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# Salvaging the Welfare State?: The Prospects for Judicial Review of the Canada Health and Social Transfer

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Lorne Sossin\*

Salvaging the Welfare State?:  
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*The Canadian Health and Social Transfer ("CHST"), which came into force on April 1, 1996, contains no national standards relating to the quality of social welfare. The goal of this new transfer was to promote provincial flexibility in the sphere of social policy. The author argues that this flexibility may undermine the core of the Canadian welfare state. Given the preoccupation of the provincial and federal governments with devolution, welfare recipients must turn to the judiciary to determine the "bottom line" of the welfare state. The author explores the various constitutional and administrative law grounds on which the federal government's spending power under the CHST could be constrained. He concludes that while judicial review may serve as a useful catalyst for reexamining the normative foundation of the Canadian welfare state (as it arguably has in the U.S. context), current administrative and constitutional jurisprudence make a successful challenge of the CHST unlikely.*

*Le transfert canadien en matière de santé et de programmes sociaux («CHST»), qui date du 1er avril 1996, ne contient pas de normes nationales quant à la qualité de l'assistance sociale. Le but de ce nouveau transfert était de promouvoir la flexibilité des provinces dans le domaine de la politique sociale. L'auteur argumente que cette flexibilité pourrait ébranler l'essentiel de l'état de l'aide sociale au Canada. Compte tenu de la préoccupation des gouvernements provincial et fédéral avec la décentralisation, ceux qui vivent aux dépens de l'état doivent recourir aux cours de justice pour déterminer l'essentiel de l'état actuel de l'aide sociale. L'auteur examine les divers motifs constitutionnels et administratifs sur lesquels le pouvoir de dépenser du gouvernement fédéral sous le CHST pourrait être contraint. Quoiqu'une enquête judiciaire pourrait servir comme un catalyseur pour réexaminer la base normative de l'état actuel de l'aide sociale (comme a eu lieu aux États-Unis), l'auteur conclut que la jurisprudence administrative et constitutionnelle actuelle font qu'une contestation réussie du CHST est peu probable.*

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Everybody applauded that we were giving [the provinces] more freedom and now the people say yeah but maybe we're giving them too much freedom.

Prime Minister Jean Chrétien<sup>1</sup>

### *Introduction*

The Canadian welfare state is in a state of flux, buffeted by government downsizing, deficit reduction, the devolution of powers to the provinces and a growing ambivalence towards the role of the state in alleviating poverty. As Tom Courchene bluntly concluded after reviewing recent social policy developments, “there is no status quo.”<sup>2</sup> A number of disquieting trends, however, are emerging. One of the most important of these trends is the reduction of federal supervision over the content of provincial welfare policy. This trend questions the very foundations of the Canadian welfare state and its capacity to articulate shared norms regarding the obligations of governments to citizens in need. This trend is exemplified and extended by the federal government’s enactment of the Canadian Health and Social Transfer (CHST), which came into force on April 1, 1996.<sup>3</sup>

The CHST is a unilateral federal payment composed of cash and tax points allocated to the provinces as a spending envelope covering health care, post-secondary education and social welfare.<sup>4</sup> The provinces may choose to spend this fund in any proportion they wish as between these

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1. Quoted in S. McCarthy, “PM Loath to Pay Provinces for Health Care” *The [Toronto] Globe & Mail* (24 June 1998) A4.

2. T.J. Courchene, *ACCESS: A Convention on the Canadian Economic and Social Systems, Working Paper* (Toronto: Ontario Ministry of Intergovernmental Affairs, 1996) [hereinafter *ACCESS*] at 38.

3. The *Budget Implementation Act 1995*, S.C. 1995, c.17, s.48 [hereinafter *Budget Act*] amended the *Federal-Provincial Fiscal Arrangements Act*, R.S.C. 1985, c. F-8 and established the CHST as a block grant encompassing federal funding for health care and post-secondary education, replacing the Established Programs Financing (“EPF”) and social assistance (replacing the *Canada Assistance Plan* R.S.C. 1985, c.c-1 [hereinafter CAP]). Section 32 of the *Budget Act* repeals CAP as of March 31, 2000. For a review of developments in EPF and CAP up to their repeal, see T. Courchene, *Social Canada in the Millennium: Reform Imperatives and Restructuring Principles* (Toronto: C.D. Howe Institute, 1994) at 84-130 [hereinafter *Social Canada*]; and F. Vaillancourt, “Income Distribution, Income Security and Fiscal Federalism” and S. Phillips, “Social Policy in Winter” in K. Banting, D. Brown & T. Courchene, eds., *The Future of Fiscal Federalism* (Kingston: School of Policy Studies, Queen’s University, 1994) 255, 283; and P. Leslie, “The Fiscal Crisis of Canadian Federalism” in P. Leslie et al., eds., *A Partnership in Trouble: Renegotiating Fiscal Federalism* (Toronto: C.D. Howe Institute, 1993) 1.

4. A tax point is the amount of money yielded by 1 per cent of income tax revenue in the province. In other words, if the federal government collected \$1,000,000 in income tax revenue

three areas. However, the provinces must comply with certain conditions in order to be eligible to receive their full cash proportion of the funding. The *Canada Health Act* conditions (public administration, comprehensiveness, universality, portability and accessibility) continue to apply to the portion of the CHST used to fund health care. However, conditions relating to welfare contained in the previous *Canada Assistance Plan* no longer apply. In its place, the CHST contains only a single, national standard applicable to provincial social assistance programs: no province receiving the CHST may make a minimum residency period a prerequisite to eligibility for social assistance (the “residency requirement”).

It is the removal of national standards from the substance of social welfare that has been most controversial to social policy observers.<sup>5</sup> My primary concern regarding the CHST is its implications for the welfare state, not its implications for the future of fiscal federalism (these are interrelated but in my view distinct issues).

An ongoing program of general social assistance to those in need constitutes the core of any welfare state - without this, the welfare state loses its capacity to advance our political and social aspirations.<sup>6</sup> I share

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in Ontario, every tax point would be worth \$10,000 to Ontario. If, the following year, the federal government collected \$1,500,000 in income tax revenue from Ontario, the value of the tax point would increase to \$15,000 for Ontario. When a tax point is transferred, the province is permitted to retain a larger share of income tax collected by the federal government, but no actual money changes hands between the governments.

5. A partial review of this literature would include C.M. Scott, “Covenant Constitutionalism and the Canada Assistance Plan” (1995) 6 *Constitutional Forum* 79; M. Jackman, “Women and the Canada Health and Social Transfer: Ensuring Gender Equality in Federal Welfare Reform” (1996) 8 *C.J.W.L.* 371 at 375-83 [hereinafter “Women and the CHST”]; M. Mendelson, *Looking for Mr. Good-Transfer: A Guide to the CHST Negotiations* (Ottawa: Caledon Institute of Social Policy, 1995) at 10-11; S. Torjman & K. Battle, *Can We Have National Standards* (Ottawa: Caledon Institute of Social Policy, 1995); The Council of Canadians, *Danger Ahead: Assessing the Implications of the Canada Health and Social Transfer* (Ottawa: The Council of Canadians, 1995); Citizens for Public Justice, *Will Ottawa Preserve National Equity?* (Toronto: Citizens for Public Justice, 1995); J. Rice, “Redesigning Welfare: The Abandonment of a National Commitment,” in S. Phillips, ed., *How Ottawa Spends, 1995-96 - Mid-Life Crisis* (Ottawa: Carleton University Press, 1995) 185; and S. Phillips, “The CHST: Fiscal Federalism in Search of a Vision” in D. Brown & J. Rose, eds., *Canada: The State of the Federation* (Kingston: Institute of Intergovernmental Relations, Queen’s University, 1995) 65.

6. See R. Goodin, *Reasons for Welfare: The Political Theory of the Welfare State* (Princeton: Princeton University Press, 1988) at 5. Keith Banting, in his comparative analysis of the Canadian welfare state, observes, “[W]hile the particular form of income security varies from nation to nation, it tends to cover a similar range of social needs, compensating for the loss of earnings resulting from retirement, disability, sickness, and unemployment, supplementing the incomes of families with children, and in some jurisdictions also augmenting the incomes of low-wage earners. These programs represent one of the most important functions of government, one with consequences for the well-being of millions of citizens, for the stability of social relations, and for the legitimacy of the process of government itself.” *The Welfare State and Canadian Federalism*, 2nd ed. (Kingston and Montreal: McGill-Queen’s Press, 1987) at 2.

with the drafters of the CHST the belief that the Canadian welfare state, in order to thrive, must encourage provincial experimentation and innovation in designing new social welfare strategies. However, this need not alter the requirement that all provinces share a common “bottom line” below which no citizen may fall. By virtue of the constitutional division of powers in Canada, the only instruments through which the federal government can establish and supervise such a “bottom line” in the area of social welfare are conditional grants to the provinces. The federal spending power has evolved as the means by which the federal government expresses and enforces national standards in spheres under the legislative competence of the provinces (health care being the most familiar example).

The CHST currently contains no bottom line relating to national welfare standards. It does provide, however, for a process through which the federal government and the provinces may agree in the future to shared principles and objectives to underlie social welfare programs. This provision presupposes that no such shared principles and objectives *already* exist and further that they may only be found through traditional federalism mechanisms (*i.e.*, annual meetings between provincial and federal leaders). The purpose of this article is to question this presupposition. I suggest evidence of shared principles and objectives does indeed already exist. These shared principles and objectives are reflected elsewhere in our constitutional, political and legal traditions. Cumulatively, they constitute the substantive foundation of the Canadian welfare state. By removing any relationship between federal social funding and the needs of economically vulnerable Canadians, the CHST denies to the Canadian welfare state the social bond on which it was founded and strengthened. The challenge, in order to salvage the welfare state, is to restore and deepen this bond. I do not suggest that cooperative federalism will not yield additional principles and objectives in relation to social welfare. However, assuming this process stalls or fails, the federal government, in disbursing and spending funds for social programs under the CHST, should still be guided by those norms which *already* exist elsewhere in our legal system.

Judicial review of the CHST would be a costly and uncertain undertaking. Judicial review is a reactive mechanism. A government, group or individual must first challenge the CHST or action taken under its authority. Given scarce resources and no shortage of other battles in the sphere of social welfare, actually launching litigation against the CHST remains for now a remote prospect. While I conclude that judicial review could serve as a crucial catalyst in the project to salvage the welfare state in Canada, this is a role that the judiciary has expressly eschewed in recent

litigation. However, the Supreme Court has sent mixed signals respecting the obligations of the state with respect to social welfare. I believe the CHST provides a timely opportunity to examine the scope and nature of the Canadian welfare state. In this sense, my project has two ambitions. The first ambition is positive—to clarify what legal obligations, if any, the federal government is under in its funding of social welfare in light of the current administrative and constitutional jurisprudence. The second ambition is normative—to argue that some legal obligation should exist requiring the federal government to supervise the “bottom line” of the welfare state through the exercise of its spending power.

This paper is divided into two parts. The first part examines the CHST and is divided into four sections. In the first section, I examine the political and fiscal context in which the CHST emerged. In the second section, I discuss how the CHST works and the limited discretion it provides to the federal government to regulate provincial social programs. In the third section, I distinguish the CHST from the *Canada Assistance Plan* which it replaces. Finally, in the fourth section, I review the debate between the critics and the supporters as to the implications of removing national standards from the CHST.

In the second part of the paper, I consider the potential of welfare recipients to restore the norms underlying federal funding of social assistance through judicial review of the CHST. This part is divided into five sections. In the first section, I examine whether there is a basis in administrative law to supervise how the federal government exercises its spending power under the CHST. In the second section, I examine whether there are grounds under sections 7 or 15 of the *Charter of Rights and Freedoms* to guide the exercise of the federal spending power. In this section, I consider the extent to which the courts’ interpretation of “rights” and the trend towards legislative deference insulates spending programs such as the CHST from judicial intervention. In the third section, I canvass the influence of constitutional provisions outside the *Charter*, and specifically the commitment to provide essential services of reasonable quality under s.36 of the *Constitution Act, 1982*. In the fourth section, I consider the same question with respect to international law obligations. In the fifth section, I analyze the impact of the rise and fall of welfare rights in the U.S. on the emergence and implications of the CHST. Finally, in the conclusion, I explore the “bottom-line” of welfare state norms which ought to guide the federal government’s spending power under the CHST.

Ultimately, in my view, the welfare state ought to be about enforceable social responsibilities rather than shifting fiscal arrangements. To welfare recipients, which government provides a particular benefit or portion

thereof is of little consequence next to the question of whether those benefits are adequate to meet their basic needs. At its core, social welfare is a normative project. Historically, in Canada, the popularity and justice of this project has served as a catalyst for the federal and provincial governments overcoming the strictures of federalism. Beginning with the Rowell-Sirois Report on Dominion-Provincial Relations in 1940, and cemented through the subsequent constitutional agreement on unemployment insurance, cooperative federalism and incremental constitutional amendments provided the means for funding and administering the welfare state.<sup>7</sup> Among other accomplishments, these agreements paved the way for the development of shared-cost programs and the advent of national standards relating to the provision of social welfare. Fiscal federalism, in this respect, evolved to meet the demand for more comprehensive welfare programs and thereby transformed Canada into something more than simply the sum of its parts. With the advent of the CHST, the equation of the Canadian welfare state has been reversed. Now, welfare legislation is devolving to meet the demands of fiscal federalism, and as a result, welfare programs and benefits are steadily eroding in name of provincial autonomy. As one judge observed, “[I]t must not be blithely supposed that it is necessarily in the public interest to bleed those who live at or below the poverty line as a purgative for social health, even if the bleeding is only a little at a time and only once a month.”<sup>8</sup> As a consequence of the CHST, the capacity of the Canadian welfare state to fulfill its purposes is in serious jeopardy.

