

Constitutional Castaways: Poverty and the McLachlin Court

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I. INTRODUCTION

It must be remembered that poverty is not just an economic issue. Fundamentally it is a denial of rights.¹

In her 1994 judgment in *R. v. Prosper*, McLachlin J. (as she then was) declared that: “The poor are not constitutional castaways.”² Chief Justice McLachlin made this statement in support of her argument that the right to counsel guaranteed under section 10(b) of the *Canadian Charter of Rights and Freedoms*³ “cannot be denied to some Canadian citizens merely because their financial situation prevents them from being able to afford private legal assistance”.⁴ Access to legal aid in criminal law proceedings is critical, especially for the disproportionate number of poor Aboriginal and racialized men, women and youth who are caught up in our increasingly punitive criminal justice system.⁵ But it is hard to credit that McLachlin C.J.C., or any other member of the Court over which she has presided for the past 10 years, truly considers

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¹ Nancy Burrows, Coordinator, Fédération des femmes du Québec, Evidence, Subcommittee on Cities, 2nd Session, 39th Parl., June 4, 2008, cited in Senate of Canada, Standing Senate Committee on Social Affairs, Science and Technology, *In From the Margins: A Call to Action on Poverty, Housing and Homelessness* (Ottawa: Standing Senate Committee on Social Affairs, Science and Technology, December, 2009) (Chair: Art Eggleton), at 69 [hereinafter “Senate, *In From the Margins*”].

² [1994] S.C.J. No. 72, [1994] 3 S.C.R. 236, at 302 (S.C.C.) [hereinafter “*Prosper*”].

³ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

⁴ *Prosper*, *supra*, note 2, at 302.

⁵ See Jennie Abell, “Poverty and Social Justice at the Supreme Court during the McLachlin Years: Slipsliding Away” in this collection; Melina Buckley, *Moving Forward on Legal Aid: Research on Needs and Innovative Approaches* (Ottawa: Canadian Bar Association, 2010), at 41-45 [hereinafter “Buckley, *Moving Forward*”]; Melina Buckley, “The Challenge of Litigating the Rights of Poor People” in Margot Young *et al.*, eds., *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: U.B.C. Press, 2007) 337, at 338 [hereinafter “Young, *Poverty*”].

that legal aid funding in criminal cases is sufficient to satisfy the governments' Charter obligations towards the poor.

The Court's 2002 decision in the *Gosselin* case⁶ certainly reinforces the impression that the Charter has little to offer to people living in even the most abject poverty in our country. So too does the more recent *Chaoulli* decision,⁷ where a majority of the Court appears to have turned the Chief Justice's reasoning in *Prosper*⁸ on its head, ruling that some Canadians can be denied Charter rights to life, liberty and security of the person, merely because their financial situation prevents them from being able to afford private health insurance.⁹ This is not what poor people and other disadvantaged groups expected of the Charter or of the Supreme Court of Canada when the Charter was enacted.¹⁰ As Bruce Porter explains, the Charter was seen as "a guarantee that both government action and inaction would be assessed for compatibility with the constitutionally affirmed values of enhanced social participation and economic justice",¹¹ and equality-seeking communities expected the Supreme Court to play a central role in affirming and enforcing "the new responsibilities on governments to proactively address issues of socio-economic disadvantage and systemic discrimination".¹²

The following paper will suggest that, instead of interpreting and applying the Charter to enhance social participation and justice for the poor, or to address the socio-economic disadvantage and systemic discrimination that poor people experience on a daily basis, the McLachlin Court has done the opposite. Rather than supporting poor people's efforts to gain access to the courts and to claim their Charter rights, the

⁶ *Gosselin v. Quebec (Attorney General)*, [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429 (S.C.C.) [hereinafter "*Gosselin* (S.C.C.)"], affg *Gosselin c. Quebec*, [1999] J.Q. no 1365, [1999] R.J.Q. 1033 (Que. C.A.) [hereinafter "*Gosselin* (Que. C.A.)"], affg *Gosselin c. Quebec (Procureur général)*, [1992] R.J.Q. 1647 (Que. S.C.) [hereinafter "*Gosselin* (Que. S.C.)"].

⁷ *Chaoulli v. Quebec*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 (S.C.C.) [hereinafter "*Chaoulli* (S.C.C.)"], revg *Chaoulli c. Québec (Procureur général)*, [2002] J.Q. no 759 (Que. C.A.) [hereinafter "*Chaoulli* (Que. C.A.)"], affg *Chaoulli c. Québec (Procureure générale)*, [2000] J.Q. no 479 (Que. C.S.) [hereinafter "*Chaoulli* (Que. S.C.)"].

⁸ *Prosper*, *supra*, note 2, at 302.

⁹ See generally Colleen Flood, Kent Roach & Lorne Sossin, eds., *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005) [hereinafter "Flood, *Access to Care*"]; Marie-Claude Prémont, "L'affaire *Chaoulli* et le système de santé au Québec: cherchez l'erreur, cherchez la raison" (2005-2006) 51 McGill L.J. 167.

¹⁰ Bruce Porter, "Expectations of Equality" (2006) 33 S.C.L.R. (2d) 23 [hereinafter "Porter, 'Expectations of Equality'"]; Bruce Porter, "Twenty Years of Equality Rights: Reclaiming Expectations" (2005) 23 Windsor Y.B. Access. Just. 145 [hereinafter "Porter, 'Reclaiming Expectations'"].

¹¹ Porter, "Reclaiming Expectations", *id.*, at 152.

¹² *Id.*

McLachlin Court has either ignored the access to justice and other fundamental interests of people living in poverty, or been actively complicit in preventing the poor from using the Charter as a tool and terrain for achieving a greater measure of social justice in Canada. To substantiate this critique, the paper will consider how the Court's treatment of public interest standing and justiciability have together resulted in the poor being almost entirely shut out of the benefit of the Charter. This assessment will draw on the small number of Charter claims by poor people that have managed to reach the Supreme Court over the past 10 years; on cases brought by other litigants in which Charter arguments on behalf of poor people were made; and on poverty-related cases that the McLachlin Court has refused to hear. The paper will consider the Court's record not only in terms of what it has said, but also in terms of what it has failed to say: the arguments and Charter interpretations injurious to the rights of poor people that the Court has knowingly allowed to stand. The paper will conclude by suggesting what is required of the McLachlin Court in order for poor people's status as "constitutional castaways" to finally change.

II. THE COURT'S APPROACH TO PUBLIC INTEREST STANDING

Since the enactment of the Charter, its critics have pointed to the high cost of litigation and the general difficulty of accessing the courts as a major reason why the social justice promise of the Charter to poor people and other disadvantaged groups represents nothing more than a "liberal lie".¹³ In its 1992 decision in *Canadian Council of Churches*,¹⁴ the Supreme Court confirmed that, in addition to the standing automatically available to direct victims of Charter violations and those personally threatened with legal sanction under an unconstitutional law, standing would be extended to public interest litigants where it could be shown that a serious constitutional issue was being raised; that a litigant had a genuine interest in it; and that there was no other reasonable or effective way for the matter to come before the courts.¹⁵ According to Cory J., the decision whether to grant public interest standing was a discretionary one: "Thus undeserving applications may be refused. Nonetheless, when

¹³ See generally Andrew Petter, *The Politics of the Charter: The Illusive Promise of Constitutional Rights* (Toronto: University of Toronto Press, 2010).

¹⁴ *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] S.C.J. No. 5, [1992] 1 S.C.R. 236 (S.C.C.) [hereinafter "*Canadian Council of Churches*"].

¹⁵ *Id.*, at 248.

exercising the discretion the applicable principles should be interpreted in a liberal and generous manner.”¹⁶ Where public interest standing was not available, “the views of the public litigant who cannot obtain standing need not be lost. Public interests organizations are, as they should be, frequently granted intervener status.”¹⁷

In the Supreme Court’s 2005 decision in *Chaoulli*,¹⁸ Deschamps J. held that the *Canadian Council of Churches* conditions had been met, and that the appellants could challenge Quebec’s statutory ban on private health insurance as public interest litigants. In her view:

The issue of the validity of the prohibition is serious. Chaoulli is a physician and Zeliotis is a patient who has suffered as a result of waiting lists. They have a genuine interest in the legal proceedings. Finally, there is no effective way to challenge the validity of the provisions other than recourse to the courts.¹⁹

In their dissenting opinion, Binnie and LeBel JJ. agreed that the appellants should be granted public interest standing:

... the appellants advance the broad claim that the Quebec health plan is unconstitutional for *systemic* reasons. They do not limit themselves to the circumstances of any particular patient. Their argument is not limited to a case-by-case consideration. They make a generic argument that Quebec’s chronic waiting lists destroy Quebec’s legislative authority to draw the line against private health insurance.²⁰

Justices Binnie and LeBel went on to explain why it would be unreasonable to demand that a Charter challenge be brought by an actual victim of the alleged Charter violation:

From a practical point of view, while individual patients could be expected to bring their own cases to court if they wished to do so, it would be unreasonable to expect a seriously ailing person to bring a systemic challenge to the whole health plan, as was done here. The material, physical and emotional resources of individuals who are ill, and quite possibly dying, are likely to be focussed on their own circumstances. In this sense, there is no other class of persons that is

¹⁶ *Id.*, at 238.

¹⁷ *Id.*, at 254. For a discussion of how the McLachlin Court has dealt with interventions in social justice cases, see Sanda Rodgers, “Getting Heard: Leave to Appeal, Interveners and Procedural Barriers to Social Justice in the Supreme Court of Canada”, in this collection.

¹⁸ *Supra*, note 7.

¹⁹ *Id.*, at para. 35.

²⁰ *Id.*, at para. 189.

more directly affected and that could be expected to undertake the lengthy and no doubt costly systemic challenge to single-tier medicine.²¹

The implications of the McLachlin Court's decision on standing in *Chaoulli* have been thoroughly canvassed by Kent Roach.²² From the specific perspective of people living in poverty, however, the Court's decision is particularly problematic. Notwithstanding how Binnie and LeBel JJ. characterized it, the appellants' claim was limited to the circumstances of one particular class of patients: those who were eligible for and who could afford private health insurance. Mr. Zeliotis did not argue for improved access to care within the existing public system. Rather he claimed a Charter right to buy his way out of the public queue. While the former argument would have engaged the life, liberty and security interests of all residents of the province, including the poor, Piché J. found on the evidence presented at trial,²³ and a majority of the Quebec Court of Appeal agreed,²⁴ that the remedy being sought by Mr. Zeliotis would benefit only a small number of economically advantaged patients and would seriously undermine access to health care for the rest.

