), 10 C.H.R.R. D/6112 (B.C.S.C.), once again with reliance on the Martland illustrations. Schools and universities appear to pose difficult questions, sometimes because the facilities are of a particularly limited nature or scope and sometimes because they are made available to only a limited portion of the public. As the following section of the paper shows, this latter argument has been dismissed in relation to various other services and ought to be rejected in the context of schools as well.

55. (1988), 9 C.H.R.R. D/5145 (P.E.I. Sup. Ct., A.D.).

56. McQuaid J. concluded this aspect of the case by saying at D/5148: "Certainly within this context it cannot be argued that the compensation scheme established by the legislature of this Province is a `service' within the parameters of section 2(1) of our *Human Rights Act*." The case was a claim for widow's benefits by an ex-wife of a deceased employee. One aspect of the decision dealt with the claimant's inability to bring her claim within the terms of the statute. The Court did not have to deal with the "service" issue in deciding the case. It is unfortunate that it chose to do so. It is hard to imagine the Court coming to the same conclusion if the legislation had disentitled blacks or women or Roman Catholics to workers' compensation.

57. (1988), 9 C.H.R.R. D/4763 (B.C.S.C.), presently on appeal.

agencies to review the actions of governments in the provision of services. In that case the complainant alleged that he had been discriminated against on the basis of his religion in terms of dress requirements while attending therapy and testing sessions at the Workers' Compensation Board's clinic. As a result of his failure to comply with the dress requirements, his benefits were cut off. The Board sought and obtained an order prohibiting the Human Rights Council from proceeding to hear the complaint. In her decision Southin J. did not address directly the issue of whether workers' compensation and the workers' compensation process is a "service". However, she precluded the application of human rights scrutiny to the workers' compensation process (and to many other provincial government administrative proccesses).[58] She stated as the issue and then decided that a review by a provincial human rights tribunal of a workers' compensation assessment would constitute judicial review of an administrative agency, a section 96 function respecting which a provincially appointed tribunal is constitutionally incompetent to perform. She stated at page D/4770:

> *I cannot persuade myself that the Legislature when it passed the* Human Rights Act *and conferred these powers intended that a member of the Council have powers which are powers of review of a statutory power of decision. To put it another way, I interpret this statute to keep it from constituting an infringement of section 96 powers. Section 14 and 17 do not apply to any person whose alleged act of discrimination was committed in the exercise of a power of decision which is subject to judicial review.*
>
> *In coming to this conclusion, I make no finding as to the applicability of the* Human Rights Act *to the Board in matters which do not fall within the ambit of judicial review, e.g. matters of employment. ...*
>
> *Thus, I make no finding as to what would be the power of the Human Rights Council if access were refused to Sikhs wearing kirpans who came to the Board's premises for reasons not part of the continuing process of a claim for compensation.*[59]

If Southin J. is right in this analysis, an enormous s. 96 barrier will be erected around substantial aspects of provincial[60] government activity. Discriminatory conduct in the administration of provincial government programs would become unreviewable within the

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58. Southin J. recognized this herself. She said at D/4765-64: "... I am of the opinion that whether [counsel for the Board's] submissions on the interpretation of Section 3 of the *Human Rights Act* be right or no, the issue I have postulated, namely, who has the power to review decisions of the Workers' Compensation Board - and perhaps other tribunals with similarly extensive legislative and administrative mandates although covering different fields — if these decisions are asserted to be contrary to Section 3 of the *Human Rights Act* is of far more profound importance."

59. Southin J. did not explain why review of the administrative acts of workers' compensation officers by a provincial human rights board (admittedly a non-s. 96 tribunal) violates s. 96 whereas review by a workers' compensation board (another non-s. 96 tribunal) would not violate s. 96. Indeed, such latter reviews are clearly constitutional. With respect, if s. 96 is to be seriously entertained as a bar to reviews by provincial human rights agencies, a more extensive analysis of the s. 96 jurisprudence is required than was provided in this case.

60. Given the operational features of s. 96 of the *Constitution Act,* federal human rights tribunals would be unaffected.

framework of provincial human rights legislation and process. This insulation would be directly applicable to government services, since it is through the delivery of services that the administration of government programs is effected. The consequences for the poor would be substantial, given poor people's reliance on government as an active support system in their lives and given that most services for the poor are delivered through provincial government agencies. New vistas in human rights scrutiny in areas of real importance to the poor would become little more than a mirage.

b) "Offered to the Public"[61]

Much of the reasoning which may establish that a government program constitutes a "service" under human rights laws is applicable to the issue of whether the service is "offered to the public", or in some jurisdictions, a service "to which the public is customarily admitted".

The best example is *Bailey* v. *Minister of National Revenue*[62] in which Chairman Cumming held that the income tax assessment process was a service "customarily available to the general public" pursuant to the *Canadian Human Rights Act*. He approached the question in this way:[63]

> *Popular sovereignty means government is to serve the people. In a modern, pluralistic country, while most goods and services are produced and provided by individuals or private groups or entities, public governments regulate economic activities and also provide goods and services. The federal government provides services to the general population. Services are provided both through legislative enactment (for example, the family allowance) and in administering its responsibilities as established by the legislation enacted by Parliament (for example, providing the appropriate information and forms to citizens to be able to obtain family allowance, as well as sending out family allowance cheques, etc.).*

This appeal to the fundamentally public nature of government has itself been reinforced in *Dolphin Delivery Ltd.* v. *Retail, Wholesale and Department Store Union, Local 580*.[64]

> Greschner makes a similar point:[65]
>
> *As a matter of political theory and reality, governments cannot offer their services to any group other than the public. Governments are the quintessential*

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61. For much of this analysis I am indebted to Donna Greschner, *supra* note 38.