## I. *The CHST*

### 1. *The Context of the CHST*

The CHST was made possible and necessary because of two important failures. The first was the rejection of the Charlottetown Accord. The Accord would have put in place constitutional limits on federal spending on social programs and a “social charter,” paving the way for entrenching broader and enforceable social rights in Canada.<sup>9</sup> The social Charter was

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7. *Report of the Royal Commission on Dominion-Provincial Relations* (Ottawa: The Commission, 1940); see also D.V. Smiley, *Conditional Grants and Canadian Federalism* (Toronto: Canada Tax Foundation, 1963).

8. *Finlay v. Canada*, [1990] 2 F.C. 790 at 816 (F.C.A.) MacGuigan J.

9. See J. Bakan & D. Schneiderman, eds., *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992) [hereinafter *Social Justice and the Constitution*]. See also M. Certosimo, “Does Canada Need a Social Charter?” (1992) 15 *Dalhousie L. J.* 568; G. Brodsky, *Social Charter Issues after Beaudoin-Dobbie* (Edmonton: Centre for Constitutional Studies, University of Alberta, 1992).

advanced by the Ontario government in the Charlottetown negotiations but was watered down to the point of representing little more than entrenched “good intentions” by the time the agreement was put to the people in the referendum of 1992.<sup>10</sup> After the demise of the Charlottetown Accord, it became clear that the constitutional route to social policy reform had been foreclosed. Canadians were no longer in the mood for another “mega-round” of constitutional negotiation. In its stead, some initiative from the federal government was required to respond to the demands of Quebec for more autonomy over social spending and to reinvigorate federalism generally. The second failure which made the CHST necessary was the consensus that there was a fiscal crisis in the federal government in the early and mid-1990s. Redesigning social transfers into a block grant would accommodate the need for greater provincial autonomy while providing an opportunity to cap federal social spending at a significantly reduced level. Thus, devolution represented a mutually beneficial *quid pro quo*—the federal government ceded budgetary control over federal social funding to the provinces, who in turn received greater autonomy in designing and funding social programs.<sup>11</sup>

## 2. *The Anatomy of the CHST*

The CHST is a block grant from the federal government to the provinces consisting of both a cash payment and an allocation of tax points. The value of this package is currently pegged at approximately 25 billion dollars, although the federal government may unilaterally increase or decrease the amount of the overall transfer. As tax points involve only a notional transfer of funds—no money actually changes hands—this component of the CHST will grow due to inflation and the increase in tax revenues when the economy expands. The cash portion of the CHST represents the difference between the overall ceiling and the value of the allocated tax points.<sup>12</sup> Therefore, the cash portion will begin to decrease

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10. In Part III.1, s. 36.1(2)(b) of the Accord, discussing the Social and Economic Union, established as a “policy objective” the provision of “adequate social services and benefits to ensure that all individuals resident in Canada have reasonable access to housing, food and other basic necessities.”

11. See E. Greenspon, “The New Federalism: Mother Ottawa cuts the apron strings” *The [Toronto] Globe & Mail* (1 February 1997) D1.

12. Section 14 of the *Act* as amended, 1995, provides: “The cash contribution in respect of the Canada Health and Social Transfer that may be provided to a province for a fiscal year is an amount equal to the amount, if any, by which the total entitlement in respect of the Canada Health and Social Transfer applicable to the province for that fiscal year exceeds the total equalized tax transfer applicable to the province for that fiscal year.” *Supra* note 3.



annually unless it is indexed for inflation. Assuming it were not indexed, it is estimated that the cash portion of the CHST could shrink to nil within ten to fifteen years. To prevent this occurrence, the 1996 *Budget Act* amended the *Federal-Provincial Fiscal Arrangements Act* to set a "floor" of \$11 billion per annum below which the cash portion of the CHST will not be permitted to fall.<sup>13</sup> In 1997, this floor was raised to \$12.5 billion.<sup>14</sup> This suggests a legislative commitment to retaining *leverage* over provincial governments in the field of social policy.

Unlike CAP, which was financed on the basis of how much provincial governments spent on social assistance, the CHST is financed on the basis of the Gross National Product and provincial population.<sup>15</sup> This means that the extent of need for social assistance at a particular juncture in time is irrelevant under the CHST. In this fashion, the risk of welfare expenditures rising in periods of economic downturn is off-loaded entirely to the provinces. For example, if Ontario's welfare roll rose from 100,000 to 200,000, under CAP, both Ontario and the federal government's funding for welfare in the province would have doubled. Under the CHST, the federal government's portion would remain unchanged (assuming GNP and Ontario's population remained the same) while Ontario's welfare expenditures would have to rise fourfold to meet the increased demand.

Section 13 of the *Act* sets out the purposes underlying the CHST as follows: 13(1)(a) establishing interim arrangements to finance social programs in a manner that will increase provincial flexibility; (b) maintaining the national criteria and conditions in the *Canada Health Act*, including those respecting public administration, comprehensiveness, universality, portability and accessibility, and the provisions relating to extra-billing and user charges; (c) maintaining the national standard, set out in section 19, that no period of minimum residency be required or allowed with respect to social assistance; and (d) promoting any shared principles and objectives that are developed, pursuant to subsection (3), with respect to the operation of social programs, other than a program for the purpose referred to in paragraph (b). Section 13(3) further provides for a consultative mechanism through which additional intergovernmental cooperation under the CHST may take place:

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13. See s.15(3) of the *Act*, *supra* note 3, as amended by the *Budget Implementation Act 1996*, S.C. 1996, c.18, s.49.

14. See Department of Finance Press Release at [www.fin.gc.ca/newse97/97%2D116e.html](http://www.fin.gc.ca/newse97/97%2D116e.html).

15. This formula is set out in s.15(4) of the *Act*, as amended: *supra* note 13. Based on this formula, the federal government is authorized to provide \$26.9 billion in 1996/97, and \$25.1 billion in each of 1997/98, 1998/99 and 1999/2000.

The Minister of Human Resources Development shall invite representatives of all the provinces to consult and work together to develop, through mutual consent, a set of shared principles and objects for the other social programs referred to in paragraph (1)(d) that could underlie the Canada Health and Social Transfer.

By establishing, as part of the CHST, a consultative process for the development of additional shared principles and objectives for social spending, the federal government has committed itself to a cooperative federalist model with respect to additional national standards in the area of social welfare. This initiative has not resulted in a fresh consensus regarding the purposes of the CHST, nor however, has it been an empty gesture.<sup>16</sup> At a meeting of the federal and provincial first ministers in 1996, an agreement in principle was reached to develop a national benefit in relation to child welfare.<sup>17</sup>

According to Peter Hogg, by the terms of s.13, the federal government is henceforth “obliged” to consult the provinces before imposing additional conditions.<sup>18</sup> Thus, the possibility of the federal government unilaterally adding further national standards would appear remote. The provinces, for their part, have little interest in compromising their flexibility with respect to social policy and thus are unlikely to consent to additional conditions being imposed on the CHST. The only constituency with a vested interest in establishing and enforcing additional conditions is the group with the least means of furthering this goal—the welfare recipients themselves.

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16. Perhaps, most importantly, it has provided a framework within which to continue debate on the future of Canada’s social union. For an example of current thinking on the shape of such a social union in the context of the CHST, see Tom Courchene’s ACCESS proposals, discussed below, and M. Biggs, *Building Blocks for Canada’s New Social Union: Working Paper No. F/02* (Ottawa: Renouf, 1996).

17. See D. Ferguson, “Social Service Ministers Take Aim at Child Poverty—New Program to Reward Low-Wage Families” *Toronto Star* (6 October 1997) A6; see also S. Bach & S. Phillips, “Constructing a New Social Union: Child Care Beyond Infancy” in G. Swimmer, ed., *How Ottawa Spends 1997-98, Seeing Red: A Liberal Report Card* (Ottawa: Carleton University Press) 235.

18. P. Hogg, *Constitutional Law in Canada*, 3rd ed. (Toronto: Carswell, 1992) at 145-49 [hereinafter Hogg]. In his 4th edition (1997) Hogg adds at 153 that s.13 of the *Act* represents a “declaration that the federal government will in the future no longer set conditions on its funding by unilateral fiat, which is how the conditions were established for the original shared-cost programs.” However, to the extent this “declaration” emerges from s.13, it is one that would not appear to be legally enforceable.

As for the conditions which exist, the CHST stipulates that the provinces must meet certain national standards in order to be entitled to the full cash portion of the CHST. Aside from those contained in the *Canada Health Act*,<sup>19</sup> only one condition is stipulated. Section 19 of the *Act* provides as follows:

19.(1) In order that a province may qualify for a full cash contribution referred to in section 14 of the fiscal year, the laws of the province must not.

- (a) require or allow a period of residence in the province or Canada to be set as a condition of eligibility for social assistance or for the receipt or continued receipt thereof; or
- (b) make or allow the amount, form or manner of social assistance to be contingent upon a period of such residence.

The CHST provides a mechanism to impose fiscal penalties on those provinces which do not comply with the criteria set out in the *Act*.<sup>20</sup> Where non-compliance is established, mandatory fiscal penalties will ensue. However, the process of establishing non-compliance vests Cabinet with considerable discretion.<sup>21</sup> Even if a province was found not to be in compliance with the CHST, it would remain open to the federal government to conclude that the province's non-compliance was not serious enough to warrant any financial penalty at all.

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19. R.S., 1985, c. C-6. The CHST retains the five national conditions contained in the *Canada Health Act*: comprehensiveness, universality, portability, accessibility and public administration. On the enforcement of these standards, see S. Choudhry, "The Enforcement of the Canada Health Act" (1996) 41 McGill L.J. 461.

20. Section 17(2) provides that,

The cash contribution that may be provided to a province under this Part shall be reduced or withheld for the purposes of giving effect to

- (a) any order made by the Governor in Council in respect of the province under section 15 or 16 of the *Canada Health Act* or section 21 or 22 of this *Act*; or
- (b) any deduction from the cash contribution pursuant to section 20 of the *Canada Health Act*.

*Supra* note 3.

21. Sections 21 and 22 provide as follows:

21.(1) Where, on the referral of a matter under section 20, the Governor in Council is of the opinion that the province does not or has ceased to comply with section 19, the Governor in Council *may*, by order,

- (a) direct that any cash contribution to that province for a fiscal year be reduced, in respect of each non-compliance, by an amount that the Governor in Council considers to be appropriate, having regard to the gravity of the non-compliance; or
- (b) where the Governor in Council considers it appropriate, direct that the whole of any cash contribution to that province for a fiscal year be withheld. [Emphasis added.]

The view that the residency requirement will remain the only national standard applicable to social assistance programs under the CHST is strengthened by an analysis of the Parliamentary debates leading up to the passage of the *Budget Act* (referred to then as Bill C-76). The debate surrounding Bill C-76 took place during the acrimonious lead-up to the 1995 Quebec referendum campaign. As a result, Bloc Québécois members sought to portray Bill C-76 as amounting to a reduction of funding and an increase in federal control over social programs. On May 2, 1995, for example, Lucien Bouchard, then Leader of the Opposition, declared, "The fact of the matter is that no bill has ever given the federal government so much power to impose national standards."<sup>22</sup>

In response to these allegations, Liberal Minister of Finance Paul Martin, on behalf of the government, stated unequivocally that only two conditions would accompany the CHST: 1) that the *Canada Health Act* objectives would remain, and 2) that no minimum residency requirement be required for social assistance eligibility. At three different junctures in his speech, Martin emphasized that they had "no intention of imposing new national standards."<sup>23</sup> Subsequently, in reply to questions from a Reform MP concerned that the consultative process might yield some further imposition of other national standards, a Liberal MP reaffirmed that the provinces "will be able to apply the social programs they deem most appropriate in whatever manner they see fit, and will be the ones in charge of this area."<sup>24</sup>

The CHST signalled a dramatic departure from the federal government's approach to social welfare under CAP. As the federal government made clear, this was not merely an incidental effect of the new block grant scheme but one of its central purposes.

### 3. *The CHST as distinguished from CAP*

Under the *Canada Assistance Plan*, the federal government and provincial governments agreed to each pay 50% of the cost of providing social assistance. The federal government's funding of social assistance was

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22. In the case of a continuing failure to comply with section 19, any reduction or withholding under section 21 of a cash contribution to a province for a fiscal year *shall* be reimposed for each succeeding fiscal year *as long as the Minister is satisfied*, after consultation with the minister responsible for social assistance in the province, that the non-compliance is continuing. [Emphasis added]

*Ibid.*

22. *House of Commons Debates* (2 May 1995) at 12032.

23. *Ibid.* at 12034-6.

24. *Ibid.* at 12045.

tied (1) to the number of recipients receiving social assistance, and (2) the benefit levels set by provincial governments. CAP, like other shared cost programs, represented the surmounting of the obstacles of federalism in the interest of responding to the demands of those in need. Following the striking down by the Judicial Committee of the Privy Council of Bennett's New Deal,<sup>25</sup> which attempted to respond to the social needs generated by the Depression through unilateral federal legislation, it became clear that the Canadian welfare state could only develop through federal-provincial cooperation. The factors motivating the meshing of federalism and the welfare state were fiscal, political and constitutional in origin.<sup>26</sup> Fiscally, the federal government had a revenue base which grew steadily and quickly in the post-war era by virtue of the expansion of the economy and the income tax. Politically, the welfare state was a popular nation-building initiative and federal politicians, from the Depression until the 1980s, ran on platforms to create, expand or preserve its programs. Constitutionally, social programs fell under the exclusive jurisdiction of the provincial governments by virtue of the division of powers in the *Constitution Act, 1867*. Therefore, the federal government found itself in the post-war era with the means and the desire to fund programs which only the provincial governments had the jurisdiction to implement. This impasse was cleared not only by constitutional amendment but also through the federal government's expansive use of its constitutional spending power which permitted the federal government to attach conditions to its grants and thus to set national standards for areas outside its legislative competence.<sup>27</sup> CAP was one of approximately 100 shared-cost programs initiated by the federal government since the Second World War.<sup>28</sup>

In response to the mounting federal deficit in the 1980s, the federal government sought to scale back CAP expenditures. In 1990, for the first time a spending cap on CAP was imposed by the federal government. The restrictions on CAP applied only to the three "have" provinces — Ontario, British Columbia and Alberta — limiting the growth of CAP funding to 5% annually. The result was that these three provinces began shouldering more than 50% of social assistance spending. The funding disparity was

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25. See *Canada (A.G.) v. Ontario (A.G.)*, [1937] A.C. 355.