As for Dr. Chaoulli, Piché J.'s decision sets out "les étapes de son combat"²⁵ with the Quebec health insurance system, including his failure to comply with the requirement that, as a newly licensed physician, he work in a rural region for three years; his periods of opting-out of the public system; and his unsuccessful attempts to obtain approval and funding for a 24-hour ambulance service, a 24-hour physician house-call service and a private hospital.²⁶ Based on Dr. Chaoulli's testimony, Piché J. summarized the right he was seeking to vindicate in the case:

Dr. Chaoulli voudrait souscrire à une assurance privée pouvant lui donner accès à des services médicaux et dit ressentir une profonde angoisse de ne pouvoir accéder à une assurance privée ... "Advenant que je tombe gravement malade", conclut-il, "je veux pouvoir disposer de

²¹ *Id.*

²² Kent Roach, "The Courts and Medicare: Too Much or Too Little Judicial Activism?" [hereinafter "Roach, 'The Courts and Medicare'"] in Flood, *Access to Care*, *supra*, note 9, at 188.

²³ *Chaoulli* (Que. S.C.), *supra*, note 7, at para. 263.

²⁴ *Chaoulli* (Que. C.A.), *supra*, note 7.

²⁵ *Id.*, at para. 29; Author's translation: "the stages of his battle".

²⁶ *Id.*, at paras. 25, 27, 33, 34, 40-43.

ma fortune personnelle pour sauver ma vie plutôt que pour mes funérailles.”²⁷

From the point of view of people living in poverty, it is hard to see how the claim put forward and the remedy sought by the appellants in the *Chaoulli* case in any way defended or advanced the “public interest”. As the Charter Committee on Poverty Issues (CCPI) and the Canadian Health Coalition (CHC) submitted in their joint intervention before the Supreme Court in *Chaoulli*, poverty is one of the most significant determinants of health in Canada,²⁸ and while poor people’s access to social welfare programs and services has been steadily eroded since the mid-1990s, medicare remains one social program to which they enjoy equal entitlement with other Canadians and for which public support remains high.²⁹ As CCPI/CHC argued:

The Appellants have put forward an interpretation of the *Charter* that would subvert the equal enjoyment of the right to health for ... the poor in order to entrench a right of more advantaged individuals to contract for private health insurance and private health care funding. As found by the courts below, evidence from Canada and other countries is clear that granting the Appellants’ *Charter* claim would lead to a two-tiered health care system which would deny disadvantaged Canadians an equal standard of care.³⁰

Justice Deschamps’ finding in *Chaoulli* that the appellants should be granted public interest standing because “there is no effective way to challenge the validity of the provisions other than recourse to the courts”³¹ does represent a potentially promising restatement of the traditional *Canadian Council of Churches* requirement that there be no other reasonable or effective way for a matter to come before the courts.³² There are many examples, beginning with the 1995 repeal of the *Canada*

²⁷ *Id.*, at paras. 37-38; Author’s translation: “Dr. Chaoulli wishes to subscribe to private insurance providing access to medical services and feels profound anxiety due to his inability to secure private insurance ... ‘In the event that I fall gravely ill’, he concludes, ‘I want to be able to use my personal wealth to save my life rather than for my funeral.’”

²⁸ See Sheila Leatherman & Kim Sutherland, *Quality of Healthcare in Canada: A Chartbook* (Ottawa: Canadian Health Services Research Foundation, 2010), at 190-210; Dennis Raphael, ed., *Social Determinants of Health: Canadian Perspectives*, 2d ed. (Toronto: Canadian Scholars’ Press, 2008); Martha Jackman, “Health and Equality: Is There a Cure?” (2007) 15 *Health L.J.* 87.

²⁹ *Chaoulli* (S.C.C.), *supra*, note 7 (*Factum of the Intervener: The Charter Committee on Poverty Issues and the Canadian Health Coalition*, at para. 7) [hereinafter “*Chaoulli*, CCPI/CHC Factum”]. The author acted as counsel for CCPI/CHC in the intervention.

³⁰ *Chaoulli*, CCPI/CHC Factum, *id.*, at para. 8.

³¹ *Chaoulli* (S.C.C.), *supra*, note 7, at para. 35.

³² *Supra*, note 14.

Assistance Plan at the federal level,³³ through the current social profiling of the homeless in many Canadian cities,³⁴ of laws and policies being adopted notwithstanding, or indeed because of, their adverse impacts on the poor.³⁵ Given the limited access poor people have to the other branches of government in Canada, reformulating the *Canadian Council of Churches* principles to expand the availability of public interest standing, so public interest litigation and judicial review can more effectively operate as a Charter accountability mechanism, would represent a major step forward in access to justice for the poor.³⁶

Justice Deschamps boldly declared in *Chaoulli* that: “governments have lost sight of the urgency of taking concrete action. The courts are therefore the last line of defence for citizens.”³⁷ Ironically, as CCPI/CHC noted in their intervention in *Chaoulli*,³⁸ limits on private funding and their impact on wait times for publicly funded health care represent one of the only social policy issues upon which there continues to be intense and publicly funded debate in Canada.³⁹ Justice Deschamps’ statement fails to take into account the fact that the health care system has been under ongoing scrutiny for more than a decade by health reform bodies, federal and provincial governments, health care providers, and health policy experts, and that it has seen major infusions of public funds in an

³³ See generally Shelagh Day & Gwen Brodsky, *Women and the Canada Social Transfer: Securing the Social Union* (Ottawa: Status of Women Canada, March, 2007) [hereinafter “Day & Brodsky, *Women and the CST*”]; Barbara Cameron, “Accounting for Rights and Money in the Canadian Social Union” in Young, *Poverty*, *supra*, note 5, at 162.

³⁴ Christine Campbell & Paul Eid, *La judiciarisation des personnes itinérantes à Montréal: Un profilage social* (Québec: Commission des droits de la personne et des droits de la jeunesse, 2009); Céline Bellot *et al.*, *La judiciarisation des personnes itinérantes en Ontario* (Montreal: Centre international de criminologie comparée, 2007); Joe Hermer & Janet Mosher, eds., *Disorderly People: Law and the Politics of Exclusion in Ontario* (Halifax: Fernwood Publishing, 2002).

³⁵ See generally Feminist Alliance for International Action, *Women’s Inequality in Canada* (Ottawa: Feminist Alliance for International Action, September, 2008) at 85-97; Janet E. Mosher, “Welfare Reform and the Re-Making of the Model Citizen” in Young, *Poverty*, *supra*, note 5, at 117; Bruce Porter, “Homelessness, Human Rights, Litigation and Law Reform: A View from Canada” (2004) 10 *Austl. J. H. R.* 133.

³⁶ See Bruce Porter, “Claiming Adjudicative Space: Social Rights, Equality, and Citizenship” in Young, *Poverty*, *id.*, at 77; Margot Young, “Why Rights Now: Law and Desperation” in Young, *Poverty*, *id.*, 317, at 319-20; Porter, “Expectations of Equality”, *supra*, note 10, at 177-78.

³⁷ *Chaoulli* (S.C.C.), *supra*, note 7, at para. 96.

³⁸ *Chaoulli*, CCPI/CHC Factum, *supra*, note 29, at para. 7.

³⁹ See generally Martha Jackman, “The Last Line of Defence for [Which] Citizens?: Accountability, Equality and the Right to Health in *Chaoulli*” (2006) 44 *Osgoode Hall L.J.* 349; Andrew Petter, “Wealthcare: The Politics of the Charter Revisited” in Flood, *Access to Care*, *supra*, note 9, at 116.

effort to address the complex problem of wait times for care.⁴⁰ At the same time, the single-payer system has been under constant attack from those who are prepared “to accept a system where money, rather than need, determines who gets access to care” and “who have the most to gain from its privatization”.⁴¹ Aside from Senator Michael Kirby’s two-year review of the health care system relied upon by the majority in *Chaoulli*,⁴² there have been no shortage of opportunities for critics of the public system to call into question existing limits on private care. As Roy Romanow concluded in the *Final Report* of the Commission on the Future of Health Care in Canada:

Early in my mandate, I challenged those advocating ... greater privatization [and] a parallel private system to come forward with evidence that these approaches would improve and strengthen our health care system ... There is no evidence these solutions will deliver better or cheaper care, or improve access (except, perhaps, for those who can afford to pay for care out of their own pockets.)⁴³

In contrast to the issue of access to health care, Canadian governments have shown little interest in fostering public debate or in confronting the equally pressing problem of access to justice, especially for people living in poverty.⁴⁴ As Melina Buckley summarizes the current situation:

⁴⁰ See Health Council of Canada, *Rekindling Reform: Health Care Renewal in Canada, 2003-2008* (Toronto: Health Council of Canada, 2008); Antonia Maioni, “A Decade of Health Care Commissions: Assessing the Net Effect of Federal and Provincial Reports” (Spring, 2008) Health Innovation Report 4; Cathy Fooks & Steven Lewis, “Romanow and Beyond: A Primer on Health Reform Issues in Canada” (Ottawa: Canadian Policy Research Networks, 2002).

⁴¹ Commission on the Future of Health Care in Canada, *Building on Values: The Future of Health Care in Canada – Final Report* (Saskatoon: Commission on the Future of Health Care in Canada, 2002), at xx (Chair: Roy Romanow) [hereinafter “*Building on Values*”]; Robert G. Evans, *Reform, Re-Form, and Reaction in the Canadian Health Care System* (Vancouver: Centre for Health Services Policy and Research, December 2007); Robert G. Evans, “Preserving Privilege, Promoting Profit: The Payoffs of Private Health Insurance” in Flood, *Access to Care*, *supra*, note 9, at 347; Martha Jackman, “Misdiagnosis or Cure? *Charter* Review of the Health Care System” in Colleen M. Flood, ed., *Just Medicare: What’s In, What’s Out, How We Decide* (Toronto: University of Toronto Press, 2006), at 58.