62. *Supra* note 38.

63. *Ibid.* at D/213.

64. (1988), 71 N.R. 83; 33 D.L.R. (4th) 174 (S.C.C.).

65. Greschner, *supra* note 38 at 182.

> *public institution, existing only for the public good. A government* by definition *has no relationships other than public ones. When a government, any government, offers services, whether pursuant to a statute or for that matter a Cabinet order, it is offering those services for public purposes, to persons with whom it has a public relationship.*

These arguments are compelling and in my view irrefutable.

And, some views to the contrary notwithstanding, it makes no difference that the government services are made available to a limited portion of the public. In *Chambers* v. *Saskatchewan (Department of Social Services*) the Saskatchewan Court of Appeal acknowledged exactly this point. In *Chambers* the complainant, a childless unmarried man, received less social assistance than a childless married person. The Government argued that because social assistance is available to only a limited segment of the population, the program was not a service "offered to the public" and was therefore immune from human rights scrutiny. This argument had been accepted by the Board of Inquiry and had not been affected by the lower court's decision dismissing the complainant's appeal. The Court of Appeal rejected this argument and found the program to be a service "offered to the public". Vancise J.A., for the Court, reviewed and accepted the Greschner analysis and said:[66]

> *The fact that a service is offered to the public does not mean that it must be offered to all members of the public. The government can impose eligibility requirements to ensure that the program or service reaches the intended client group. The only restriction is that the Government cannot discriminate among client groups, that is, the elderly, the poor or others, on the basis of the enumerated characteristics set out in the* Code.

This analysis of "offered to the public" reaches the only possible conclusion. Otherwise, virtually every government program would be excluded from human rights scrutiny. What government program is made available to everyone? Virtually none. What is particularly relevant to this topic is that any other interpretation would *by definition* insulate from human rights scrutiny programs directed at the poor, since such programs have as their target group one portion of the public — the poor.

These judicial developments have introduced into the poverty law agenda the use of human rights legislation as a means of seeking a degree of dignity and equality for the poor, particularly in their dealings with government agencies which play so large a part in their lives.

V. CONCLUSION AND AGENDA

In human rights matters in Canada there is a new breeze blowing. It begins with more generous interpretive approaches to the meaning and importance of human rights. It shares with the *Charter* some important and constructive philosophies. And in some respects

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66. *Supra* note 38 at D/5188.

(for example, with respect to human rights scrutiny of the provision of government services), new possibilities are being discovered.

For poverty lawyers and for those who care about the plight of Canada's poor and about the "inherent dignity and equal and inalienable rights of all members of the human family", these possibilities, this new breeze, must be harnessed. Uses must be made of the opportunities to achieve greater equality for the poor. At least these three things must be done:

1. Human rights laws and support systems must begin to be seen as a serious and significant vehicle for the promotion of the rights of the poor. The advantages of human rights commission resources, and administrative and legislative authority for the use of affirmative remedies, and the more pronounced recognition of the importance of human rights, must be tapped in ways and to an extent not previously contemplated by any of us.

2. With the use of adverse effect discrimination as a tool and with the use of evidence of systemic aspects of poverty as aspects of human rights, poverty issues must be transformed into human rights issues. This will make it possible for the might and right of human rights laws to become the might and right of the poor.

3. Human rights issues related to the provision of government services on a non-discriminatory basis must become a part of the mainstream of human rights adjudication. In this effort we must think less in terms of economics and equality of opportunity and more in terms of substantive equality as a priority in our consideration of human rights.

For decision-makers I make four comments on a tentative and, for some a new, orientation:

1. The era of even vaguely strict construction of human rights laws is behind us. A mandate exists to make human rights legislation an implement in the delivery of equality in this society.

2. In particular, decision-making which recognizes more than liberal notions of equality of opportunity, must be given full flower. To reach the less fortunate in our society, particularly those who are economically less fortunate, access to government programs without discrimination, even unintended, is a basic prerequisite. Such basic rights will be essential for the poor to advance their lives; for some these rights may be essential for survival.

3. The legislation is not limited to concepts of equality of opportunity, nor should our judgments be. Indeed, treating unequals equally may seem "neutral". Human rights laws are not neutral. And such treatment is often the unkindest, most undignified form of inequality of all.

4. The decision-makers' mandate requires recognition of the pain and indignity experienced by those who suffer discrimination. It is for them that human rights laws were passed and it is for us to eliminate those practices which generate the

> pain and indignity. The Supreme Court of Canada has invited a warm and generous reach for the redress of discrimination. It must be delivered in individual cases. Otherwise the respect we may profess for the "inherent dignity ... of all members of the human family" will signify nothing.

As Dickson C.J. recently stated:

"... [I]t is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and enfeeble their proper impact."[67]

67. *Action Travail des Femmes and the Canadian Human Rights Commission* v. *Canadian National Railway Co.*, [1987] 1 S.C.R. 1114 at 1132, Dickson C.J.C.