26. See D. Guest, *The Emergence of Social Security in Canada*, 2d ed. (Vancouver: University of British Columbia Press, 1985) [hereinafter *The Emergence of Social Security*].

27. The federal government's spending power is not expressly granted under s.91 of the *Constitution Act, 1867*, but rather is inferred from the power to levy taxes in s.91(3) and is further supported by the federal powers in relation to public debt and property (s.91(1A)) and to appropriate public funds (s.106).

28. See Hogg, *supra* note 18.

exacerbated and accelerated due to the recession which struck those provinces in the early 1990s. For example, in 1992/93 alone, Ontario was estimated to have lost \$1.7 billion due to reduced federal CAP funding.<sup>29</sup> Between 1988 and 1993, Ontario's social assistance caseload doubled, as did the proportion of Ontario's budget spent on social assistance. The federal contribution per welfare recipient in Ontario fell from \$3,100 in 1990/91 to \$1,800 in 1994/95.<sup>30</sup> The B.C. government sued the federal government seeking to invalidate its unilateral funding cap.<sup>31</sup> The Supreme Court of Canada upheld these amendments on the basis that the federal government's constitutional spending power provided it the unfettered jurisdiction to spend its money as it saw fit.<sup>32</sup>

CAP placed important limitations on the flexibility of the provinces to design and implement social policy utilizing federal funds. Under CAP, the Minister was given the authority to enter into an agreement with any province to provide for the payment of contributions towards provincially administered social programs. These federal transfers under CAP were tied to a number of conditions referred to as "terms of agreement". These conditions required that:

- (i) the provinces must provide social assistance to all those in need regardless of the cause of a person's need;
- (ii) the provinces must take into account a recipient's budgetary needs;
- (iii) the provinces could not impose a minimum residency period as a condition of receiving social assistance;
- (iv) provinces must provide for recipients to have a route of appeal;
- (v) provinces could not require recipients to work as a condition of receiving social assistance; and
- (vi) provinces must keep records regarding programs and services under CAP.<sup>33</sup>

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29. See *Social Canada*, *supra* note 3 at 118.

30. *Ibid.*

31. See *Re Canada Assistance Plan*, [1991] 2 S.C.R. 525 [hereinafter *CAP Reference*].

32. In his analysis of this case, Peter Hogg remarked (*supra* note 18 at 152): "It seems to me that the better view of the law is that the federal Parliament may spend or lend its funds to any government or institution or individual it chooses, for any purpose it chooses; and that it may attach to any grant or loan any conditions it chooses, including conditions it could not directly legislate." For a discussion of the breadth of the federal spending power, see A. Petter, "Federalism and the Myth of the Federal Spending Power" (1989) 68 Can. Bar Rev. at 448; and E. Driedger, "The Spending Power" (1981) 7 Queen's L.J. 124. See also *Winterhaven Stables v. Canada* (1988), 53 D.L.R. (4th) 413 (Alta. C.A.) (Leave to appeal to SCC denied (1989) 55 D.L.R. (4th) viii); and *YMHA Jewish Community Centre v. Brown*, [1989] 1 S.C.R. 1532.

33. For a discussion of these standards, see *Torjman & Battle*, *supra* note 5.

While these conditions did not mandate any uniform or national levels of social assistance, they did create obligations on provincial governments which were held to be enforceable by social assistance recipients as well as the federal government.<sup>34</sup> CAP was simply a contract between governments. However, the *effect* of CAP was to create a national entitlement to social assistance funded in relation to need.<sup>35</sup>

The nature and scope of this entitlement was considered by the Supreme Court of Canada in *Finlay v. Canada* (1993).<sup>36</sup> In *Finlay*, a welfare recipient had received overpayments from the Manitoba government. The government sought to recover these overpayments by deductions of 5% from Finlay's monthly allowance. He challenged those deductions as a violation of CAP, specifically on the basis of section 6(2)(a) which established as a condition of the Manitoba government receiving federal contributions that the province agree to provide assistance to any person in the province who is in need in an amount that takes into account the basic requirements of that person.

A slim majority of the Court (5-4) upheld the deductions. The majority held that s.6 established the principles and objectives of CAP, but that this did not dictate precise terms with which the provincial legislation had to comply. Writing for the majority, Sopinka J. held:

In my view, s.6(2)(a) requires assistance to be provided in an amount that is compatible, or consistent, with an individual's basic requirements. It thus requires something more than mere "consideration" of an individual's basic requirements. If that were all that were required, a province could provide almost any amount of assistance, including an amount far less than that which would be compatible with basic requirements, as long as it had turned its mind to such requirements. Such an interpretation would not even permit the federal government to limit its contributions to schemes that were of the *general* nature it wished to support. I cannot accept this as

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34. See *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, 33 D.L.R. (4th) 321 [hereinafter *Finlay (1986)* cited to D.L.R.]. It is important to emphasize that Finlay was not granted standing to directly challenge the federal government's funding of a provincial welfare scheme under CAP. Rather, Finlay was granted public interest standing. To meet this threshold, Finlay established that there was a serious issue to adjudicated, that he had a genuine interest in the outcome, and that the matter would not otherwise be litigated.

35. Rice, in distinguishing CAP from the CHST, emphasized, "No matter how many people were forced onto welfare or for what reasons, CAP ensured the development and existence of a nationwide social welfare system. People who could not meet their own needs were protected from falling into destitution. With the introduction of the CHST . . . changes to the previous fundamental conditions undermine the notion of universal rights contained within the CAP system." See Rice, *supra* note 5 at 198.

36. [1993] 1 S.C.R. 1080, 101 D.L.R. (4th) 567 [hereinafter *Finlay (1993)* cited to D.L.R.]. For a critique of this decision, see M. Young, "Starving in the Shadow of the Law: A Comment on *Finlay v. Canada (Minister of Finance)*" (1994) 5 *Constitutional Forum* 31.

Parliament's intention. However, s.6(2)(a) does not necessitate an *exact* fit in the sense of requiring a province to provide an amount of assistance that "fulfills" or "equals" basic requirements for each payment period.<sup>37</sup>

Writing for the dissenting minority, McLachlin J. held that CAP required that, in order to be eligible for full federal funding, the provinces had to implement a scheme for social assistance which provided for the basic requirements of the person in need (*i.e.*, "food, shelter, clothing, fuel, utilities, household supplies, and personal requirements").<sup>38</sup> McLachlin J. added that if the Manitoba scheme had never adequately provided for Finlay's basic requirements to begin with, any deduction would necessarily deprive him of his basic requirements.<sup>39</sup> On this basis, the minority of the Court would have struck down the Manitoba overpayment recovery scheme. Notwithstanding the narrower approach adopted by the majority, *Finlay* confirmed that CAP provided welfare recipients with an enforceable entitlement to *some* level of benefits but not to any particular minimum level.

The national standards contained in CAP are not present in the legislation establishing the CHST (with the exception of the residency requirement). Obviously, recipients do not have any standing to enforce national standards which no longer exist. The CHST represents a new model of "flexibility" in the social policy sphere, one calculated to defeat any claim to an entitlement to welfare by rendering all federal funding for social programs a matter of legislative or executive discretion. The CHST has thus removed two related and fundamental aspects of the Canadian welfare state: 1) the obligation on governments to respond to the "basic requirements" of those in need, along with other national standards; and 2) a cause of action for welfare recipients themselves to enforce those standards.

#### 4. *The CHST and its Critics*

While all observers agree the CHST removes national standards from social welfare programs, there is less agreement as to whether this is a step forwards or backwards for the welfare state.

Critics fear the CHST, by pitting popular, universal "middle class" benefits such as health care and postsecondary education against unpopular, means-tested social assistance benefits ensures that social assistance will receive a smaller slice of a shrinking social programs pie.<sup>40</sup> The

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37. *Ibid.* at 574-75.

38. *Ibid.* at 592.

39. *Ibid.* at 600.

40. See "Women and the CHST," *supra* note 5 at 381.



removal of national standards from social welfare, while retaining them for health care, reinforces this view of the CHST. Combined with provincial initiatives to reduce welfare expenditures, institute workfare and limit eligibility for benefits, critics charge that the Canadian welfare state is regressing to a time when welfare was a minimally funded, locally administered system of "last resort" assistance, intended as much to correct perceived flaws in the character and work ethic of recipients as to alleviate poverty. In the words of Loren Fried, executive director of the North York Harvest Food Bank, the CHST "unleashed the most destructive chain reaction of government domino downloading and government cost-cutting of welfare and social spending that has ever been inflicted on Canada's poor and marginalized population."<sup>41</sup> These observers further caution that "flexibility" is a euphemism for imposing additional behavioural conditions on welfare recipients such as "workfare," "learnfare," "bridefare" and the "family cap," and that the CHST will reinforce the pernicious distinction between the "deserving" and the "undeserving" poor, which reserves special stigma for groups such as single mothers, and able-bodied, employable individuals who are outside the labour force.<sup>42</sup>

Supporters, by contrast, predict the devolution of powers over social policy will result in each province experimenting with new ideas on welfare, leading to innovation and competitive federalism. These observers highlight the virtues of competitive federalism and the policy initiatives that might be nurtured by allowing different provinces to take different paths in the amelioration of poverty. They cite the example of Canada's health care system, modelled after a social experiment which succeeded in Saskatchewan in the 1950s. As well, labour codes, human rights codes and public auto insurance all were introduced through provincial pilot projects. For Tom Courchene, provincial leadership is necessary in the social policy sphere as the evolution of federalism veers away from a "negative integration" model, under which the federal government issues "thou shall nots" to the provinces, and towards a

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41. G. Fraser, "Ottawa Urged to Take Lead on Poverty Issues" *The [Toronto] Globe & Mail* (6 December 1997) A16.

42. See I. Morrison & G. Pearce, "Under the Axe: Social Assistance in Ontario in 1995" (1995) 11 *J. Law & Soc. Pol'y* 1; M. Evans, "Linking Welfare to Jobs: Workfare Canadian Style" (1994) 16:4 *Policy Options* 25; M. Drumbl, "Exploring the Constitutional Limits to Workfare & Learnfare" (1994) 10 *J. Law & Soc. Pol'y* 107; "Women and the CHST," *supra* note 5 at 379-80; and Battle & Torjman, *supra* note 5 at 3. On the deserving/undeserving dichotomy generally, see J. Handler & Y. Hasenfeld, *The Moral Construction of Poverty: Welfare Reform in America* (Newbury Park: Sage Publications, 1991); and M. Katz, *The Undeserving Poor: The War on Poverty to the War on Welfare* (New York: Pantheon Books, 1989).

“positive integration” approach, exemplified by intergovernmental accords such as the Agreement on Internal Trade.<sup>43</sup> Additionally, Courchene points out that welfare standards were already arbitrary and unequal under CAP.<sup>44</sup>

The debate between the critics and the supporters of devolution may be critical to the future of fiscal federalism. However, in my view, the focus on the contest over fiscal federalism obscures much of the meaning and the danger of the CHST for the Canadian welfare state. At least with respect to social welfare, the real issue underlying the CHST is not what level of government is vested with discretion over regulating social welfare, but rather how, and in whose interests, governments exercise their discretion. As I stated at the outset of this paper, welfare is principally about the substance of state assistance, not about who pays for the programs or signs the social assistance cheques. If anything, the division of powers in the field of social welfare renders both levels of government less accountable for their respective policies.<sup>45</sup>

The limits which may constrain the federal government’s exercise of its spending power are found in the requirements of administrative and constitutional law which in part control state action in Canada. The task of determining and delineating such limits may fall to the courts through judicial review. However, as I discuss below, this is a task that courts in Canada appear to have abdicated by expanding their reliance on administrative and constitutional doctrines of legislative deference.

## II. *Judicial Review and the CHST*

In this section, I explore whether judicial review of the CHST may guide the exercise of the federal government’s spending power in relation to social welfare.

Courts historically have served as a catalyst for shaping social welfare policy in Canada. Indeed, as noted above, it was the refusal of the Judicial

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43. *ACCESS*, *supra* note 2 at 5.

44. Courchene points out that for a couple with two children in 1993, benefit levels ranged from \$9,512 in New Brunswick to \$19,695 in Ontario, annually. See T. Courchene, *Redistributing Money and Power: A Guide to the Canada Health and Social Transfer* (Vancouver: C.D. Howe Institute, 1995) at 52.

45. See Petter, *supra* note 32 at 467, where he argues, “the spending power does not simply shift political responsibility from one order of government to the other; it intersperses responsibility between both orders. The result is to require those advocating a particular reform to fight a battle on two fronts. At the same time, it becomes virtually impossible for citizens to determine which order of government to hold accountable for policies that fail or, for that matter, for ones that succeed. The consequence is to diminish the influence of the ordinary citizens over government policy-making and to heighten the power of governmental elites.”

Committee of the Privy Council to sanction the federal government's attempt to unilaterally provide unemployment insurance that paved the way for federal-provincial cooperation in the construction of the Canadian welfare state. While the courts have provided a frequently used forum for resolving disputes between governments over federalism, they have not been equally hospitable to the recipients of public assistance.