⁴² *Chaoulli* (S.C.C.), *supra*, note 7, at paras. 78, 141-148; see generally Theodore R. Marmor, “Canada’s Supreme Court and its National Health Insurance Program: Evaluating the Landmark *Chaoulli* Decision from a Comparative Perspective” (2006) 44 *Osgoode Hall L.J.* 311; Christopher P. Manfredi & Antonia Maioni, “‘The Last Line of Defence for Citizens’: Litigating Private Health Insurance in *Chaoulli v. Quebec*” (2006) *Osgoode Hall L.J.* 250, at 270.

⁴³ *Building on Values*, *supra*, note 41, at xx; Morris Barer, “Experts and Evidence: New Challenges in Knowledge Translation”, in Flood, *Access to Care*, *supra*, note 9, at 216.

⁴⁴ See Buckley, *Moving Forward*, *supra*, note 5, at 31-32; Gwen Brodsky, “The Subversion of Human Rights by Governments in Canada” [hereinafter “Brodsky, ‘The Subversion of Human Rights’”] in Young, *Poverty*, *supra*, note 5, 355, at 359-62; Ab Currie, “A National Survey of the Civil Justice Problems of Low and Moderate Income Canadians: Incidence and Patterns” (2006) 13

“eligibility for legal aid, the types of situations in which legal aid is available, and the level and type of services provided vary widely from one jurisdiction to another. However the common thread across the county is woeful inadequacy.”⁴⁵ In a 1998 lecture, Bastarache J. underscored the fundamental importance of equal access to justice for the poor in Canada’s post-Charter democracy:

[A]lienation may ... arise because of a sense that access to justice has been denied or is remote from real problems faced by individuals of limited means ... If legal aid is granted only to defend the most serious crimes, then individuals will feel disenfranchised. Not only will potentially important matter in their lives go unlitigated, but their faith in the legitimacy and validity of the legal system will be eroded ... This is particularly important in the age of the *Charter*, where judicial output is often perceived in highly charged political terms. One way to convince Canadians that the courts are not administering anti-democratic fiats from behind judicial robes is to show them that they too have access to justice where important interests are at stake, and not simply when their liberty is threatened.⁴⁶

In this light, Deschamps J.’s reasoning and the Court’s expansive decision on standing in *Chaoulli* stand in sharp contrast to the British Columbia courts’ highly restrictive decision in the 2008 *Canadian Bar Assn.* case,⁴⁷ from which the Supreme Court nevertheless refused leave to appeal.⁴⁸ In its action seeking a declaratory order against the federal and British Columbia governments, the Canadian Bar Association (CBA) sought to argue that the inadequacy of civil legal aid in British Columbia and the legal aid system’s failure to ensure that poor people⁴⁹ have

International Journal of the Legal Profession 217; Mary E. Marrone, *Research Paper on Poverty Law Services in Canada* (Vancouver: Poverty Law Advocacy Network of Canada, March, 2006); Melina Buckley, *The Legal Aid Crisis: Time for Action* (Ottawa: Canadian Bar Association, June, 2000); Janet Mosher, “Poverty – A Case Study” in Ontario, Ministry of the Attorney General, *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services*, Vol. 3 (Toronto: Queen’s Printer, 1997), at 913.

⁴⁵ Buckley, “Litigating the Rights of Poor People” in Young, *Poverty*, *supra*, note 5, at 338.

⁴⁶ Hon. Michel Bastarache, “The Challenge of Law in the New Millennium” (1997-98) 25 *Man. L.J.* 411, at 419; Kerri Froc, “Is the Rule of Law the Golden Rule? Accessing ‘Justice’ for Canada’s Poor” (2008) 87 *Can. Bar Rev.* 459, at 509-10 [hereinafter “Froc, ‘Rule of Law’”]; Brodsky, “Subversion of Human Rights” in Young, *Poverty*, *supra*, note 5, at 367.

⁴⁷ *Canadian Bar Assn. v. British Columbia*, [2008] B.C.J. No. 350 (B.C.C.A.) [hereinafter “*Canadian Bar Assn. (C.A.)*”]; affg *Canadian Bar Assn. v. British Columbia*, [2006] B.C.J. No. 2015 (B.C.S.C.) [hereinafter “*Canadian Bar Assn. (B.C.S.C.)*”].

⁴⁸ [2008] S.C.C.A. No. 185 (S.C.C.).

⁴⁹ The CBA defined “Poor People” as “people living on lower incomes as defined by Statistics Canada Low Income Cut-Offs (“LICOS”) and who lack sufficient means to obtain proper advice and redress, including legal representation if necessary, in matters where their Fundamental

meaningful access to justice in situations where their fundamental interests are at stake, constitute a violation of sections 7, 15 and 28 of the Charter, section 36 of the *Constitution Act, 1982*, unwritten constitutional principles, and Canada's international human rights obligations.⁵⁰ In support of its claim, the CBA pointed to the significant decline in federal and provincial legal aid funding since the mid-1990s⁵¹ and to the fact that matters engaging poor people's fundamental interests in areas such as family law, poverty law, and immigration and refugee law, are not covered by legal aid; that financial eligibility guidelines exclude many poor people; and that, where legal aid is available, the services provided are too restrictive.⁵²

In his decision for the British Columbia Supreme Court, Brenner C.J. dismissed the CBA's action on the grounds that it did not meet the established test for public interest standing. In terms of the first *Canadian Council of Churches* requirement of a "serious issue",⁵³ Brenner C.J. held that none had been shown: "The CBA does not challenge any legislation, nor indeed any government action ... rather it seeks a sweeping review of the entire program ..."⁵⁴ In his view, the situation was akin to the one in the *Borowski* case,⁵⁵ where the court was "being asked to 'answer a purely abstract question which would in effect sanction a private reference'".⁵⁶ As Brenner C.J. put it: "the CBA here has no standing to assert a claim on behalf of an amorphous group of individuals whose *Charter* rights may have been, or in the future may be, breached by the operation (or more accurately the non-operation) of a public program."⁵⁷

Justice Brenner readily accepted that the CBA had a "genuine interest" in the constitutionality of the legal aid program.⁵⁸ However, in terms of the third requirement for public interest standing — that there be no other reasonable or effective manner in which the matter may be brought before the court — Brenner C.J. held that the CBA's claim also

Interests are threatened"; Canadian Bar Association (B.C.S.C.), *supra*, note 47 (Statement of Claim, at para. 8) [hereinafter "CBA, Statement of Claim"].

⁵⁰ *Id.*, at paras. 1-5.

⁵¹ *Id.*, at para. 25.

⁵² *Id.*, at paras. 41-43.

⁵³ *Canadian Council of Churches*, *supra*, note 14.

⁵⁴ *Canadian Bar Assn.* (B.C.S.C.), *supra*, note 47, at para. 35.

⁵⁵ *Borowski v. Canada (Attorney General)*, [1989] S.C.J. No. 14, [1989] 1 S.C.R. 342 (S.C.C.) [hereinafter "*Borowski*"].

⁵⁶ *Canadian Bar Assn.* (B.C.S.C.), *supra*, note 47, at para. 54.

⁵⁷ *Id.*

⁵⁸ *Id.*, at para. 59.

failed. In particular, he disagreed with the CBA's reliance on *Chaoulli* as a precedent for arguing that its public interest action was the most reasonable and effective way to bring a systemic challenge to the legal aid program, in view of the total lack of resources and otherwise dire circumstances of those directly affected.⁵⁹ Chief Justice Brenner questioned the characterization of the *Chaoulli* case as a "systemic challenge" and instead opined that *Chaoulli* was "a typical constitutional challenge to legislation brought by two directly affected citizens".⁶⁰ He also pointed out that the CBA had itself identified case-by-case legal action as a means of putting concerns about the inadequacy of the legal aid system before the courts.⁶¹ Finally, Brenner C.J. held that, having failed to challenge a specific governmental decision, act or statute, the CBA's claim did not disclose a reasonable cause of action and should be struck down on that ground also.⁶²

On appeal, the British Columbia Court of Appeal agreed that in the absence of specific facts of individual cases, the CBA's statement of claim failed to show a reasonable cause of action and should therefore be dismissed.⁶³ Since she was of the view that a reasonable claim must first be pleaded,⁶⁴ Saunders J. expressed no opinion on the issue of whether the CBA met the requirements for public interest standing in the case.⁶⁵ Justice Saunders also upheld Brenner C.J.'s order of costs against the CBA. In her view:

Although the action is intended to assist low-income members of the public and its spirit is commendable, I do not consider that the altruistic nature of the action should be afforded much weight until at least the plaintiff has established it can meet the minimal test of disclosing a reasonable claim.⁶⁶

In his ruling in the *Canadian Bar Assn.* case, Brenner C.J. appears to fundamentally disagree with the Supreme Court of Canada's approach to standing in *Chaoulli*. The *Chaoulli* claim does, as Kent Roach suggests, look very much like the type of "sweeping and abstract private reference

⁵⁹ *Id.*, at paras. 65-66.

⁶⁰ *Id.*, at paras. 70-71.

⁶¹ *Id.*, at para. 84.

⁶² *Id.*, at paras. 93, 119.

⁶³ *Canadian Bar Assn.* (B.C.C.A.), *supra*, note 47, at paras. 46-54.

⁶⁴ *Id.*, at para. 14.

⁶⁵ *Id.*, at para. 54.

⁶⁶ *Id.*, at para. 58.

case”⁶⁷ that the Supreme Court rejected in *Borowski*.⁶⁸ Having granted public interest standing to the appellants in *Chaoulli*, however, one would have expected the McLachlin Court to grant leave to appeal Brenner C.J.’s decision in the *Canadian Bar Assn.* case. As the CBA argued,⁶⁹ the Court’s justification for granting standing in *Chaoulli* applies with even greater force in regards to poor people’s ability to challenge the inadequacies and inequities of the civil legal aid system. To adopt Binnie and LeBel JJ.’s analysis, like those who are seriously ill, the material, physical and emotional resources of individuals who are poor are likely to be focused on their own circumstances, and there is no other class of persons that is more directly affected and that could be expected to undertake the lengthy and no doubt costly systemic challenge to the civil legal aid system.⁷⁰

Having shown itself ready not only to grant leave, but to accept a systemic challenge so inimical to the rights of poor people under the guise of public interest standing in the *Chaoulli* case, one cannot help questioning the McLachlin Court’s unwillingness even to hear the CBA’s public interest standing arguments. By refusing leave to appeal the preliminary ruling in the *Canadian Bar Assn.* case, the Supreme Court denied the CBA an opportunity even to attempt to convince the Court of the merits of its substantive claim that people living in poverty have the right to the equal protection and benefit of the rule of law and the civil justice system.⁷¹ As Sujit Choudhry wrote in relation to *Chaoulli*: “It is impossible to say whether a class bias, unconscious or otherwise, is at work. But as they say in politics, the optics are bad.”⁷²

III. THE JUSTICIABILITY OF POOR PEOPLE RIGHTS

The British Columbia courts’ finding that the CBA’s claim failed to show a reasonable cause of action and should therefore be struck down, was also left undisturbed as a result of the McLachlin Court’s refusal to grant leave to appeal the *Canadian Bar Assn.* case. In the nearly three decades since the Charter’s enactment, the poor have had great difficulty

⁶⁷ Roach, “The Courts and Medicare”, *supra*, note 22, at 188.

⁶⁸ *Borowski*, *supra*, note 55.

⁶⁹ *Canadian Bar Assn.* (S.C.C.), *supra*, note 48 (Factum of the Appellants at paras. 73-87).

⁷⁰ *Chaoulli* (S.C.C.), *supra*, note 7, at para. 189.

⁷¹ CBA, Statement of Claim, *supra*, note 49, at para. 1; Froc, “Rule of Law”, *supra*, note 46, at 502.

⁷² Sujit Choudhry, “Worse than *Lochner*?” in Flood, *Access to Care*, *supra*, note 9, 75, at 95.

convincing Canadian courts of the justiciability of their rights claims. Interrelated arguments that government inaction is immune from Charter review; that the Charter imposes no positive obligations on governments to protect or promote the rights of the poor or other disadvantaged groups and that socio-economic rights are not included under the Charter, have all created serious obstacles to poverty-related Charter challenges.⁷³ As its leave to appeal decision in the *Canadian Bar Assn.* case illustrates, the McLachlin Court has been of little assistance to people living in poverty in this regard.

At first blush, the Court's 2001 decision in the *Dunmore*⁷⁴ case appears to set a promising precedent. At trial, Sharpe J. concluded that the exclusion of agricultural workers from Ontario's labour relations regime was constitutionally unobjectionable.⁷⁵ In his view, the Charter did not impose a positive duty on the government to enact protective legislation "to curb the private economic power of employers and to constrain the exercise of common law rights of property and contract" so that workers could in fact exercise their section 2(d) freedom of association rights.⁷⁶ Justice Sharpe held that it made no difference that the applicants were challenging the repeal of an earlier law that had extended collective bargaining rights to agricultural workers. As he explained:

[I]f the legislature is free to decide whether or not to act in the first place, it cannot be the case that once it has acted in a manner that enhances or encourages the exercise of a Charter right, it deprives itself of the right to change policies and repeal the protective scheme.⁷⁷

Justice Sharpe also concluded that the exclusion of agricultural workers did not amount to discriminatory treatment on an analogous

⁷³ See Young, *Poverty*, *supra*, note 5; Margot Young, "Section 7 and the Politics of Social Justice" (2005) 38 U.B.C. L. Rev. 539 [hereinafter "Young, 'Politics of Social Justice'"]; David Wiseman, "The Charter and Poverty: Beyond Injusticiability" (2001) 51 U.T.L.J. 425; Martha Jackman & Bruce Porter, "Women's Substantive Equality and the Protection of Social and Economic Rights Under the Canadian Human Rights Act" in *Women and the Canadian Human Rights Act: A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, 1999), at 43.

⁷⁴ *Dunmore v. Ontario (Attorney General)*, [2001] S.C.J. No. 87, [2001] 3 S.C.R. 1016 (S.C.C.) [hereinafter "*Dunmore* (S.C.C.)"], revg *Dunmore v. Ontario*, [1999] O.J. No. 1104, 182 D.L.R. (4th) 471 (Ont. C.A.) [hereinafter "*Dunmore* (C.A.)"], affg *Dunmore v. Ontario (Attorney General)*, [1997] O.J. No. 4947, 37 O.R. (3d) 287 (Ont. Ct. Gen. Div.) [hereinafter "*Dunmore* (Ont. Ct.)"].

⁷⁵ *Dunmore* (Ont. Ct.), *id.*, at 312.

⁷⁶ *Id.*, at 300.

⁷⁷ *Id.*, at 301.

ground within the meaning of section 15. On appeal, in a single-paragraph judgment, the Ontario Court of Appeal agreed with the reasoning and the outcome of Sharpe J.'s decision.⁷⁸

The McLachlin Court reversed the Ontario courts' rulings in *Dunmore* on appeal. Writing for the majority, Bastarache J. agreed with Sharpe J.'s conclusion that "by 'dipping its toe in the water', and affording or enhancing the rights of some", the government is not obliged to "go all the way and ensure the collective enjoyment of rights by all".⁷⁹ Justice Bastarache also agreed that there was no "constitutional right to protective legislation *per se*". However, contrary to Sharpe J., Bastarache J. went on to assert that "exclusion from a protective regime may in some contexts amount to an affirmative interference with the effective exercise of a protected freedom" and that "legislation that is *underinclusive* may, in unique circumstances impact the exercise of a constitutional freedom" in a manner that violates the Charter.⁸⁰

While accepting that challenges to underinclusive legislation need not be restricted to section 15, Bastarache J. identified a number of constraints facing Charter challenges of this type. In particular, he pointed to the requirement that such claims be "grounded in fundamental Charter freedoms rather than in access to a particular statutory regime";⁸¹ "that a proper evidentiary foundation must be provided before creating a positive obligation under the Charter";⁸² and that it be shown that "the state can truly be held accountable for any inability to exercise a fundamental freedom".⁸³ Finally, Bastarache J. underscored the section 32(1) requirement of a minimum of state action before the Charter can be invoked.⁸⁴ As he cautioned:

I reiterate that the above doctrine does not, on its own, oblige the state to act where it has not already legislated in respect of a certain area. One must always be on guard against reviewing legislative silence, particularly where no legislation has been enacted in the first place.⁸⁵

⁷⁸ *Dunmore* (C.A.), *supra*, note 74.

⁷⁹ *Dunmore* (S.C.C.), *supra*, note 74, at para. 22 citing *Dunmore* (Ont. Ct.), *supra*, note 74, at 300.

⁸⁰ *Dunmore* (S.C.C.), *id.* (emphasis added).

⁸¹ *Id.*, at para. 24.

⁸² *Id.*, at para. 25.

⁸³ *Id.*, at para. 26.

⁸⁴ *Id.*, at para. 28.

⁸⁵ *Id.*, at para. 29.

Based on this analysis, Justice Bastarache went on to find that the exclusion of agricultural workers from Ontario's labour relations regime interfered with their fundamental freedom to organize.⁸⁶ Having found a section 2(d) violation, Bastarache J. held that it was unnecessary to address the appellants' section 15 arguments.⁸⁷

Aside from its failure to call into question the lower court's reasoning in rejecting agricultural work as an analogous ground of discrimination prohibited under section 15,⁸⁸ the McLachlin Court's decision in *Dunmore* reflects and reinforces a number of crucial barriers to the justiciability of poor people's Charter claims. Foremost among these is the insistence that government inaction is not subject to Charter scrutiny and the parallel demand that a right be proven to exist "independently of any statutory enactment"⁸⁹ in order for it to be constitutionally recognized. As McLachlin C.J.C. declared most recently in the *Auton* case: "this Court has repeatedly held that the legislature is under no obligation to create a particular benefit"⁹⁰ or "to distribute non-existent benefits equally".⁹¹

The distinction drawn between rights that require government action and those that are purported to be of a "fundamentally non-statutory character"⁹² has the effect of limiting the protection of the Charter to traditional negative rights and traditional rights-holders, while at the same time excluding the most pressing positive rights claims of the poor, such as rights to health care, social assistance or legal aid, that depend on legislation to give them effect. The McLachlin Court has adopted a negative rights-based approach to the Charter even though neither the language of section 32(1), nor that of section 52 of the *Constitution Act, 1982*, justify immunizing rights violations that result from legislative or government inaction from Charter review. As a recent report by the International Commission of Jurists documents, the distinction between state action and inaction, and between positive and negative rights, has been entirely discredited under international human rights law and is increasingly rejected by courts in other constitutional democracies.⁹³ Yet

⁸⁶ *Id.*, at para. 48.

⁸⁷ *Id.*, at para. 70.

⁸⁸ *Dunmore* (Ont. Ct.), *supra*, note 74, at 301-12.

⁸⁹ *Dunmore* (S.C.C.), *supra*, note 74, at para. 24.

⁹⁰ *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] S.C.J. No. 71, [2004] 3 S.C.R. 657, at para. 41 (S.C.C.).

⁹¹ *Id.*, at para. 46.

⁹² *Dunmore* (S.C.C.), *supra*, note 74, at para. 24.

⁹³ See International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability* (Geneva: International Commission of Jurists, 2008); Louise Arbour & Fannie Lafontaine, "Beyond Self-Congratulation:

it remains an intractable obstacle to poor people's rights in the Charter jurisprudence of the McLachlin Court.⁹⁴

The argument that underinclusion challenges must present a "proper evidentiary foundation"⁹⁵ and that claimants must show that the government "can truly be held to be accountable for any inability to exercise a fundamental freedom"⁹⁶ also presents enormous hurdles to success in poverty-related Charter cases. This is illustrated most glaringly in the McLachlin Court's 2002 judgment in *Gosselin*.⁹⁷ In that case Louise Gosselin, acting in her own name and on behalf of all others who were similarly affected, challenged a provincial welfare regulation that reduced benefits payable to recipients under the age of 30 by two-thirds (to approximately \$170 per month) unless they participated in remedial education, community work or on-the-job training programs.⁹⁸

The evidentiary record in support of the plaintiff's claim included reports by several qualified experts, including a social worker, a psychologist, a dietitian and a physician working in a community health practice, all of whom had interacted closely with young welfare recipients. The evidence submitted at trial also included a number of studies in support of the experts' findings and the plaintiff's claim.⁹⁹ This evidence showed, among other things, that young welfare recipients living on the reduced welfare rates were malnourished, socially isolated, often homeless, and in poor physical and psychological health.¹⁰⁰ The expert evidence also showed that some recipients resorted to prostitution and to selling drugs to earn enough money to pay their rent, while others attempted suicide, and that lack of stable housing, telephone or presentable clothing made it extremely difficult for young welfare recipients to find work.¹⁰¹

The Charter at 25 in an International Perspective" (2007) 45 Osgoode Hall L.J. 240; Malcolm Langford, ed., *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2007).