Welfare recipients are a poorly organized constituency. Their capacity to influence the decision-making of either federal or provincial governments is extremely limited.<sup>46</sup> It is only in light of these obstacles to political solutions that the courtroom appears to hold such promise—despite the fact that litigation brought by welfare recipients and claimants has yielded few successes. Partially, out of desperation, but also as an appeal to principle, welfare recipients continue to seek to advance their interests in the courts. Litigation remains an appealing option for those who seek to resist and roll back government cuts in the social policy sphere for two reasons: (1) recourse to the protections of administrative and constitutional law casts welfare recipients as citizens with rights to assert and entitlements to enforce, which has been generally associated with the empowerment of litigants;<sup>47</sup> and (2) courts are the only political institution with the practical capacity and remedial authority to allow welfare recipients to challenge the government's design and implementation of social benefits.<sup>48</sup> The government can and does, after all, ignore protests but cannot as readily resist litigation. For this reason, litigation

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46. Jackman emphasizes that the vulnerability of welfare recipients renders them especially marginalized by the democratic process. See M. Jackman, "Constitutional Rhetoric and Social Justice: Reflections on the Justiciability Debate" in *Social Justice and the Constitution*, *supra* note 9, 17 at 23-25.

47. For this reason, the Supreme Court's ruling in *Finlay (1986)*, *supra* note 34, was hailed as a substantial victory for welfare recipients as the Court recognized that federal spending in the social welfare sphere gave rise to governmental obligations enforceable by welfare recipients. Le Dain J. held (at 341): "as a person in need within the contemplation of [CAP] who complains of having been prejudiced by the alleged provincial non-compliance shows that he is a person with a genuine interest in these issues and not a mere busybody." Under the CHST, however, "a person in need" has no relevance to the provision of federal funding. However, because the CHST contains a mechanism for enforcing certain conditions (consisting for now of only the residency requirement) welfare recipients would appear to retain a "genuine interest" in the validity of the CHST. On the implications of *Finlay (1986)* for the law of standing, see K. Roach, *Constitutional Remedies in Canada* (Toronto: Canada Law Book, 1994) at 5.120; W.A. Bogart, "Understanding Standing, Chapter IV: *Minister of Finance of Canada v. Finlay*" (1988) 10 *Supreme Court L.R.* 377; T. Cromwell, "From Trilogy to Quartet: *Minister of Finance v. Finlay*" (1987), 7 *Windsor Y.B. Access Justice* 103.

48. The most probable relief sought in a challenge to the CHST would be declaratory in nature. This would enable a Court to set out the obligations of the federal government while leaving to the government to determine precisely how to fulfil those obligations.

may be the “last resort” of groups that are marginalized in the legislative process.<sup>49</sup> Because governments must listen to the pronouncements of the courts, vulnerable groups such as welfare recipients continue to seek a voice there.<sup>50</sup>

The importance of establishing limits on the “flexibility” of governments in the field of social welfare must be seen in historical as well as legal contexts. Allowing local governments “flexibility” often has been used to implement welfare policies unequally and arbitrarily - to control welfare recipients by making their eligibility dependent on the “good graces” of state officials.<sup>51</sup> Further, flexibility in the social policy context has often permitted discretionary powers to be used to do nothing. Because of this history, welfare rights have been viewed as a necessary and effective means by which welfare recipients and their advocates may supervise government (in)action.<sup>52</sup> However, courts supervise governments in a specialized and limited way, privileging the abstract rights of citizens over their concrete needs.<sup>53</sup>

To date, the CHST has not been judicially considered in Canada.<sup>54</sup> What follows is an account of the administrative and constitutional

49. For further discussion of this point, see K. Roach, “The Role of Litigation and the Charter in Interest Advocacy” in F.L. Seidle, ed., *Equity & Community: The Charter, Interest Advocacy and Representation* (Kingston: Institute for Research on Public Policy, 1993) 159.

50. For example, when the Ontario Tories announced a 21% cut to welfare benefits in the fall of 1995, a group of recipients retained a group of lawyers headed by Mary Eberts to launch a Constitutional challenge. See *Masse v. Ontario (Com. & Soc. Services)* (1996), 134 D.L.R. (4th) 20 (Ont. Div. Ct.), leave to appeal to C.A. refused (30 April 1996) Doc. CA M17794 (Ont. C.A.) [hereinafter *Masse*]. See also *Falkiner v. Ontario*, [1996] O.J. No. 3737 (QL) (Div. Ct.) (in which welfare recipients challenged the “man in the house” rule under Ontario’s welfare legislation).

51. See F. Piven & R. Cloward, *Regulating the Poor: The Functions of Public Welfare* (New York: Vintage, 1993) at 248-340. For this reason, members of disadvantaged minorities likely to be the target of discrimination by state officials often view structured rights as preferable to broad discretion. See, e.g., R. Delgado, “The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?” (1987) 22 Harv. C.R.-C.L. L. Rev. 301 at 314-15; M. Matsuda, “Looking to the Bottom: Critical Legal Studies and Reparations” (1987) 22 Harv. C.R.-C.L. L. Rev. 323 at 390-91; and P. Williams, “Alchemical Notes: Reconstructing Ideals from Deconstructed Rights” (1987) 22 Harv. C.R.-C.L. L. Rev. 401 at 408.

52. See, e.g., J. Mashaw, “Welfare Reform and Local Administration of Aid to Families with Dependent Children in Virginia” (1971) 57 Va. L. Rev. 818.

53. See for a fuller discussion of these issues, J. Hiebert, *Limiting Rights: The Dilemma of Judicial Review* (Montreal and Kingston: McGill-Queen’s Press, 1996).

54. According to Janet Mosher, a workshop was held at the University of Toronto Law School in 1996 in which launching a judicial review of the CHST was recommended. Apparently this has not yet taken place. A Quicklaw search conducted in June of 1998 revealed that no Canadian court has yet to rule on either the meaning or the validity of the provisions of the CHST, although the obligation of the federal government to provide the CHST so long as the provinces fulfil the conditions set out therein was confirmed in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.

doctrines that would likely be at issue if such a challenge were mounted in search of restoring national standards to social welfare. It should be reiterated that the CHST, like CAP before it, cannot compel provincial governments to design particular welfare programs or fund them at particular levels. Because the federal spending power is limited to placing conditions on federal funding, it will always remain open to provincial governments simply to refuse federal funding and develop whatever social programs they wish. In this sense, major aspects of the Canadian welfare state will always rest on provincial autonomy. However, what the spending power does make possible is the establishment of norms to guide the design and development of social programs. Conditional grants such as the CHST ought to embody the common ground and shared aspirations of *all* Canadians with respect to the areas of government activity being funded. When they fail to do this, such grants deprive Canadians of a tangible and meaningful entitlement.

### 1. *Administrative Law and the CHST*

Administrative law delineates the legal boundaries of public authority. While administrative law is concerned with jurisdiction rather than the content of government action, these two issues often become entangled. For example, where a statute gives a Minister the discretion to close a hospital for regulatory infractions and the minister decides instead to close the hospital for budgetary reasons, the court will quash the decision on the basis that the Minister exceeded the authority of the statute.<sup>55</sup> This amounts to a procedural protection which may have important substantive implications. In the case of the CHST, the scope of administrative law supervision similarly will turn on an analysis of the purpose(s) of the transfer.

As set out above, section 13 states that one of the purposes of the CHST is to establish “interim arrangements to finance *social programs* in a manner that will increase provincial flexibility”.<sup>56</sup> “Social programs” are defined to include “programs in respect of health, post-secondary education, social assistance and social services.”<sup>57</sup> Therefore, the definition of “social program” under the CHST is illustrative rather than exhaustive — it *includes* “social assistance” and “social services” but is not limited to these. “Social assistance” is further defined broadly as “aid in any form to or in respect of a person in need.”<sup>58</sup>

55. See *Re: Doctors Hospital and Minister of Health* (1976), 12 O.R. (2d) 164 (Div. Ct.).

56. Section 13(1)(a) of the *Act*, as amended, *supra* note 3 [emphasis added].

57. Section 25 of the *Act*, as amended, *ibid.*

58. Section 18 of the *Act*, as amended, *ibid.*

As the provinces have complete discretion with respect to which social programs will receive CHST funds, even if a province announced that it was no longer going to provide “social assistance” benefits of any kind, this would appear to be within the contemplation of the CHST. Indeed, as a practical matter, the federal government currently does not require provinces to report how the CHST funds are spent, nor does it have any supervisory mechanism to ensure the grant is allotted to programs which meet the definition of “social programs” contained in the Act.<sup>59</sup> Parliament has stated the purposes of the CHST, but as those purposes only indirectly connect the funding of social assistance to the provision of aid to those in need, this significantly reduces the scope of judicial review under administrative law.

The nature of the CHST could (and perhaps should) result in merely shifting the focus of legal regulation from the federal to the provincial sphere. However, an examination of recent challenges to provincial social welfare schemes on the basis of administrative law reveals that courts are prepared to afford virtually unlimited discretion regarding the types of welfare programs, and the levels of welfare support, to provincial governments. In *Masse v. Ontario*,<sup>60</sup> for example, the Ontario government’s decision to cut social assistance benefits by 21.6% was challenged as being *ultra vires* Ontario’s *General Welfare Assistance Act*<sup>61</sup> and *Family Benefits Act*.<sup>62</sup> Each of the three Divisional Court judges hearing the case issued a separate judgment. All three agreed, however, that the reduction in social assistance benefits was within the jurisdiction of the provincial government and consistent with the purposes of the impugned welfare legislation. O’Brien J., who addressed this issue specifically, added:

In reaching my conclusions on the administrative law arguments I agree with comments made by Professor Hogg in *Constitutional Law of Canada*, 3rd ed. (Scarborough, Ont.: Carswell, 1992) at pp. 922-12, where he states:

It seems that virtually any benefit program could be held to be under-inclusive in some respects.

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59. I am grateful to the staff of the Ontario Ministry for Intergovernmental Affairs for clarifying how the CHST is treated from the standpoint of provincial budgeting. Recently, Prime Minister Chrétien rejected calls to infuse more money into the CHST on the basis that there was no guarantee the additional funds would be spent on social programs (or health care specifically). Chrétien stated, “In the transfer payments, when we send the cheque, after that we don’t know what happens to the money on the CHST . . . some provinces say, it’s not your business, we might put this into roads.” See McCarthy, *supra* note 1.

60. *Supra* note 50.

61. R.S.O. 1990, c.G.6.

62. R.S.O. 1990, c.F.2.

The question of the finality of policy decisions was concisely expressed in *Thorne's Hardware Ltd. v. The Queen* [cite omitted]. Mr. Justice Dickson (as he then was) considered the matter. . . :

Decisions made by the Governor in Council in matters of public convenience and general policy are final and not reviewable in legal proceedings. Although the possibility of striking down an Order in Council on jurisdictional or other compelling grounds remains open, it would take an egregious case to warrant such action.

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The courts should not lightly interfere with government decisions made on a legislative or policy level and I agree with statements that the available remedy should be political, not legal.<sup>63</sup>

One of the rare instances of a court striking down government legislation in the social policy sphere occurred in *Federated Anti-Poverty Groups of B.C. v. British Columbia (Minister of Social Services)*,<sup>64</sup> in which a British Columbia court held that a residency provision instituted by the provincial government, requiring individuals to be resident in B.C. 90 days before becoming eligible for social assistance, was *ultra vires* the *Guaranteed Available Income for Need Act*,<sup>65</sup> and therefore invalid. Additionally, because the measure was contrary to the CAP standard regarding residency, the federal government had withheld \$46 million in transfer payments from the province. The regulation in question empowered the Minister to exercise discretion in a number of contexts, including that of designating benefits and establishing the criteria of eligibility. The applicants argued that the regulation was beyond the powers of the Lieutenant Governor-in-Council, that it was inconsistent with the purpose of GAIN, that it was discriminatory and not authorized under GAIN and that it violated the B.C. *Human Rights Act*. Spencer J. characterized the purpose of GAIN as “the relief of poverty, neglect or suffering . . . within the budgetary allowance to be provided by the legislature from time to time and the establishment of the Minister’s discretionary powers to achieve it.”<sup>66</sup> Distinguishing between residents and non-residents was held not to be consistent with this purpose.<sup>67</sup>

63. See *Masse*, *supra* note 50 at 55-56.

64. [1996] B.C.J. No. 2088 (QL) (S.C.).

65. R.S.B.C. 1979, c.158 [hereinafter GAIN].

66. *Supra* note 64 at para. 17.

67. Spencer J. stated (*ibid.* at para. 20), “At first glance s.26(2)(d) seems to give an unlimited power to pass a regulation which establishes rules of eligibility for income assistance. But read in the context of the whole Act can that be so? Could the government by regulation declare that only people of certain occupations, persuasions, places of residence within the Province or age groups or that one sex only be eligible for assistance? The answer to that rhetorical question is clearly that it could not. Nothing in the context of the Act enables eligibility to be accorded

While government action taken under the authority of the CHST would be difficult to invalidate as being inconsistent with its purpose, it may be possible to impugn the establishment of the CHST on the basis that it eliminated two important entitlements from federal social welfare funding without allowing those affected a chance to be heard. The two entitlements are: 1) the obligation on governments to respond to the “basic requirements” of those in need, along with other national standards; and 2) a cause of action for recipients to enforce those standards. There are two related administrative law doctrines on which a challenge to the establishment of the CHST could be launched: 1) the rules of natural justice; and 2) the doctrine of legitimate expectations.

#### a. *The Rules of Natural Justice*

The rules of natural justice impose a duty of fairness on the state in making and implementing administrative decisions. The rules of natural justice have been used to attain some procedural guarantees for recipients of public assistance in Canada.<sup>68</sup> However, on balance, the rules of natural justice have proven an ineffective instrument with which to advance the interests of the poor.<sup>69</sup> First, this is because a court will only intervene in the government’s policy decisions if the case has a “sufficient legal component.” Decisions held to be “purely political” have been held to be non-justiciable.<sup>70</sup> Second, decisions characterized as “legislative” have been held to be outside the scope of the rules of natural justice.<sup>71</sup>

In the *CAP Reference*, the Supreme Court held that the federal government’s unilateral amendment of CAP notwithstanding its agreement with the provinces in relation to cost-sharing was justiciable because the legal interpretation of a statute and the agreement between the provinces and the federal government was at issue. Therefore, the dispute

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in any of those ways. They are far removed from its purposes, namely the relief of poverty, neglect and suffering within the financial parameters set by the legislature in its budget from time to time.”