⁹⁴ See Lorne Sossin, "Towards a Two-Tier Constitution? The Poverty of Health Rights" in Flood, *Access to Care*, *supra*, note 9, at 161; Porter, "Reclaiming Expectations", *supra*, note 10, at 180-85.

⁹⁵ *Dunmore* (S.C.C.), *supra*, note 74, at para. 25.

⁹⁶ *Id.*, at para. 26.

⁹⁷ *Gosselin* (S.C.C.), *supra*, note 6.

⁹⁸ *Id.*, at paras. 6-7.

⁹⁹ *Gosselin* (S.C.C.), *supra*, note 6 (Mémoire de l'appelante: Louise Gosselin) [hereinafter "*Gosselin*, Appellant's factum"] at para. 14; *Gosselin* (Que. S.C.), *supra*, note 6, at 1656-61.

¹⁰⁰ *Gosselin* (Que. S.C.), *id.*, at 1658-59.

¹⁰¹ *Id.*

The evidence in the case also included Louise Gosselin's extensive testimony as to her own attempts to live on the under-30 benefit level, and to access and participate in the workfare and other available government programs. This evidence showed that Louise Gosselin's experience of living on the reduced rates was one of acute material and psychological insecurity, deprivation and indignity. She was often hungry, and she suffered symptoms of malnourishment, including anxiety, fatigue, vulnerability to infections and illness, and lack of concentration.¹⁰² She faced the daily indignity and discomfort of being ill-dressed and under-clothed.¹⁰³ In order to obtain food, she was forced to rely on her family and resorted to soup kitchens, church and other charity-run food programs. As she put it: "Quand quelqu'un me donnait à manger, j'y allais."¹⁰⁴ She lived in unsafe and substandard housing and was frequently homeless.¹⁰⁵ At times she exchanged sex for money, food or a place to stay.¹⁰⁶ Existing under such adverse psychological and material conditions, it was virtually impossible for her to present herself properly to employers, or to find or keep a job.¹⁰⁷ As she described her situation:

Bon il n'y a jamais personne qui m'a rappelée, j'étais incapable de me présenter convenablement devant un employeur puis de me vendre comme bonne ouvrière, j'étais complètement démunie au niveau de l'estime de moi-même puis au niveau de la confiance en moi, mes repas n'étaient pas équilibrés, ma vie sociale non plus, je n'avais absolument rien pour être en forme, ou pouvoir travailler premièrement là, alors souvent les endroits étaient complets.¹⁰⁸

At trial, Reeves J. concluded that the evidence submitted was insufficient to support the plaintiff's Charter claim because Louise Gosselin was the only witness to testify on behalf of the entire class of welfare recipients affected by the reduced rate, and because no evidence

¹⁰² *Id.*, at 1658.

¹⁰³ *Gosselin* (S.C.C.), *supra*, note 6 (Appellant's Record, Testimony of Louise Gosselin, Vol. 1) [hereinafter "Testimony of Louise Gosselin"] at 102, 104, 111, 130, 137, 146.

¹⁰⁴ *Id.*, at 134; Author's translation: "when someone gave me food I went".

¹⁰⁵ *Id.*, at 112, 126, 137.

¹⁰⁶ *Id.*, at 106; *Gosselin* (Que. S.C.), *supra*, note 6, at 1655.

¹⁰⁷ Testimony of Louise Gosselin, *id.*, at 110.

¹⁰⁸ *Id.*, at 110; Author's translation: "Well no one ever called me back, I was unable to present myself properly to an employer and to sell myself as a good worker, I was completely lacking in terms of self-esteem and in terms of self-confidence, my meals weren't balanced, my social life wasn't either, I had absolutely nothing to keep myself together or to be able to work so, often, the places were filled."

was offered by the plaintiff as to the circumstances of recipients over the age of 30.¹⁰⁹ Had such comparative evidence been available, Reeves J. suggested, it might have been possible to determine whether unconditional assistance met the government's objectives of encouraging recipients to join the workforce and become independent "ou, au contraire, les maintenait-elle dans un état de passivité et de dépendence?"¹¹⁰ In her decision for the majority of the Supreme Court, McLachlin C.J.C. agreed with Reeve J.'s assessment of the evidence. In her view: "The trial judge did not find evidence indicating a violation, and my review of the record does not reveal any error in this regard."¹¹¹ And she warned: "We must base our decision on the record before us, not on personal beliefs or hypotheticals."¹¹²

While rejecting the sufficiency of Louise Gosselin's evidence in the case, the majority of the McLachlin Court nevertheless accepted a number of the province's arguments in defence of the differential regime, in the absence of any supporting evidence. For example, although the province failed to provide any actual evidence of the benefits of the regime in terms of promoting the integration of young welfare recipients into the workforce, McLachlin C.J.C. accepted the province's key claim that the regulation helped, rather than harmed, young welfare recipients.¹¹³ The Chief Justice also accepted the province's unsubstantiated allegation that, left to their own devices, young people would develop long-term dependence on government assistance and would have to be forced off welfare for their own good. As she asserted: "Simply handing over a bigger welfare cheque would have done nothing to help welfare recipients under 30 escape from unemployment."¹¹⁴

The differences in the McLachlin Court's approach to the evidence and to the evidentiary burden imposed on the claimants in the *Gosselin* and *Chaoulli* cases are impossible to reconcile. Jacques Chaoulli's and Georges Zeliotis' Charter claim was deemed to be justiciable even though they were unable to show that they themselves had suffered any

¹⁰⁹ *Gosselin* (Que. S.C.), *supra*, note 6, at 1664.

¹¹⁰ *Gosselin* (Que. S.C.), *supra*, note 6, at 1664; Author's translation: "or on the contrary, kept them in a state of passivity and dependence?"

¹¹¹ *Gosselin* (S.C.C.), *supra*, note 6, at para. 47.

¹¹² *Id.*, at para. 74. See generally Patricia Cochran, "Taking Notice: Judicial Notice and the 'Community Sense' in Anti-Poverty Litigation" (2007) 40 U.B.C. L. Rev. 559; Lorne Sossin, "The Poverty of Health Rights" in Flood, *Access to Care*, *supra*, note 9, at 175-77.

¹¹³ *Gosselin*, *supra*, note 6, at paras. 66, 70.

¹¹⁴ *Id.*, at para. 43.

harm as a result of Quebec's ban on private health insurance.¹¹⁵ In contrast, Louise Gosselin presented more than enough evidence to support her claim that her own life, liberty and security had been severely compromised by the differential welfare regime.¹¹⁶ Nor was the evidentiary burden imposed on Louise Gosselin as a public interest litigant met by the appellants in *Chaoulli*, who not only failed to demonstrate a connection between the ban on private insurance and waiting lists, but who also presented no factual evidence of actual harm to the rights of any individual patients.¹¹⁷ Both Deschamps J.¹¹⁸ and McLachlin C.J.C. pointed to the fact that "some patients die as a result of long waits for treatment in the public system"¹¹⁹ as evidence that waiting lists violated Quebec¹²⁰ and Canadian Charter rights to life and security of the person. This conclusion was based on the statement made by a cardiovascular surgeon called as an expert by the appellants: "when a person is diagnosed with cardiovascular disease, he or she is 'always sitting on a time bomb and can die at any moment.'"¹²¹ In contrast, the expert evidence submitted by Louise Gosselin outlined the myriad ways in which the differential welfare regime infringed not only her own but the Charter rights of other young welfare recipients. As the Charter Committee on Poverty Issues argued in its intervention before the Court:

As the expert evidence adduced by the Appellant clearly confirms, the inadequacy of the assistance provided under the Regulation made it impossible for the Appellant and others in her situation to meet basic needs: to obtain adequate food, clothing, shelter, and to maintain an acceptable standard of physical and mental health. Moreover, it perpetuated and exacerbated the hopelessness, vulnerability to violence,

¹¹⁵ *Chaoulli* (Que. S.C.), *supra*, note 6, at 241-42; Kent Roach, "Judicial Activism" in Flood, *Access to Care*, *supra*, note 9, at 186.

¹¹⁶ For some of the many critiques of the McLachlin Court's assessment of the Charter violations suffered by Louise Gosselin, see Sheila McIntyre, "The Supreme Court and Section 15: A Thin and Impoverished Notion of Judicial Review" (2006) 31 Queen's L.J. 731 [hereinafter "McIntyre, 'A Thin and Impoverished Notion'"]; Martha Jackman, "Sommes-nous dignes? L'égalité et l'arrêt *Gosselin*" (2005) 17 C.J.W.L. 161; Gwen Brodsky, "*Gosselin v. Quebec (Attorney General)*: Autonomy with a Vengeance" (2003) C.J.W.L. 185.

¹¹⁷ See Hamish Stewart, "Implications of *Chaoulli* for Fact Finding in Constitutional Cases" in Flood, *Access to Care*, *supra*, note 9, at 207; Charles J. Wright, "Different Interpretations of 'Evidence' and Implications for the Canadian Health Care System" in Flood, *Access to Care*, *id.*, at 220.

¹¹⁸ *Chaoulli* (S.C.C.), *supra*, note 7, at para. 40.

¹¹⁹ *Id.*, at para. 37.

¹²⁰ *Quebec Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, s. 1.

¹²¹ *Chaoulli* (S.C.C.), *supra*, note 7, at para. 123.

loss of self-esteem, social isolation and immobilization which unmitigated poverty creates.¹²²

Still the Chief Justice concluded:

As the trial judge emphasized, the record contains no first-hand evidence supporting Ms. Gosselin's claim about the difficulties with the programs, and no indication that Ms. Gosselin can be considered representative of the under-30 class. It is, in my respectful opinion, utterly implausible to ask this Court to find the Quebec government guilty ... and order it to pay hundreds of millions of taxpayer dollars to tens of thousands of unidentified people, based on the testimony of a single affected individual.¹²³

The insufficiency of the plaintiff's evidentiary record was also a subject of comment by the McLachlin Court in the 2007 *Christie* case.¹²⁴ The plaintiff, Dugald Christie, was a Vancouver lawyer who, for over 30 years, acted primarily for low-income clients unable to obtain *pro bono* or legal aid services. The plaintiff's income in the 1990s did not exceed \$30,000 per year and he survived in part due to his low overhead costs, for example by trading legal services for free office space at the Salvation Army boarding house where he lived.¹²⁵ The plaintiff challenged the constitutionality of a seven per cent tax, imposed by the province of British Columbia on the purchase of legal services beginning in 1993, on the grounds that the tax "hinders and impedes access to justice by poor and low income persons" and thereby violates the rule of law.¹²⁶

At trial, the British Columbia Supreme Court found that, since the plaintiff's low-income clients had trouble paying their bills, he carried a number of unpaid accounts, often for years. Even though his clients' accounts had not been paid, the province demanded payment of the legal services tax as soon as the plaintiff's legal accounts were remitted. When the province's demands for payment of the tax were not met, the

¹²² *Gosselin* (S.C.C.), *supra*, note 6 (Factum of the Intervener: Charter Committee on Poverty Issues, at para. 41.) The Author acted as co-counsel for CCPI in the intervention.

¹²³ *Gosselin* (S.C.C.), *id.*, at para. 47. See generally Day & Brodsky, *Women and the CST*, *supra*, note 33, at 55-59.

¹²⁴ *British Columbia (Attorney General) v. Christie*, [2007] S.C.J. No. 21, [2007] 1 S.C.R. 873 (S.C.C.) [hereinafter "*Christie* (S.C.C.)"], revg *Christie v. British Columbia (Attorney General)*, [2005] B.C.J. No. 2745, 2005 BCCA 631 (B.C.C.A.) [hereinafter "*Christie* (B.C.C.A.)"], affg *Christie v. British Columbia (Attorney General)*, [2005] B.C.J. No. 217 (B.C.S.C.) [hereinafter "*Christie* (B.C.S.C.)"].

¹²⁵ *Christie* (B.C.S.C.), *id.*, at paras. 22-23, 54.

¹²⁶ *Christie* (S.C.C.), *supra*, note 124 (Factum of the Respondent: Dugald Christie, at para. 32).

plaintiff's accounts were seized.¹²⁷ As a result, Christie was unable to pay his Law Society fees and he ceased to work as a practising lawyer in 1997.¹²⁸ After reviewing the totality of the evidence put forward by the plaintiff at trial, Koenigsberg J. summarized the impact of the impugned tax on low income people in need of legal services:

I find that the effect of low income clients who have difficulty paying even the very modest amounts Mr. Christie charges when he does not include the tax, combined with the precarious financial circumstances of any lawyer who is available to act for such persons — reduces the number of legal services available at a cost affordable by low income persons. This in turn increases the number of low income persons who cannot find legal services at amounts they can afford.¹²⁹

In response to the province's argument that the tax could not be found unconstitutional because of the availability of legal aid to assist poor or low-income litigants, Koenigsberg J. held that, although its stated purposes was to assist in funding legal aid:

the tax has not been used to fund legal aid and, over the last 10 years the availability of legal aid has shrunk to new lows. As a result, the number of people in B.C. who require legal assistance in order to have access to justice and who cannot afford to pay the cost for such assistance has grown.¹³⁰

Justice Koenigsberg also criticized the Attorney General of Canada's submission that: "Mr. Christie's arguments rely on the notion that access to justice is equal to a right to access a lawyer on all court matters" as one that "sets up a straw man more easily to knock him down".¹³¹ She asserted in this regard:

I find as a fact that if Mr. Christie were to charge them his hourly rate plus the social services tax, they could not pay him. I also find that if Mr. Christie is not paid the minimum amount which he charges, in most of his cases he could not continue to practice law, thus denying those individuals access to justice.

As a result, I infer that the imposition of the social services tax, does in fact deny access to justice in some cases of low income persons ... and this

¹²⁷ *Christie* (B.C.S.C.), *supra*, note 124, at para. 34.

¹²⁸ *Id.*, at paras. 28-29.

¹²⁹ *Id.*, at para. 55.

¹³⁰ *Id.*, at para. 71.

¹³¹ *Id.*, at para. 81.

court is prepared to declare that the constitutional rights of low income people who cannot afford legal representation have been breached.¹³²

Justice Koenigsberg's decision that "the Act infringes the fundamental constitutional right of access to justice of low income persons and the Act is *ultra vires* to that extent"¹³³ was upheld by the British Columbia Court of Appeal, which concluded that the legal services tax was "unconstitutional as offending the principle of access to justice, one of the elements of the rule of law".¹³⁴

On appeal, the McLachlin Court reversed the British Columbia courts' decision in *Christie*. At the outset of its judgment, the Court acknowledged the depth of the plaintiff's commitment to access to justice for poor and low income people:

Mr. Christie was consumed by a passion to provide legal services to those at the margins of society. It was a passion that ultimately took his life; last year, on a cross-Canada bicycle trip to raise funds for the cause, he was struck and killed on a stretch of highway near Sault Ste. Marie, Ontario.¹³⁵

However the Court went on to find that the principle set out in the Court of Appeal's judgment: "the general right to be represented by a lawyer in a court or tribunal proceedings where legal rights or obligations are at stake"¹³⁶ was not encompassed by "the text of the constitution, the jurisprudence and the historical understanding of the rule of law".¹³⁷

Although the Court held that its conclusion on the rule of law made it unnecessary "to inquire into the sufficiency of the evidentiary record upon which the plaintiff based its claim", it nevertheless went on to suggest that "a comment on the adequacy of the record may not be amiss, in view of the magnitude of what is being sought — the striking out of an otherwise constitutional provincial tax".¹³⁸ The Court commented in this regard:

[A]s the Attorney General points out, the economics of legal services may be affected by a complex array of factors, suggesting the need for

¹³² *Id.*, at para. 83.

¹³³ *Id.*, at para. 88.

¹³⁴ *Christie* (B.C.C.A.), *supra*, note 124, at para. 76.

¹³⁵ *Christie* (S.C.C.), *supra*, note 124, at para. 2.

¹³⁶ *Id.*, at para. 13.

¹³⁷ *Id.*, at para. 27.

¹³⁸ *Id.*, at para. 28.

expert economic evidence to establish the tax will in fact adversely affect access to justice. Without getting into the adequacy of the record in this case, we note that this court has cautioned against deciding constitutional cases without an adequate evidentiary record.¹³⁹

In *Christie*, contrary to the situation in *Gosselin*, Koenigsberg J. found that the evidence presented at trial supported the plaintiff's claim that the province had violated the constitutional rights of the poor. She found, as a matter of fact, that the effect of the legal services tax was to deny access to justice to low-income persons in some cases and, based on the evidentiary record, she concluded that "the constitutional rights of low income people who cannot afford legal representation have been breached".¹⁴⁰ As in *Chaoulli*, the McLachlin Court disregarded the evidentiary findings of the trial judge in *Christie*. But, as in *Gosselin*, it deemed the evidentiary record to be insufficient to support a rights claim that would have reinforced, rather than undermined, the rights of the poor. In Kerri Froc's analysis:

Comparing the affidavit evidence [in *Christie*] with the virtual "absence of any concrete adjudicative facts" in the successful constitutional challenge in *Chaoulli* again puts into stark relief the privileging of what the Court constructs as "negative rights" claims over "positive" economic claims of the poor, but this time in the guise of enforcing evidentiary rules.¹⁴¹

The fact that the British Columbia Court of Appeal relied on the McLachlin Court's decision in *Christie* as a basis for concluding that the *Canadian Bar Assn.* challenge to the inadequacy of British Columbia's civil legal aid regime was unjusticiable, simply adds to the injury in terms of the access to justice rights of the poor.

In addition to evidence-related barriers facing Charter-based poverty challenges, the impact on the justiciability of poor people's rights of requiring claimants to show that "the state can truly be held accountable for any inability to exercise a fundamental freedom" and that government action "substantially orchestrates, encourages or sustains the violation of fundamental freedoms"¹⁴² can also be seen in the *Gosselin* case. In his decision at trial, Reeves J. made a number of statements suggesting that

¹³⁹ *Id.*

¹⁴⁰ *Christie* (B.C.S.C.), *supra*, note 124, at para. 83.

¹⁴¹ Froc, "Rule of Law", *supra*, note 46, at 497, citing Kent Roach, "Judicial Activism" in Flood, *Access to Care*, *supra*, note 9, at 188.

¹⁴² *Dunmore* (S.C.C.), *supra*, note 74, at para. 26.

Louise Gosselin and other young welfare recipients were themselves to blame for their predicament, and that the government could in no way be held responsible. In his view: “En effet, il est constant que l’être humain qui a développé les qualités de force, courage, persévérance et discipline surmonte et maîtrise généralement les obstacles éducatifs, psychiques et même physiques qui pourraient l’entraîner dans la pauvreté matérielle.”¹⁴³ Thus he affirmed: “L’État ne peut substituer sa volonté ou ses habiletés à celles de l’individu. Celui-ci reste le maître des causes intrinsèques de son état de pauvreté.”¹⁴⁴

Instead of reproving the negative stereotypes of poverty and the poor contained in the trial judgment, McLachlin C.J.C. endorsed the view that the harms experienced by young welfare recipients were owing, not to the differential welfare regime the province itself admitted did not meet recipients’ basic needs,¹⁴⁵ but rather to personal circumstances and individual choice. As the Chief Justice declared:

[T]o cause young people to attend training and education programs as a condition of receiving the full “basic needs” level of social assistance ... did not effectively consign the appellant or others like her to extreme poverty ... the condition did not force the appellant to do something that demeaned her dignity or human worth.¹⁴⁶

In short, the Chief Justice concluded that the government was not accountable for the rights violations Louise Gosselin alleged in her Charter claim.¹⁴⁷

From the inception of the Charter, Canadian governments have vigorously resisted all efforts by poor people and other disadvantaged groups to invoke the Charter as a source of positive obligations to

¹⁴³ *Gosselin* (Que. S.C.), *supra*, note 6, at 1676; Author’s translation: “In effect it is always the case that a human being who has developed qualities of strength, courage, perseverance and discipline generally overcomes and masters the educational, psychological and even physical obstacles that could pull him into material poverty.”