68. On these grounds, welfare benefits cannot be denied applicants, or taken from recipients, without some provision for the applicant/recipient being heard. See, for example, *Re Webb and Ontario Housing Corporation* (1978), 93 D.L.R. (3d) 187 at 195 (Ont. C.A.) (holding that if a recipient of public housing assistance is deprived of part or all of those benefits, that recipient must be provided with notice and an opportunity to be heard before those benefits are taken away).

69. See generally E. Tucker, “The Political Economy of Administrative Fairness” (1987) 25 Osgoode Hall L.J. 555.

70. See *CAP Reference*, *supra* note 31 at 545. See also *Canada (Auditor-General) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49 at 90-91.

71. “Legislative” functions for these purposes has been defined as “[a] purely ministerial decision, on broad grounds of public policy.” See *Martineau v. Matsqui Institution*, [1980] 1 S.C.R. 602 at 628.



between the provinces and the federal government was held not to be “purely political” in nature. However, having found the dispute justiciable, the Court held that procedural fairness, a component of the rules of natural justice, does not reach the “legislative functions” of government—this included ministerial decisions “on broad grounds of public policy”—and consequently the cap on CAP was upheld.<sup>72</sup> There is little doubt that the CHST would be upheld on the same bases. While welfare recipients may claim that they should have a voice in substantial changes to the federal funding of social welfare programs, the Supreme Court has elsewhere held that the government is not obliged to consult any particular constituency in carrying out its legislative functions.<sup>73</sup>

### b. *Legitimate Expectations*

Some observers have argued that the exclusion of legislative functions (such as the removal of national standards for social welfare in the CHST) from procedural fairness requirements by Canadian courts is unduly restrictive.<sup>74</sup> As a possible alternative, they point to the doctrine of “legitimate expectations,” which is sometimes seen as an extension of the duty of fairness and sometimes as an independent duty on governments to abide by their undertakings. The doctrine of legitimate expectations states that where the government promises to follow a particular procedure in reaching a decision, and then deviates from that procedure without the consent of the affected parties, those parties may invalidate that decision based on the breach of their legitimate expectations.<sup>75</sup> In the U.K., this doctrine has been extended to hold governments accountable for substantive promises regarding the scope and nature of govern-

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72. See *CAP Reference*, *supra* note 31 at 558, citing *Martineau*, *ibid*. For the “legislative functions” exception to the application of fairness, see *Canada (A.G.) v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735; *Cardinal and Oswald v. Kent Institution*, [1985] 2 S.C.R. 643; and *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653.

73. See *Native Women’s Ass. of Canada et al v. The Queen*, [1994] 3 S.C.R. 627, 119 D.L.R. (4th) 224.

74. See D. Wright, “Rethinking the Doctrine of Legitimate Expectations in Canadian Administrative Law” (1997) 35 *Osgoode Hall L.J.* 139; see also D.J. Mullan, “Canada Assistance Plan - Denying Legitimate Expectations A Fair Start” (1993) 7 *Admin. L.R.* (2d) 269.

75. This doctrine was first confirmed by the Supreme Court of Canada in *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170.

ment benefits.<sup>76</sup> However, courts appear not to have adopted this broader approach to the doctrine in Canada.<sup>77</sup>

The restrictive approach of the Supreme Court of Canada was once again demonstrated in the *CAP Reference*. The Court of Appeal had held that the federal government's cap on CAP violated the legitimate expectations of the provinces that they would be consulted prior to any change in the structure of CAP.<sup>78</sup> The Supreme Court, however, reversed this finding. Sopinka J. held the doctrine of legitimate expectations, while a part of administrative law in Canada, did not extend to the "legislative functions" of government:

Parliamentary government would be paralyzed if the doctrine of legitimate expectations could be applied to prevent the government from introducing legislation in Parliament. Such expectations might be created by statements during an election campaign. The business of government would be stalled while the application of the doctrine and its effect was argued out in the courts. Furthermore, it is fundamental to our system of government that a government is not bound by the undertakings of its predecessor. The doctrine of legitimate expectations would place a fetter on this essential feature of democracy.<sup>79</sup>

This reasoning with respect to legislative decision-making was applied by the Ontario Divisional Court to the context of executive funding decisions in *Hamilton-Wentworth (Reg. Mun.) v. Ontario (Min. of Tran.)*.<sup>80</sup> In that case, a regional municipality challenged a provincial government's decision to stop funding a highway. Funding the project was subject to annual review by the provincial government. In 1990, after construction of the highway was under way, a new provincial government ordered that funding for part of the project be stopped due to environmental concerns.

The Ontario Divisional Court dismissed the regional municipality's application for judicial review to reverse the province's cancellation of its promised funding. The Court held that the provincial government had reserved to itself a discretion (*i.e.*, annual review of the budget for the project), and was therefore free to exercise that discretion (*i.e.*, curtail funding) as it saw fit. While a Minister may not use a statute designed for

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76. See *R. v. Secretary of State for the Home Department, ex parte Khan*, [1985] 1 All E.R. 40 (C.A.). There is also some authority for a narrower approach to legitimate expectations in the U.K.: see *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] A.C. 374 (H.L.) at 408 per Diplock L.J. Both these cases are discussed in Wright, *supra* note 74 at 152-53.

77. *Ibid.* at 156-65.

78. *Re: Canada Assistance Plan* (1990), 45 Admin. L.R. 34 (B.C. C.A.).

79. *CAP Reference*, *supra* note 31 at 559.

80. (1991), 78 D.L.R. (4th) 289 (Ont. Div. Ct.) [hereinafter *Hamilton-Wentworth*].

one purpose to achieve another (as discussed above), the *wisdom* of the executive's discretionary determination is not reviewable by the Court.<sup>81</sup> Specifically, the Court held that it would be inappropriate for judges to trench upon the Cabinet's discretion to determine how it spends its revenue:

Because the Act requires annual review and allocation, it does not confer any right on the Region to receive any particular amount of funding in any particular year. It is equally clear that there is no jurisdiction in this court to direct the Minister to make any particular allocation to the Region.

The "doctrine of legitimate expectations" does not impose any positive obligation on the government to grant the substantive right claimed in these proceedings. While the various commitments have no doubt led many acting in good faith into a dilemma which has caused them great expense, it does not follow that the court can dictate to the government its view of public interest in such matters.<sup>82</sup>

Immunizing legislative and executive bodies from the application of the doctrine of legitimate expectations has been criticized as failing to recognize any mechanisms whereby governments may be held accountable for how they deal with their most vulnerable citizens. David Wright, for example, advances this argument in the following terms:

Determinations such as the amount of welfare payments or tuition fees are often delegated to the executive to be set by regulation. While large benefit cuts or fee increases may be considered to be in the broad "public interest" certain people bear the brunt of these decisions, and it is crucial to require to require some consultation with them when the decisions are being made. At the very least, this is because people have planned their lives based on the existing state of affairs.<sup>83</sup>

While such criticisms hold out the hope for the future evolution of this area of administrative law, for the moment, it would appear that neither the doctrine of legitimate expectations, nor the rules of natural justice are capable of redressing the government's removal of national standards for welfare in the CHST. Indeed, these doctrines, even if held to be applicable to legislative and executive settings, are not intended to lead to substantive changes to legislation or how legislation is applied, but rather to procedural rights requiring additional consultation with affected parties. Given the limited influence of welfare recipients on political decision-making mentioned above, this would constitute a hollow victory at best.

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81. See also *Doctors Hospital*, *supra* note 55 and *Re: Metropolitan General Hospital and Minister of Health* (1979), 101 D.L.R. (3d) 530 at 536 (Ont. H.C.J.). See also *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441.

82. *Hamilton-Wentworth*, *supra* note 80 at 306. This view is consistent with the *dicta* of Sopinka J. in *CAP Reference*, *supra* note 31.

83. Wright, *supra* note 74 at 192.

Moreover, if such consultations were ordered, the terms of the CHST would seem to make the provinces, not welfare recipients, the affected parties (as was the case under the *CAP Reference*, discussed above).

## 2. *The Charter of Rights and Freedoms and the CHST*

The *Constitution* is the supreme law in Canada and early decisions confirmed that, unlike administrative law, the exercise of executive and legislative decision-making is subject to review under the *Charter of Rights and Freedoms*.<sup>84</sup> As in the administrative law context, the question to answer is whether by removing the obligation on government to respond to the “basic requirements” of those in need, along with other national standards, and thereby depriving recipients of a cause of action against governments to enforce those standards, the federal government has violated the *Charter*.

As noted above, by virtue of the division of powers under the *Constitution Act of 1867*, the federal government has no jurisdiction to dictate to the provinces what social programs the provinces should legislate. Therefore, a *Charter* challenge of the CHST would not be intended to force the provinces to enact certain kinds of social assistance programs, but rather to clarify the conditions for provincial eligibility to the CHST, beyond that which is set out in the *Act* (i.e., the residency requirement). The *Charter* in this fashion could be used to compel the federal government to impose “implied” conditions to the CHST, or extend the conditions to be applied to remedy under-inclusiveness.

Judicial review of the CHST on *Charter* grounds would likely revolve around sections 7 and 15. The application of each of these sections to the CHST are discussed below. The general nature and impact of *Charter* jurisprudence on the poor has been exhaustively detailed elsewhere.<sup>85</sup> I will limit the following analysis to a brief review of the leading cases on welfare rights and their specific implications for the CHST.

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84. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter *Charter*]. See *Operation Dismantle*, *supra* note 81.

85. See M. Jackman, “Poor Rights: Using the Charter for Social Welfare Claims” (1993) 19 *Queen’s L.J.* 65 [hereinafter “Poor Rights”]; R. Howse, “Another Rights Revolution? The Charter and the Reform of Social Regulation in Canada” in J. Maxwell, P. Grady & R. Howse, eds., *Redefining Social Security* (Kingston: School of Policy Studies, Queen’s University, 1995) 99; and T. Scassa, “Social Welfare and Section 7 of the *Charter*: *Conrad v. Halifax (County of)*” (1994) 17 *Dal. L.J.* 187 at 192. See generally I. Morrison, “Security of the Person and the Person in Need: Section 7 of the *Charter* and the Right to Welfare” (1988), 4 *J. Law & Soc. Pol’y* 1; R.A. Hasson, “What’s Your Favourite Right? The Charter and Income Maintenance Legislation” (1989), 5 *J. Law & Soc. Pol’y* 1 and I. Johnstone, “Section 7 of the Charter and Constitutionally Protected Welfare” (1988) 46 *U.T. Fac. L. Rev.* 1.

a. *Welfare Rights Under Section 7*

The search for a constitutional right to welfare in Canada has focused on section 7 of the *Charter*. Section 7 provides as follows:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

There are two stages for determining if section 7 has been violated. First, the court must determine whether there has been a deprivation of life, liberty or security of the person. Second, the court must consider whether this deprivation was in accordance with the principles of fundamental justice.<sup>86</sup>

The question at issue under section 7 thus would be whether there is any irreducible minimum below which state assistance could not fall without violating recipients' constitutional right to life, liberty and security of the person. A variety of attempts to advance a substantive right to welfare on the basis of the "security of the person" component of section 7 have failed to meet with any significant success.<sup>87</sup>

As no right to welfare has yet to be found in section 7 of the *Charter* (although it remains for the Supreme Court to consider this issue directly), recourse to whether an individual has been deprived of such a right in accordance with the principles of fundamental justice usually has not been necessary. However, the jurisprudence elaborating upon the principles of fundamental justice under section 7 may shed light on normative requirements applicable to the social welfare setting.

The principles of fundamental justice arise out of, but extend beyond the rules of natural justice in administrative law.<sup>88</sup> In this sense, section 7 may be used to advance the argument that welfare recipients ought to

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86. See *Rodriguez v. British Columbia (A.G.)*, [1993] 3 S.C.R. 519 at 584 [hereinafter *Rodriguez*].

87. Commenting on the first decade of *Charter* jurisprudence, however, Jackman noted that "[w]hile in principle, the design and implementation of social welfare legislation should be open to *Charter* scrutiny, in practice, few welfare related claims have been decided by courts, and even fewer have been successful." See "Poor Rights," *supra*, note 85 at 67.