¹⁴⁴ *Id.*; Author’s translation: “The State cannot substitute its will or skills for those of the individual. It is the individual who remains master of the intrinsic causes of his state of poverty.”

¹⁴⁵ *Gosselin* (Que. C.A.), *supra*, note 6, at 1085.

¹⁴⁶ *Gosselin* (S.C.C.), *supra*, note 6, at para. 52; see Dianne Pothier, “But It’s for Your Own Good” in Young, *Poverty*, *supra*, note 5, 40, at 47-52; Diana Majury, “Women are Themselves to Blame: Choice as a Justification for Unequal Treatment” in Margaret Denike, Fay Faraday & M. Kate Stephenson, eds., *Making Equality Rights Real: Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006), at 209.

¹⁴⁷ See generally, Martha Jackman, “Reality Checks: Presuming Innocence and Proving Guilt in Charter Welfare Cases” [hereinafter “Jackman, ‘Reality Checks’”] in Young, *Poverty*, *supra*, note 5, at 23; McIntyre, “A Thin and Impoverished Notion”, *supra*, note 116.

ameliorate poverty and inequality within Canadian society.¹⁴⁸ As Shelagh Day and Gwen Brodsky summarize the “Blueprint” for resisting these claims:

Governments consistently discount the adverse effects complained of, shift the blame, deny governments have any positive obligation to do anything, emphasize intention over effects, assert that courts must defer to governments and claim, in particular, that courts must not spend government money.¹⁴⁹

As the majority of the McLachlin Court’s judgment in *Gosselin* illustrates, requiring claimants to show that “the state can truly be held accountable for any inability to exercise the fundamental freedom”¹⁵⁰ too easily translates into a disturbing collusion between governments and courts in denying the justiciability of poor people’s Charter claims.¹⁵¹

IV. HOW TO CHANGE POOR PEOPLE’S STATUS AS CONSTITUTIONAL CASTAWAYS

In her judgment for the Court in *Gosselin*, McLachlin C.J.C. left open the possibility that: “One day s. 7 may be interpreted to include positive obligations.”¹⁵² Having previously discounted the adverse effects of the impugned welfare regime on the health, security and dignity of Louise Gosselin and other young welfare recipients, the Chief Justice concluded:

The question therefore is not whether s. 7 has ever been — or will ever be — recognized as creating positive rights. Rather the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.

I conclude that they do not ... The frail platform provided by the facts of this case cannot support the weight of a positive state obligation of citizen support.¹⁵³

¹⁴⁸ See Brodsky, “The Subversion of Human Rights”, *supra*, note 44, at 355.

¹⁴⁹ Day & Brodsky, *Women and the CST*, *supra*, note 33, at 53-58.

¹⁵⁰ *Dunmore* (S.C.C.), *supra*, note 74, at para. 26.

¹⁵¹ See generally, Jackman, “Reality Checks”, *supra*, note 147, at 23; McIntyre, “A Thin and Impoverished Notion”, *supra*, note 116; Day & Brodsky, *supra*, note 33, at 58.

¹⁵² *Gosselin* (S.C.C.), *supra*, note 6, at para. 82.

¹⁵³ *Id.*, at paras. 82-83; see generally Young, “Politics of Social Justice”, *supra*, note 73.

Despite its profession of theoretical openness, the McLachlin Court's denial of leave to appeal not only in the *Canadian Bar Assn.* case¹⁵⁴ but in every other significant poverty case it has been asked to consider since *Gosselin*¹⁵⁵ can arguably be taken as a more telling expression of the Court's antipathy to poor people's Charter claims. What changes in doctrine and attitude on the part of the McLachlin Court will be required to improve this situation?

One could begin by looking to the dissenting voices within the McLachlin Court itself. In her decision in *Dunmore*,¹⁵⁶ L'Heureux-Dubé J. agreed with Bastarache J. that the government was under a positive obligation to provide legislative protection against unfair labour practices under section 2(d) of the Charter, and that it was unnecessary to consider whether section 15 had also been violated. However, she took issue with Sharpe J.'s finding at trial¹⁵⁷ that agricultural work did not constitute an analogous ground of discrimination under section 15. Justice L'Heureux-Dubé pointed to the fact that agricultural workers suffered from disadvantage, were devalued and marginalized within Canadian society, and in David Beatty's words, faced "serious obstacles to effective participation in the political process".¹⁵⁸ Like non-citizens, agricultural workers were, in the language of *Andrews*:

a group lacking in political power and as such are vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among those groups in society to whose needs and wishes elected officials have no apparent interest in attending.¹⁵⁹

In terms of the immutability of their situation, L'Heureux-Dubé J. argued that, similar to off-reserve band members in *Corbiere*¹⁶⁰ "[a]gricultural workers, in light of their relative status, low levels of

¹⁵⁴ *Canadian Bar Assn.*, *supra*, note 47.

¹⁵⁵ See, for example, *Boulter v. Nova Scotia Power Assn. Inc.*, [2009] N.S.J. No. 64, 2009 NSCA 17 (N.S.C.A.), leave to appeal refused [2009] S.C.C.A. No. 172 (S.C.C.) [hereinafter "*Boulter* (N.S.C.A.)"]; *Guzman v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 1506, 2007 FCA 358 (F.C.A.), leave to appeal refused [2008] S.C.C.A. No. 4 (S.C.C.); *R. v. Banks*, [2007] O.J. No. 99, 2007 ONCA 19 (Ont. C.A.), leave to appeal refused [2007] S.C.C.A. No. 139 (S.C.C.).

¹⁵⁶ *Dunmore* (S.C.C.), *supra*, note 74.

¹⁵⁷ *Dunmore* (Ont. Ct.), *supra*, note 74, at 312.

¹⁵⁸ David M. Beatty, *Putting the Charter to Work: Designing a Constitutional Labour Code* (Kingston: McGill-Queen's University Press, 1987), at 89.

¹⁵⁹ *Andrews v. Law Society of British Columbia*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143, at 152 (S.C.C.).

¹⁶⁰ *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] S.C.J. No. 24, [1999] 2 S.C.R. 203, at paras. 13-14 (S.C.C.).

skill and education, and limited employment mobility, can change their occupational status ‘only at great cost, if at all’.”¹⁶¹ As she saw it, the highly transient nature of their occupational status was a reflection of the instability of their work environment and lack of other employment options, militating in favour of, rather than against, their recognition as a disadvantaged group under section 15.¹⁶²

In his decision at trial in *Dunmore*, Sharpe J. expressed the view that:

Economic disadvantage is often the product of discrimination on an analogous ground, and hence serves as a marker that may indicate the presence of such discrimination. There are, however, many causes of economic disadvantage that do not attract the scrutiny of s. 15, and showing economic disadvantage does not, by itself, establish discrimination on an analogous ground within the meaning of s. 15. In my view, the absence of evidence of any traits or characteristics analogous to those enumerated in s. 15 which serve to identify those who make up the group of agricultural workers is fatal to their s. 15 claim.¹⁶³

In the face of the majority of the McLachlin Court’s silence on this issue, Sharpe J.’s decision has been relied upon in a number of subsequent cases rejecting poverty or economic disadvantage as prohibited grounds of discrimination under section 15.¹⁶⁴ Rather than attempting to identify a single “personal characteristic”¹⁶⁵ common to all agricultural workers as individuals, L’Heureux-Dubé J. focused her analysis on the social, economic and political indices of disadvantage shared by agricultural workers as a group, and on the systemic forms of group-based discrimination they were subject to, including devaluation, stigmatization and exclusion. In keeping with L’Heureux-Dubé J.’s analytic approach in *Dunmore*, the first and most significant step the McLachlin Court must take to change poor people’s status as constitutional castaways would be to recognize the social condition of poverty as an analogous

¹⁶¹ *Dunmore* (S.C.C.), *supra*, note 74, at para. 169.

¹⁶² *Id.*

¹⁶³ *Dunmore* (Ont. Ct.), *supra*, note 74, at 309.

¹⁶⁴ See for example *Guzman v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1443, 2006 FC 1134 (F.C.A.) [hereinafter “*Guzman* (F.C.)”]; *Federated Anti-Poverty Groups of B.C. v. Vancouver (City)*, [2002] B.C.J. No. 493 (B.C.S.C.); *R. v. Banks*, [2001] O.J. No. 3219 (Ont. C.J.); *Polewsky v. Home Hardware Stores*, [1999] O.J. No. 4151 (Ont. Ct.), *revd* on other grounds [2003] O.J. No. 2908 (Ont. S.C.J.); *Pleau v. Nova Scotia* (N.S.S.C. Prothonotary), [1998] N.S.J. No. 526 (N.S.S.C.).

¹⁶⁵ *Dunmore* (Ont. Ct.), *supra*, note 74, at 308.

ground of prohibited discrimination, rather than simply as a marker of disadvantage, under section 15 of the Charter.

Evidence and support for such a Charter interpretation is available to the McLachlin Court in the research commissioned for, and in the report tabled over a decade ago by, the Canadian Human Rights Act Review Panel, chaired by former Supreme Court Justice Gerard La Forest.¹⁶⁶ As La Forest J. succinctly stated in recommending that social condition be added to the list of prohibited grounds of discrimination under federal human rights law:

Our research papers and the submissions we received provided us with ample evidence of widespread discrimination based on characteristics related to conditions such as poverty, low education, homelessness and illiteracy. We believe there is a need to protect people who are poor from discrimination.¹⁶⁷

In her section 2(d) analysis in *Dunmore*,¹⁶⁸ L'Heureux-Dubé J. alluded to her ruling for the majority of the Court almost a decade earlier, in *Haig*,¹⁶⁹ where she held that:

... distinctions between “freedoms” and “rights”, and between positive and negative entitlements, are not always clearly made, nor are they always helpful. One must not depart from the context of the purposive approach articulated by this Court in *R. v. Big M Drug Mart Ltd.* ...¹⁷⁰ Under this approach, a situation might arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive government action might be required.¹⁷¹

Justice L'Heureux-Dubé also referred to the majority's response to the province of Alberta's insistence in the 1998 *Vriend* case¹⁷² that government inaction could not give rise to a Charter claim. As Cory J. explained in his judgment in the case:

¹⁶⁶ Canada, Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision, Report of the Canadian Human Rights Act Review Panel* (Ottawa: Department of Justice, 2000). The various research studies submitted to the La Forest Panel are included in the Bibliography of Wayne MacKay & Natasha Kim, *Adding Social Condition to the Canadian Human Rights Act* (Ottawa: Canadian Human Rights Commission, 2009).

¹⁶⁷ *Id.*, at 107. See generally MacKay & Kim, *Adding Social Condition to the CHRA, id.*

¹⁶⁸ *Dunmore* (S.C.C.), *supra*, note 74.

¹⁶⁹ *Haig v. Canada*, [1993] S.C.J. No. 84, [1993] 2 S.C.R. 995 (S.C.C.) [hereinafter “*Haig*”].

¹⁷⁰ *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 (S.C.C.).

¹⁷¹ *Haig, supra*, note 169, at para. 79.

¹⁷² *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493 (S.C.C.) [hereinafter “*Vriend*”].

The relevant subsection, s. 32(1)(b), states that the *Charter* applies to “the legislature and government of each province in respect of all matters within the authority of the legislature of each province”. There is nothing in that wording to suggest that a *positive act* encroaching on rights is required; rather the subsection speaks only of *matters within the authority of the legislature*. Dianne Pothier has correctly observed that s. 32 is “worded broadly enough to cover positive obligations on a legislature such that the *Charter* will be engaged even if the legislature refuses to exercise its authority”.¹⁷³ The application of the *Charter* is not restricted to situations where the government actively encroaches on rights.¹⁷⁴

Justice L’Heureux-Dubé went on to draw an analogy to the situation of minority language groups and to Bastarache J.’s declaration in *Beaulac* that “the freedom to choose is meaningless in the absence of a duty of the State to take positive steps to implement language guarantees”.¹⁷⁵ As L’Heureux-Dubé J. concluded: “Similarly, in the case of agricultural workers in Ontario, the freedom to associate becomes meaningless in the absence of a duty of the state to take positive steps to ensure this right is not a hollow one.”¹⁷⁶

In her dissenting judgment in *Gosselin*, Arbour J. also questioned the premise that the *Charter* generally, and section 7 in particular, contained “only negative rights of non-interference and therefore cannot be implicated absent any positive state action”.¹⁷⁷ Justice Arbour acknowledged the institutional competence concerns reflected in Peter Hogg’s oft-cited objection to the justiciability of positive rights as involving “issues upon which elections are won and lost ...”¹⁷⁸ In her view, such concerns in no way justified the Court’s failure to address the *Charter* claim raised in *Gosselin*. As she explained:

While it may be true that courts are ill-equipped to decide policy matters concerning resource allocation ... this does not support the conclusion that justiciability is a threshold issue barring the consideration of the substantive claim in this case ... namely whether the state is under a positive obligation to provide basic means of subsistence to

¹⁷³ Dianne Pothier, “The Sounds of Silence: *Charter* application When the Legislature Declines to Speak” (1996) 7 Const. Forum Const. 113, at 115.

¹⁷⁴ *Vriend*, *supra*, note 172, at para. 60 (emphasis added).

¹⁷⁵ *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768, at para. 20 (S.C.C.).

¹⁷⁶ *Dunmore* (S.C.C.), *supra*, note 74, at para. 146.

¹⁷⁷ *Gosselin* (S.C.C.), *supra*, note 6, at para. 319.

¹⁷⁸ Peter W. Hogg, *Constitutional Law of Canada*, Vol. 2, loose-leaf edition (Scarborough: Carswell, 1997) at 44-12.1.

those who cannot provide for themselves ... this is a question about what kinds of claims individuals can assert against the state. The role of courts as interpreters of the Charter and guardians of its fundamental freedoms against legislative or administrative infringements by the state requires them to adjudicate such rights-based claims.¹⁷⁹

In keeping with earlier more promising jurisprudence on this issue, a second major step the McLachlin Court must take to remedy the status of people living in poverty as constitutional castaways is to reject, without qualification, the argument that section 7, section 15 and other Charter guarantees offer no positive rights protection to the poor, and that the Charter has nothing to say when poor people's rights are violated as a result of government neglect or wilful inaction. A series of reports by United Nations human rights monitoring bodies has criticized the lack of effective domestic remedies for Canadian governments' failure to respect its obligations under the *International Covenant on Economic, Social and Cultural Rights*¹⁸⁰ and other human rights treaties, and has called on Canadian courts to cease treating the socio-economic rights claims of the poor as matters of non-justiciable social policy rather than as fundamental human rights.¹⁸¹ In its recent report on poverty and homelessness in Canada, the Standing Senate Committee on Social Affairs, Science and Technology made note of this criticism, and cited Louise Arbour J.'s observations in her more recent role as United Nations High Commissioner for Human Rights:

The Committee has heard that poverty and human rights (or their denial) are intertwined. A report of the UN High Commissioner of Human Rights describes the linkages: "Poverty is not only a matter of income, but also, more fundamentally, a matter of being able to live a life in dignity and enjoy basic human rights and freedoms. It describes a complex of interrelated and mutually reinforcing deprivations, which impact on people's ability to claim and access their civil, cultural, economic, political and social rights. In a fundamental way, therefore, the denial of human rights forms part of the very definition of what it is to be poor."¹⁸²

¹⁷⁹ *Gosselin* (S.C.C.), *supra*, note 6, at para. 332.

¹⁸⁰ *International Covenant on Economic, Social and Cultural Rights* (December 16, 1966), 993 U.N.T.S. 3 (entered into force January 3, 1976).

¹⁸¹ See generally Shelagh Day, "Minding the Gap: Human Rights Commitments and Compliance" in Young, *Poverty*, *supra*, note 5, at 201; Craig Scott, "Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight?" (1999) 10 *Const. Forum Const.* 97.

¹⁸² Senate, *In From the Margins*, *supra*, note 1, at 71.

It is past time for the McLachlin Court to respond to the concerns expressed both internationally and domestically, around the reluctance of Canadian courts to recognize and enforce Canada's human rights commitments in regards to the poor. The McLachlin Court's rulings, and its failure to decide crucial poverty-related issues have created a jurisprudential climate in which even the few Charter gains poor people have made over the past 25 years are increasingly at risk of being rolled back.¹⁸³ It is imperative that the McLachlin Court begin to show lower courts and tribunals, and Canadian governments, positive leadership in its treatment of poverty and poor people's rights under the Charter. In addition to affirming the justiciability and interdependence of all human rights, this will require the Court to acknowledge and address the differing evidentiary burdens imposed on poverty-related claims relative to other Charter claims; the discriminatory attitudes that are too often expressed by judges in relation to poverty and poor people; and the presumptions of innocence accorded to governments defending against Charter challenges by the poor.

Finally, the McLachlin Court must take seriously the access to justice concerns of people living in poverty. As the Canadian Bar Association argued in its legal aid challenge,¹⁸⁴ and again in its intervention before the Court in *Christie*,¹⁸⁵ this is an issue that goes beyond the Charter to engage underlying principles of constitutionalism and the rule of law. In a lecture delivered a year after she left the Supreme Court of Canada, Arbour J. explained why access to justice is so crucial for the poor: "The possibility for people themselves to claim their human rights entitlements through legal processes is essential so that human rights have meaning for those most at the margins, a vindication of their equal worth and human agency."¹⁸⁶ Chief Justice McLachlin has also spoken frequently on the importance of preserving and promoting access to justice in

¹⁸³ See for example the Federal Court decision in *Guzman* (F.C.), *supra*, note 164, distinguishing the Ontario Court of Appeal decision in *Falkiner v. Ontario (Ministry of Community and Social Services)*, [2002] O.J. No. 1771, 59 O.R. (3d) 481 (Ont. C.A.); and the Nova Scotia Court of Appeal decision in *Boulter* (N.S.C.A.), *supra*, note 155, that appears to overturn the Court of Appeal's earlier decision in *Dartmouth/Halifax (County) Regional Housing Authority v. Sparks*, [1993] N.S.J. No. 97, 119 N.S.R. (2d) 91 (N.S.C.A.).

¹⁸⁴ Canadian Bar Association, *Factum of the Appellant*, *supra*, note 69.

¹⁸⁵ *Christie* (S.C.C.), *supra*, note 124 (Factum of the Intervener: Canadian Bar Association); Proc. "Rule of Law", *supra*, note 46.

¹⁸⁶ Louise Arbour, "'Freedom from Want' — From Charity to Entitlement" (LaFontaine-Baldwin Lecture, Quebec City, March 3, 2005), at 17; Institute for Canadian Citizenship, online: <www.icc-icc.ca/en/projects/documents/LouiseArbour2005EN.pdf>.

Canada.¹⁸⁷ In a speech at the Faculty of Law at the University of Alberta in 2008, she affirmed:

I believe that basic justice is a fundamental social good in our society to which every woman, man and child is entitled, like food, shelter and adequate medical care. It is our duty as members of the profession ... to ensure that everyone — regardless of how much money they have or who they know or don't know — can access the justice system and obtain justice.¹⁸⁸

Given its social justice record, described above, marshalling the full might of the Court to turn this belief into reality is perhaps the first and most important lifeline the McLachlin Court can throw to the poor.

¹⁸⁷ A number of the Chief Justice's speeches on this topic can be found on the Supreme Court of Canada's website, Supreme Court of Canada, online: <<http://www.scc-csc.gc.ca/court-court/ju/spe-dis/index-eng.asp>>.

¹⁸⁸ Right Honourable Beverley McLachlin, "Lawyers' Professional Obligations, Public Service and Pro Bono Work", remarks presented to the Faculty of Law, University of Alberta (September 19, 2008) Alberta Law Review, online: <<http://www.albertalawreview.com/index.php/alr/supplement/view/McLachlin's%20Centenary%20Lecture>>.