88. As Lamer J. (as he then was) observed, "[t]he principles of fundamental justice are to be found in the basic tenets . . . of our legal system." *Re: B.C. Motor Vehicles Act*, [1985] 2 S.C.R. 486 at 512 [hereinafter *Re: B.C. Motor Vehicle Act*]. For a discussion of the distinction between the rules of natural justice and the principles of fundamental justice, see J. Evans, "The Principles of Fundamental Justice: The Constitution and the Common Law" (1991) 29 *Osgoode Hall L.J.* 51. See also M. Jackman, "The Protection of Welfare Rights Under the Charter" (1988) 20 *Ottawa L. Rev.* 257 at 322, where Jackman remarks that, "[i]t is difficult to accept that the state might be allowed to deny constitutionally protected welfare rights completely and irrespective of individual need, so long as it does so with procedural regularity and in a manner which does not offend other *Charter* guarantees."

play a meaningful role in the policy process relating to social welfare.<sup>89</sup> Section 7, however, also extends beyond procedural safeguards. The Supreme Court of Canada has recognized the concept of “substantive fundamental justice” as a component of the principles of fundamental justice.<sup>90</sup> By substantive fundamental justice, the Court has in mind certain minimum substantive requirements, the absence of which would be *inherently* incompatible with section 7 of the *Charter*. For example, offences of absolute liability, under which a person could be deprived of liberty irrespective of the person’s mental state at the time the offence was committed, were held to constitute a violation of substantive fundamental justice.<sup>91</sup>

An analogous argument was raised in *Rodriguez*, in which a woman seeking to invalidate the criminal provision prohibiting assisted suicide contended that respect for human dignity constituted a substantive requirement of fundamental justice. The Supreme Court in *Rodriguez* rejected the notion that a law which does not respect human dignity would in every case run afoul of the principles of fundamental justice. Sopinka J. held:

The principles of fundamental justice cannot be created for the occasion to reflect the court’s dislike or distaste of a particular statute. While the principles of fundamental justice are concerned with more than process, reference must be made to principles which are “fundamental” in the sense that they would have general acceptance among reasonable people.<sup>92</sup>

Sopinka J. went on to find that, in the context of physician assisted suicide, there was no consensus as to what human dignity required in the circumstances—to end suffering or to prolong life. In the context of poverty, there may also be disagreement as to the requirements of human dignity—whether to ameliorate want or to provide a transitional safety net to the destitute.<sup>93</sup> Whatever the minimum level of social assistance

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89. See M. Jackman, “Rights and Participation: The Use of the *Charter* to Supervise the Regulatory Process” (1995) 4 C.J.A.L.P. 23.

90. See *Re: B.C. Motor Vehicles Act*, *supra* note 88; and *R. v. Morgentaler*, [1988] 1 S.C.R.30.

91. *Re: B.C. Motor Vehicles Act*, *ibid.*

92. *Supra* note 86 at 607.

93. As Allan Hutchison has written, “[I]f there were a true consensus of community values, there would be no need for a *Charter of Rights*. Judicial review of legal action in terms of its constitutional validity is unnecessary or unattainable. The fact is that a community consensus runs out at the very time that it is most needed—in the resolution of disputes that arise because of a breakdown, gap or shortcoming in the extant body of conventional norms.” See A.Hutchison, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: Osgoode Hall Law School, 1993) at 97.

that reasonable people may agree upon as necessary for the protection of human dignity, it is at least plausible that *all* reasonable people would insist on *some* minimum level.<sup>94</sup> On this reasoning, substantive fundamental justice requires that the state not deprive people of human dignity. While the Supreme Court has largely restricted substantive fundamental justice to the criminal context,<sup>95</sup> it is difficult to sustain the argument that a “free” person facing imprisonment is in more jeopardy than a “dependent” person facing the elimination of public assistance.

#### b. *Welfare Rights Under Section 15*

The other provision of the *Charter* which may be employed in the judicial review of federal and provincial discretion under the CHST is section 15, which provides:

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The purpose of section 15(1), as with section 7, is to ensure government acts in a fashion consistent with human dignity.<sup>96</sup> The analysis under s.15(1) involves two steps.<sup>97</sup> First, the claimant must show a denial of “equal protection” or “equal benefit” of the law, as compared with some other person. Second, the claimant must show that the denial constitutes discrimination. At this second stage, in order for discrimination to be made out, the claimant must show that the denial rests on one of the grounds enumerated in s.15(1) or an analogous ground and that the unequal treatment is based on the stereotypical application of presumed

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94. On the importance to the Canadian people of the value of compassion as expressed through social services, see the “Spicer Report,” *Citizens’ Forum on Canada’s Future: Report to the People and Government of Canada* (Ottawa: Min. Of Supply and Services, 1991) at 42.

95. *Re: B.C. Motor Vehicles Act*, *supra* note 88.

96. See *Thibadeau v. Canada*, [1995] 2 S.C.R. 627 at 701.

97. See *Vriend v. Alberta*, [1998] S.C.J. No. 29 (QL) at para. 73 [hereinafter *Vriend*]; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Benner v. Canada*, [1997] 1 S.C.R. 358; *Egan v. Canada*, [1995] 2 S.C.R. 513; *Miron v. Trudel*, [1995] 2 S.C.R. 418 at 485, 492; and *Thibadeau*, *supra* note 96. In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 [hereinafter *Andrews*] and *R. v. Turpin*, [1989] 1 S.C.R. 1296 at 1331-2, the Court emphasized that it is the substance and not the form of a law that is at issue under s.15, with reference to the larger social, political and legal context at work on a particular group of people. See also *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at 551.

group or personal characteristics. The Court has indicated that it is concerned, however, not just with stereotypes that are untrue but also with the true characteristics of a group which “act as headwinds to the enjoyment of society’s benefits and to accommodate them.”<sup>98</sup> As Sopinka J. emphasized in *Eaton v. Brant County Board of Education*, “The purpose of s.15(1) of the *Charter* is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the positions of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons”.<sup>99</sup>

The CHST provides a potential basis for an equality challenge on three distinct fronts. First, the CHST may give rise to significantly different standards of welfare in various provinces (as the risks of increased welfare loads are offloaded to provinces of vastly disparate fiscal capabilities), thus creating potential inequality on the basis of residency.<sup>100</sup> Second, the inclusion of social assistance in the block grant may discriminate against welfare recipients if they absorb deeper cuts relative to health and post-secondary education; and third, certain segments of the welfare population such as women and the disabled may suffer disproportionately harmful consequences by the provincial funding cuts blamed on the CHST.<sup>101</sup>

Because poverty is not an enumerated class under s.15, the threshold question for any challenge to the CHST on either of the first two possible grounds would be whether welfare recipients constitute a class analogous to those enumerated. Generally, whether the poor or some subset thereof qualifies as an “analogous class” for the purposes of s.15 has yet to be

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98. *Brant*, *supra* note 97 at paras. 66-67.

99. *Ibid.*

100. The Supreme Court has left open whether residency may be the basis for an analogous class. See *Turpin*, *supra* note 97. For an analysis of this case law, see Hogg, *supra* note 18 at 1192-95.

101. The argument for a challenge to the CHST on the basis of its consequences for women has been advanced by Martha Jackman in “Women and the CHST,” *supra* note 5.



definitively resolved by the Supreme Court. There is some support in lower courts for both sides of this issue.<sup>102</sup>

In *Masse*, discussed above, all three judges agreed that social assistance recipients were not a discrete and insular minority and therefore not an analogous class entitled to the protection against discrimination contained in s.15. The applicants had claimed that the Ontario welfare cuts imposed a greater burden of reducing the deficit on the backs of social assistance recipients than on other members of society benefitting from state services (*e.g.*, users of public health care, public transit or public education). The judges unanimously held that the welfare cuts did not constitute a differentiation based on the personal characteristics of those on public assistance. Corbett J. dissented, however, on the grounds that while the welfare cuts were constitutional, exempting certain categories of persons from the cuts (*i.e.*, the elderly and permanently disabled) on the grounds of unemployability, but not other unemployable groups (*i.e.*, sole-support mothers of pre-school age children and the temporarily disabled), did violate s.15.

The Supreme Court of Canada has recognized that poverty constitutes an “entrenched social phenomenon,”<sup>103</sup> however, it has also stated that it is not for the Court to intervene to remedy this phenomenon.<sup>104</sup> Individuals, therefore, must find traits other than poverty by which an under-inclusive benefit may be challenged under section 15. In *Sparks*,<sup>105</sup> for

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102. For the view that the economically disadvantaged are not an analogous group, see *Gosselin*, *infra* note 121, where Reeves J. concluded that because poverty is a relative state caused by factors both intrinsic and extrinsic to the individual, the poor are not protected under s.15; for the view that the economically disadvantaged are an analogous group, see *Federated Anti-Poverty Groups v. British Columbia (A.G.)* (1991), 70 B.C.L.R. (2d) 325 (S.C.) where the Supreme Court of B.C. refused to strike claim of welfare recipients forced as a condition of receiving certain assistance to waive rights to other forms of assistance, holding (at 344): “[I]t is clear that persons receiving income assistance constitute a discrete and insular minority within the meaning of s.15. It may be reasonably inferred that because recipients of public assistance generally lack substantial political influence, they comprise ‘those groups in society to whose needs and wishes elected officials have no apparent interest in attending.’” As the legislation in question was later amended, the case never actually came to trial. Additionally, in *Sparks*, the Nova Scotia Court of Appeal held that the government’s provision of legislative benefits/assistance to single mothers was evidence of their disadvantage: see *Dartmouth/Halifax County Regional Housing Authority v. Sparks*, [1993] N.S.J. No. 97 (C.A.) [hereinafter *Sparks*]; for other examples of sole support mothers on social assistance being found to merit protection as a disadvantaged group under s.15, see also *R. v. Rehberg* (1993), 127 N.S.R. (2d) 331 (S.C.); and *Schaff v. The Queen* (1993), 18 C.R.R. (2d) 143 at 158 (T.C.C.). See also H. Orton, “Section 15, Benefits Programs and Other Benefits at Law: The Interpretation of Section 15 of the *Charter* since *Andrews*” (1990) 19 Man. L.J. 288.

103. Per L’Heureux-Dubé, *Moge v. Moge*, [1992] 3 S.C.R. 813 at 853.

104. See *Finlay* (1993), *supra* note 36.

105. *Supra* note 102.

example, the Nova Scotia Court of Appeal found that public housing tenants constituted a class analogous to the classes enumerated in s.15. This is why the third type of *Charter* challenge to the CHST, alleging an unequal impact on certain categories of welfare recipients, would appear to have the greatest chance of success.

“Equality” in the context of economic disadvantage is, of course, a problematic term. Where people treated unequally by the market approach the state for assistance, does treating them equally require the government to give the same to each, thereby reinforcing the inequality of the market, or does it require providing benefits to the disadvantaged and thereby reducing their inequality? From social welfare to employment insurance to old age pensions, the Canadian welfare state intervenes to redress particular inequities produced by the market while leaving others alone. How can a court hope to reconcile the polycentric policy choices Parliament has made? While the *Charter* may not have been intended to remedy the socioeconomic inequalities of the market,<sup>106</sup> it was intended to supervise how governments respond to these inequalities. A simple answer would be to ensure that, in funding social programs such as the CHST, the government not discriminate against the poor. Such an argument has not been precluded under s.15 of the *Charter*, nor has it been embraced. A comprehensive consideration of the status of those dependent on public assistance under s.15 by the Supreme Court is overdue.

### c. *The Search for Welfare Rights in Canada*

The failure to entrench “welfare rights” in Canada illustrates the limits of judicial review as a means of scrutinizing the “flexibility” of governments in the design and implementation of social policy. The two leading justifications are that (1) the *Charter* protects negative liberties (*i.e.*, the freedom of the individual from state interference), but cannot be used to enforce impose positive entitlements (*i.e.*, the obligation on the state to intervene on behalf of the destitute); and (2) the inapplicability of the *Charter* to protect property or economic rights.

#### i. *Positive liberties and welfare*

The Supreme Court has cast the protections contained in s.7 as negative rights (the freedom *from* state prohibitions) which are concerned prima-

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106. See M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson, 1994) at 337-53.

rily with the physical integrity of individuals subject to intervention by the state. While the definition of “life” and “liberty” remain to be adequately explored by the Supreme Court of Canada, “security of the person” has been the subject of considerable judicial comment. In *Rodriguez*, Sopinka J., writing for the majority, described the scope of this protection as follows:

There is no question, then, that personal autonomy, at least with respect to the right to make choices concerning one’s own body, control over one’s own physical and psychological integrity, and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these.<sup>107</sup>

Martha Jackman, among others, has argued that section 7 ought to contain a positive right under which all Canadians are guaranteed the provision of adequate shelter, clothing, food and other necessities of life by the state:

A Canadian who suffers from basic want is not free. To recognize this reality, is to recognize that the *Charter*, by declaring that every Canadian has a right to life and liberty, imposes an affirmative obligation on the state to ensure that no Canadian is in need. A failure by the state to meet that obligation constitutes a denial of fundamental constitutional rights.<sup>108</sup>

Courts in Canada have failed to embrace this view of section 7. To the contrary, courts routinely point out that neither provincial nor federal governments can be compelled by the *Charter* to provide social welfare of any kind.<sup>109</sup>

The Supreme Court has recognized, however, that positive government steps may be required in order to protect a *Charter* right. This view was expressed in *Haig v. Canada*.<sup>110</sup> In *Haig*, the Supreme Court was

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107. *Rodriguez*, *supra* note 86 at 588.

108. Martha Jackman, “The Protection of Welfare Rights Under the Charter” (1988) 20 *Ottawa L. Rev.* 257 at 266. See also J.D. Whyte, “Fundamental Justice: The Scope and Application of Section 7 of the *Charter*” (1983), 13 *Man. L.J.* 455; and M. Manning, *Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act, 1982* (Toronto: Emond Montgomery, 1983). For more pessimistic early writings on the scope of constitutional protection for the poor, see also A.C. Hutchinson, “Charter Litigation and Social Change: Legal Battles and Social Wars” in R.J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987).

109. In *Masse*, for example, O’Driscoll J. reviewed the section 7 jurisprudence relating to social welfare and concluded, “In my view, s. 7 does not provide the applicants with any legal right to minimum social assistance . . . s. 7 does not confer any affirmative right to governmental aid.” *Supra* note 50 at 42; see also *Gosselin*, *infra* note 121, *Schaff*, *supra* note 102, and *Ontario Nursing Home Association et al. v. Ontario* (1990), 72 D.L.R. (4th) 166 (H.C.J.). For a discussion of this line of cases, see Howse, *supra* note 85 at 110.

110. [1993] 2 S.C.R. 995. See also *Native Women’s Association of Canada v. Canada*, [1994] 3 S.C.R. 627 at 655.

asked to consider whether residency provisions in Quebec's voting laws, which would prevent a recently established resident of Quebec from participating in the non-binding referendum on the Charlottetown Accord, violated the applicant's right to freedom of expression under s.2 of the *Charter*. L'Heureux-Dubé J., writing for the majority, held as follows:

One must not depart from the context of the purposive approach articulated by this Court in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295. 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. This might take the form of legislative intervention aimed at preventing certain conditions which muzzle expression, or ensuring public access to certain kinds of information. In the proper context, these may perhaps be relevant considerations leading a court to conclude that positive government action is required.<sup>111</sup>

Could social welfare conceivably fall into the category of situations where a "posture of restraint" by government is insufficient to ensure compliance with the *Charter*? In my view, such circumstances exist where welfare recipients are *already* dependent on state assistance. The ability of such individuals and families to live with "human dignity" in such circumstances arguably is contingent on basic necessities provided by the state. For this reason, the dichotomies of positive and negative liberty (and, for that matter, of government "action" and "inaction"), must be understood differently in the context of social welfare. They assume the *possibility* of living outside the realm of state assistance. For at least a core constituency of welfare recipients, this option does not exist. When the state reduces or eliminates financial or other commitments to these individuals, their freedom is compromised. Negative liberty for these people is a perverse freedom—the freedom to lose an apartment, suffer malnutrition, go without basic necessities and live without hope.<sup>112</sup>

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111. *Ibid.*

112. What is central to this analysis of positive and negative liberty is the context of the individual or family whose freedom is at stake. As Leon Trakman observed "They [courts] apply *Charter* rights according to the normative quality of those rights, not simple the *a priori* facts of their existence. A fundamental right, then, hinges upon the need for and want of it, the ability to exercise it, and the social benefit that derives from it. What is a fundamental freedom depends upon the history, practice, and expectation of those who are able to invoke it. What is a justifiable limit upon that freedom hinges upon the level of wealth, education and skill of those who claim it and are affected by its denial." See L. Trakman, *Reasoning With the Charter* (Toronto: Butterworths, 1991) at 126.

Is the repeal of national standards in the transition from CAP to the CHST a case of the government action or inaction? Plausibly, it is both, depending on the vantage point from which the legislation is viewed. For welfare recipients, it is action—removing a tangible and enforceable obligation on the state; for the government, it is inaction—the absence of certain conditions on the provinces. The difference of perception (and perspective), however, is crucial, for government action is subject to review under the *Charter*, while government inaction is not.<sup>113</sup>

This problem was recently explored in three lower court decisions in Ontario dealing with the Conservative government's repeal of employment equity legislation, its partial repeal of pay equity legislation and its repeal of labour standards protection for agricultural workers. In *Ferrell v. Ontario (A.G.)*,<sup>114</sup> Dilks J. considered the constitutionality of the *Job Quotas Repeal Act, 1995*, which repealed the *Employment Equity Act, 1993*. Dilks J. first found that the provincial government was under no "duty to legislate" in this field. Dilks J. next considered whether, having legislated in this field, the provincial government was obliged to leave this legislation in place. He concluded that the Constitution did not fetter the government from repealing the statute. Indeed, as the legislation at issue merely repealed the earlier legislation, Dilks J. noted that there was at issue no "government action" to measure against the *Charter*.

In *Service Employees International Union, Local 204 v. Ontario (A.G.)*,<sup>115</sup> O'Leary J. considered the provincial government's repeal of a portion of the *Pay Equity Act, 1990*. The repeal related to amendments made to the *Pay Equity Act* in 1993, but left the balance of the legislation intact. In this case, O'Leary J. held that the partial repeal violated section 15 as it discriminated on the basis of gender and could not be saved by section 1. O'Leary J. observed that, had the provincial government repealed the legislation in its entirety (as it had done in the case of the *Employment Equity Act*) then its action would have been constitutionally sound. However, by repealing only the portion of the *Pay Equity Act* offering protection from discrimination to vulnerable women in low-wage sectors, the government acted unconstitutionally.

In *Dunmore v. Ontario (Attorney General)*,<sup>116</sup> Sharpe J. dismissed a challenge to the repeal of the *Agricultural Labour Relations Act, 1994*.

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113. For further discussion of the problematic nature of this distinction, see D. Pothier, "The Sounds of Silence: Charter Application When the Legislature Declines to Speak" (1996), 7 Constitutional Forum 113.

114. [1997] O.J. No. 2765 (Q.L.) (Gen. Div.). This case is currently under appeal.

115. [1997] O.J. No. 3563 (Q.L.) (Gen. Div.) [hereinafter *SEIU, Local 204*].

116. (1997), 37 O.R. (3d) 287 (Gen. Div.).

That Act had ended agricultural workers' exclusion from labour protections. It was repealed by the newly elected Conservative government in 1995. The applicants sought to strike down the legislation repealing the Act as contrary to agricultural workers' right to freedom of association and their equality rights under the *Charter*. In dismissing the challenge on its merits, Sharpe J. reiterated the view expressed by Dilks J. in *Ferrell*, that what a legislature gives, it may also take away:

In my view, if 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. To hold otherwise would be to create a broad class of statutes that would enjoy the status of a constitutional guarantee that would be immune to repeal.

The logic of these recent rulings is unsettling. Where government removes *some* state protection, its actions may be reviewed for infringing the Constitution. However, where the government removes *all* state protection, its actions appear to be immune to constitutional challenge.

The Supreme Court has somewhat clarified the action/inaction and positive/negative rights dichotomies in its recent decision in *Vriend v. Alberta*.<sup>117</sup> In *Vriend*, a teacher was fired from a private school for being a homosexual. The Alberta *Individual Rights Protection Act* (“*IRPA*”) did not protect against discrimination on the basis of sexual orientation. *Vriend* challenged the exclusion of sexual orientation from among the protected grounds on the basis that it violated s.15 of the *Charter*. The trial judge found the omission of sexual orientation violated the *Charter* and ordered that the impugned section of the *IRPA* be applied as if sexual orientation were a protected ground. On appeal, the majority of the Alberta Court of Appeal reversed this ruling. McClung J.A. held that the *Charter* could not apply to a legislature's failure to enact a provision. O'Leary J.A. reached the same result for slightly different reasons. He concluded that while the *Charter* applied to the Legislature's decision not to enact a provision, such silence could not form the basis of a distinction for the purposes of the s.15 test.

In reversing the Alberta Court of Appeal, the Supreme Court took a starkly different approach to the issue of the Legislature's silence. Writing for the majority on this point, Cory J. referred to the distinction between government action and inaction in the context of a Legislature's decision not to legislate in a particular area as “very problematic.”<sup>118</sup> In

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117. *Supra* note 97.

118. *Ibid.* at para.53.

rejecting the reasoning of McClung J.A., Cory J. emphasized that “The notion of judicial deference to legislative choices should not, however, be used to completely immunize certain kinds of legislative decisions from *Charter* scrutiny.”<sup>119</sup>

Though not necessary to support the judgment, Cory J. also addressed whether a Legislature may be subject to a “duty to legislate” under the *Charter*:

It has not yet been necessary to decide in other contexts whether the *Charter* might impose obligations on the legislatures or Parliament such that a failure to legislate could be challenged under the *Charter*. Nonetheless, the possibility has been considered and left open in some cases. For example, in *McKinney*, Wilson J. made a comment in obiter that “[i]t is not self-evident to me that government could not be found to be in breach of the *Charter* for failing to act” (p. 412). In *Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1038, L’Heureux-Dubé J., speaking for the majority and relying on comments made by Dickson C.J. in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, suggested that in some situations, the *Charter* might impose affirmative duties on the government to take positive action. Finally, in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, La Forest J., speaking for the Court, left open the question whether the *Charter* might oblige the state to take positive actions (at para. 73). However, it is neither necessary nor appropriate to consider that broad issue in this case.

How would this reasoning bear on a challenge to the CHST? The CHST, *inter alia*, repeals CAP in its entirety, but replaces the federal funding provided under CAP with a new scheme. Some features of the old scheme are retained (*i.e.*, the residency requirement), while the balance are removed (*i.e.*, standards relating to basic needs) and others are altered (*i.e.*, shifting from a contract between provinces and federal government in which funding was tied to demand to a federal block grant based on per capita funding). Based on the recent decision in *Vriend*, the failure of Parliament to enact national standards relating to the quality of social welfare assistance would appear to constitute “government action” and thus to be subject to scrutiny under the *Charter*. However, *Vriend* fails to resolve the uncertainty regarding whether a legislature may be subject to a duty to legislate (or a duty not to repeal legislation) as a result of the *Charter*’s application. Judicial review of the CHST would offer an opportunity to move beyond the action/inaction and positive/negative right dichotomies to an analysis of *Charter* rights from the standpoint of citizens already dependent on the state.

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119. *Ibid.* at para.54.

## ii. *Economic rights and welfare*

Courts in Canada have held that the *Charter* does not apply to protect purely “economic rights”;<sup>120</sup> and therefore that social assistance benefits, because they are economic in nature, are beyond the scope of the *Charter* (this has arisen generally in the context of s.7).<sup>121</sup> The distinction between economic rights and other forms of rights is not easily sustainable in the context of the welfare state, where civil, social and economic relationships between state and citizen are often intertwined. The Supreme Court of Canada has acknowledged, at least in passing, that the exclusion of “economic rights” from the purview of s.7 in corporate-commercial settings may not apply in the same manner to social welfare settings. In *Irwin Toy Ltd. v. Quebec (A.G.)*, Chief Justice Dickson offered the

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120. See *Wilson v. Medical Services Commission of British Columbia* (1988), 53 D.L.R. (4th) 171 (B.C.C.A.) *Wilson* considered whether the right to work as a doctor was included in the meaning of “liberty” under section 7. The B.C. Court of Appeal appeared to distinguish between the right to work, which was purely economic and not covered by the *Charter*, and the right to practice a profession for which one is otherwise qualified, which was covered by the *Charter*. In *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123, Lamer C.J., in *obiter*, appeared to reject this distinction and stated that economic rights, broadly construed, were not the concern of the *Charter*. In this sense, Lamer C.J. went on to observe, section 7 of the *Charter* may be distinguished from the Fourteenth Amendment of the U.S. Constitution. See the discussion of this jurisprudence in Evans, *supra* note 88 at 54-55.

121. See *Masse*, *supra* note 50; also *Clark v. Peterborough Utilities Commission* (1995), 24 O.R. (3d) 7 (Gen Div.) (in which the Court rejected the claim that the requirement of a deposit by the utilities commission had an adverse impact on the poor and violated s.7 of the *Charter*). Howden J. claimed the applicant was making a “plea for economic assistance” which was beyond the scope of s.7 (at 29); *Conrad v. Halifax (County of)* (1993), 124 N.S.R. (2d) 251 (S.C.) (plaintiff received municipal social assistance from the County, and as a condition of the assistance, she was compelled to apply to Family court for a maintenance order against her abusive husband. Alleged to have cohabitated with her husband after this date, she was taken off and put back on the rolls and filed suit for damages under ss.7 and 24(1) claiming she was denied a hearing when her benefits were terminated. In *Conrad*, Gruchy J. found the claimant was not credible and that she was ineligible for social assistance, but used broad language with respect to any social welfare claim being economic in nature and therefore beyond the scope of s.7. The claimant’s lawyers had argued the “security of the person” component of s.7 placed an affirmative duty on government to provide the means to sustain one’s physical and emotional security. Alternatively, her lawyers argued that once she had been found eligible, a security interest vested in the maintenance of those benefits. The Court rejected both prongs of this argument.); *Gosselin v. Quebec (Procureur général)*, [1992] R.J.Q. 1647 (Q.L.) (C.S.) (a class action brought under ss.7 and 15 in which a reduction in social assistance to able bodied adults who did not participate in a workfare program was upheld because s.7 could not apply); *Bernard v. Dartmouth Housing Authority* (1989), 88 N.S.R. (2d) 190 (C.A.) (in which the Nova Scotia Court of Appeal rejected the argument that the Public Housing authority had violated the appellant’s right to security of the person by giving her notice to vacate); *Fernandes v. Director of Social Services (Winnipeg Central)* (1992), 93 D.L.R. (4th) 402 (Man. C.A.) (in which claimant sought increase in welfare payments to permit him to receive medical care at home rather than in a hospital. Court dismissed claim holding that the right to a certain standard of living or way of life could not be protected under s.7).



following remarks in his discussion of the exclusion of the word “property” from s.7:

First, it leads to a general inference that economic rights as generally encompassed by the term “property” are not within the perimeters of the s.7 guarantee. This is not to declare, however, that no right with an economic component can fall within “security of the person.” Lower courts have found that the rubric of “economic rights” embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property . . . *We do not, at this moment, choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights.*<sup>122</sup>

The fact that social assistance involves an economic element, therefore, should not necessarily be determinative. A wide range of *Charter* cases impinge on the economic rights and well-being of litigants and others in both obvious and subtle ways. As Teresa Scassa has pointed out, “[t]he fact that welfare payments involve money should not be taken to mean that they are purely an economic interest . . . Denying the application of s.7 of the *Charter* in the social welfare context is not a neutral exercise in constitutional interpretation—it is a choice about whose interests we can afford the time and energy to protect.”<sup>123</sup>

The combination of the judicial aversion to what it characterizes as “positive liberties” and what it characterizes as “economic rights,” together provides the basis for the denial of anything approaching a right to welfare in Canada. This approach is illustrated in the reasons of the Ontario Divisional Court in *Masse*, in which all three judges held that the Ontario government’s welfare cuts did not violate section 7 of the *Charter*.<sup>124</sup>

In his reasons, O’Brien J. rejected the applicant’s argument that the reduction of welfare benefits pushed recipients of social assistance below an “irreducible minimum standard” without the benefit of fundamental justice.<sup>125</sup> Based on his review of the Canadian case law on s.7, O’Brien J. concluded that the right to receive social assistance benefits, or the right to receive a particular level of benefits, were economic rights that fell outside the ambit of s.7. O’Brien J. adopted Peter Hogg’s argument for judicial reticence in the realm of social policy:

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122. [1989] 1 S.C.R. 927 at 1003-4 [emphasis added].

123. Scassa, *supra* note 85 at 192.

124. *Supra* note 50.

125. *Ibid.* at 56-7.

[I]t would bring under judicial scrutiny all the elements of the modern welfare state, including the regulation of trades and professions, the adequacy of labour standards and bankruptcy laws and, of course, the level of public expenditures on social programs. As Oliver Wendell Holmes would have pointed out, these are the issues upon which elections are won and lost; the judges need a clear mandate to enter that arena, and s.7 does not provide that clear mandate.<sup>126</sup>

However, this approach is based upon the fallacy that judges have less political impact when they decline to intervene in social and economic life than they do intervene. In my view, there is no neutral stance possible for courts to take with respect to those dependent on the state for assistance. Every state decision, whether by a judge, politician or bureaucrat, has as forceful a human impact on those whose life opportunities depend on the state.

#### d. *Welfare Rights and Judicial Deference*

Throughout the *Charter* analysis under sections 7 and 15, the common refrain justifying why no right to welfare should exist in Canada is that to find otherwise would constitute an improper usurpation of legislative authority by the judiciary. The dominance of judicial deference in the field of social welfare is reinforced in the jurisprudence considering section 1 of the *Charter*. Section 1 provides:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Based on the analysis of sections 7 and 15 above, it is uncertain that any challenge to the CHST would reach the stage of section 1. It is nonetheless worth considering because, unlike other *Charter* provisions, section 1 appears expressly to require judges to consider the normative purposes of the impugned legislation. However, rather than viewing this section as a mandate to develop the limits of government action with reference to constitutional norms, courts have understood their mandate as one of determining whether impugned legislation and government action could or could not be “saved.”

The test for “saving” an infringement of a *Charter* right is well known and was set down in *R. v. Oakes*.<sup>127</sup> First, the law must be found to have a “pressing and substantial” objective. Second, the law (i) must be rationally connected to that objective, (ii) impair the rights as minimally as possible, and (iii) there must be a proportionality between the good of

126. *Ibid.* at 58, citing from Hogg, *supra* note 18, at 1030.

127. [1986] 1 S.C.R. 103.

the objective achieved and the extent to which the rights have been impaired. Recently, the Supreme Court has “relaxed” the burden on government to justify *Charter* infringements in the sphere of social policy, and emphasized the importance of deference to the legislature with respect to the crucial “rational connection” and “minimal impairment” prongs of the *Oakes* test. If a political solution is possible and has been deemed appropriate, Courts generally will refrain from imposing a legal one.

The case of *Egan v. Canada* is instructive in this regard.<sup>128</sup> In that decision, four justices found that the provisions of the *Old Age Security Act*<sup>129</sup> excluding same sex couples from spousal benefits violated section 15 of the *Charter* and could not be saved under section 1. Four justices found that the impugned provisions did not violate section 15 and that if it had, it would have been saved under section 1. Sopinka J., writing for himself alone, carried the “swing” vote. He agreed that the provisions violated section 15 but that they were saved under section 1. He justified his holding on the following basis:

*It is not realistic for the Court to assume that there are unlimited funds to address the needs of all. A judicial approach on this basis would tend to make a government reluctant to create any new social benefit schemes because their limits would depend on an accurate prediction of the outcome of court proceedings under s.15 of the Charter. The problem is identified by Professor Hogg in Constitutional Law of Canada (3rd ed. 1992) at pp.911-12, where he states:*

It seems likely that virtually any benefit program could be held to be under-inclusive in some respect. The effect of *Schacter* [1990] 2 F.C. 129 (C.A.) and *Tetrault-Gadoury* [1991] 2 S.C.R. 22 is to subject benefit programs to unpredictable potential liabilities. These decisions by-pass the normal processes by which a government sets its principles and obtains Parliamentary approval of its estimates.

This Court has recognized that it is legitimate for the government to make choices between disadvantaged groups and that it must be provided with some leeway to do so.<sup>130</sup>

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128. [1995] 2 S.C.R. 513.

129. R.S.C. 1985, c.O-9, ss.2, 19(1).

130. *Egan*, *supra* note 97 at 572-73 [emphasis added]; see also *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, per La Forest J. at 318-19: “But generally, the courts should not lightly use the Charter to second-guess legislative judgment as to just how quickly it should proceed in moving forward towards the ideal of equality. The courts should adopt a stance that encourages legislative advances in the protection of human rights. Some of the steps adopted may well fall short of perfection, but as earlier mentioned, the recognition of human rights emerges slowly out of the human condition, and short or incremental steps may at times be a harbinger of a developing right, a further step in the long journey towards full and ungrudging recognition of the dignity of the human person.”

The Supreme Court has recently clarified its position on legislative deference under s.1 in cases such as *R.J.R.-Macdonald*, *Eldridge* and *Vriend*.<sup>131</sup> This attempt to strike the proper balance under s.1 of the *Charter* was summarized by Iacobucci J., writing for the majority, in *Vriend*:

[A]lthough this Court has recognized that the Legislature ought to be accorded some leeway when making choices between competing social concerns . . . judicial deference is not without limits. In *Eldridge*, *supra*, La Forest J. quoted with approval from his reasons in *Tétrault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22 at p.42, wherein he stated that “the deference that will be accorded to government when legislating in these matters does not give them an unrestricted license to disregard an individual’s *Charter* rights.” This position was echoed by McLachlin J. in *R.J.R.-Macdonald*, *supra*, at para.136:

[C]are must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden which the *Charter* places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the Courts also have a role: to determine, objectively and impartially, whether Parliament’s choice falls within the limiting framework of the Constitution. *The Courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament’s view simply on the basis that the problem is serious and the solution is difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation was founded.*<sup>132</sup>

It is difficult to predict how the Court would view judicial deference in the context of the CHST. In *Vriend*, Iacobucci J. distinguished the deferential approach adopted by Sopinka J. in *Egan* partially on the basis of the financial consequences to the government of striking down the impugned legislation in that case, which were not present in *Vriend*. This would seem to suggest the Court would adopt a more deferential posture where financial obligations were involved. However, it would seem contrary to the purposes of the *Charter*, and an “abdication of responsibility” for the Courts to immunize violations of *Charter* rights simply because the government was motivated by financial concerns. If a government decides it cannot afford to comply with sections 7 and 15 of the *Charter*, it may always invoke section 33 of the *Constitution Act, 1982*

131. See for further discussion, M. Jackman, “Protecting Rights and Promoting Democracy: Judicial Review Under Section 1 of the Charter” (1996), 34 Osgoode Hall L.J. 661.

132. *Vriend*, *supra* note 97 at para.126 [emphasis added].

(the “notwithstanding clause”) to override any judicial finding of unconstitutionality.<sup>133</sup>

### III. *Welfare Rights Outside the Charter: Section 36 of the Constitution Act, 1982*

A further sources for constitutional norms relating to national standards and social welfare is section 36 of the *Constitution Act, 1982*, which provides:

- (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the Government of Canada and the provincial governments, are committed to
  - (a) promoting equal opportunities for the well-being of Canadians;
  - (b) furthering economic development to reducing disparity in opportunities; and
  - (c) providing essential public services of reasonable quality to all Canadians.
- (2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.<sup>134</sup>

The conventional view that this provision is non-justiciable has now been subject to persuasive challenge. In “Providing Essential Services: Canada’s Constitutional Commitment under Section 36”, Aymen Nader argues that s. 36 imposes a constitutional obligation on governments with respect to how they discharge their spending powers.<sup>135</sup> While this may not be enforceable in terms of requiring the government to penalize provinces whose welfare policies failed to meet certain standards, it could appropriately be the subject of a declaration by the Court regarding the proper action by the government in the circumstances.<sup>136</sup>

According to Nader, s. 36 sets out obligations by which both federal and provincial governments must abide in relation to the CHST:

Provincial responsibility pursuant to s. 36(1)(c), then, would entail the exercise of provincial legislative authority to establish and regulate health, education and welfare programs in the province. It is also incumbent on the

133. See Hogg, *supra* note 18 at ch. 36.

134. *Supra* note 84.

135. A. Nader, “Providing Essential Services: Canada’s Constitutional Commitment under Section 36” (1997) 19 *Dalhousie L.J.* 306.

136. *Ibid.* at 351.

provinces to guarantee legislatively that these programs be of a “reasonable quality”, as per s.36(1)(c). The actual qualitative standard, however, would not be solely supervised by the provinces. A minimum standard must be determined by the federal government based on criteria contained in conditional grant programs because only the federal government can set standards which would apply nationally. In other words, provinces would be financially penalized if they delivered services which failed to meet federally set national standards . . . . The content of the federal commitment under s. 36(1)(c) requires somewhat more from Parliament and the federal government than that which is expected from the provincial legislatures. As already noted, the federal government is also implicated in the commitment to providing essential public services “of reasonable quality. . . .”

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*[T]he provision of essential public services of “reasonable quality” to “all Canadians” will require the federal government to place, as a condition for the receipt of federal grant monies, the stipulation that provincial programs meet a standard of comprehensiveness and intrinsic adequacy. This standard of comprehensiveness will be the minimum by which provinces must abide in order for them to meet their commitment of providing essential public services of “reasonable quality”.*<sup>137</sup>

Because the CHST does not require that the provinces provide social welfare services of “reasonable quality”, the CHST would appear to be inconsistent with s. 36 of the Constitution.<sup>138</sup>

It would be difficult to sustain a challenge to the CHST on the basis of s. 36 of the Constitution alone.<sup>139</sup> This skepticism is based on the preamble to s. 36, which makes it clear that it is not intended to alter “the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority.” Clearly, obligating the federal government to supervise provincial welfare programs to ensure they are of “reasonable quality” would alter the exercise of the federal government’s legislative authority in relation to the CHST. Further, the preamble makes clear that the federal and provincial governments are “committed” to the goals set out in the section, not bound to achieve those goals. A “commitment” can be expressed in many ways. The provision of the CHST providing a mechanism to develop shared principles arguably could satisfy the federal government’s “commitment” for these purposes. Finally, while there is no more essential service from the perspective of social welfare

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137. *Ibid.* at 358-60. [emphasis added]

138. Jackman reaches a similar conclusion in “Women and the CHST,” *supra* note 5 at 392-93.

139. I am aware of no litigation that has been successfully mounted against the federal government on this basis.

recipients, it is far from clear that social welfare would be held to constitute an “essential service” for the purposes of this provision. Welfare is not a universal program like old age pensions, nor is it necessary for the well-being of *all* citizens, like police and fire services. Indeed, the very fact that the federal government has provided a block grant to the provinces and not required them to spend any portion on welfare, nor attached any substantive standards to welfare, all suggest that welfare would not qualify as an “essential” service.

Although, for the reasons stated above, I do not believe s.36 could sustain a challenge to the CHST, I would argue this provision does constitute an important statement of Canada’s constitutional norms relating to its welfare state. The welfare state is concerned not only with the equitable provision of social programs to all Canadians irrespective of the province or region in which they live, but also with the quality of those programs. It is the absence of this latter commitment that marks the distance between the CHST and the substantive foundation of the welfare state.

#### IV. *International Welfare Rights*

Canada’s international commitments relating to social and economic rights are another source of the substantive foundation of Canada’s welfare state. Canada is a signatory nation of the International Covenant on Economic, Social and Cultural Rights, which calls on all governments to ensure an “adequate standard of living” for their citizens.<sup>140</sup> While member states “undertake” to take steps to realize the rights set out in the covenant, there is no binding mechanism to enforce compliance. In addition, the U.N. Charter obligates all member governments to promote “higher standards of living” and “conditions of social and economic progress.” Finally, the Universal Declaration of Human Rights, adopted by the U.N. and supported by Canada, guarantees the right to an adequate standard of living including food, clothing, shelter, health and welfare.

When the CHST was proposed, and domestic lobbying proved fruitless, poverty advocates took their case to the international community. Following submissions from the National Anti-Poverty Organization, the Charter Committee on Poverty Issues and the National Action Committee on the Status of Women, the U.N. Committee on Economic,

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140. International Convention on Economic, Social and Cultural Rights, 19 December 1966, Can. T.S. 1976 No. 46. For a fuller argument on the connection between international obligations and federal cost-sharing of social welfare, see Scott, *supra* note 5.

Social and Cultural Rights unanimously decided to send a letter to the federal government warning that the CHST legislation could violate international human rights treaties to which Canada has been a signatory since 1976.<sup>141</sup> As with administrative law and *Charter* concerns, it was not only the failure of Canada's social programs funding legislation to enact standards that created the violation but the fact that existing standards were being repealed. In other words, the CHST was not simply inadequate but regressive.

This international initiative appeared not to have a significant impact on the federal government. Further, the international treaties Canada has signed and the commitments contained therein are unlikely to form the basis of a challenge to the CHST in Canadian courts. It is arguably the provincial governments who have the primary responsibility to implement these international agreements as the provinces have the legislative jurisdiction to design and implement social welfare programs. While it is reasonable to suggest that the federal government's exercise of its spending power should be circumscribed by its own international commitments, this would be difficult if not impossible to enforce. It is clear, however, that these international commitments form a part of the core norms of the Canadian welfare state.

Thus far in this analysis, all the norms found in administrative law, the *Charter* and international agreements appear to militate for national standards and welfare entitlements. It would be simplistic and inaccurate to conclude that the Canadian welfare state does not contain normative strands in the other direction. Surely, the acceptance of welfare cuts in provinces such as Ontario and Alberta and the absence of significant grassroots opposition to the CHST itself suggest otherwise. In fact, the Canadian welfare state has been characterized by a deep ambivalence towards its mission from the outset. The present patchwork of means-tested, social insurance based and universal programs which comprise Canada's welfare state is testament to its diversity and complexity. The view that social welfare is the cause of poverty and dependence rather than its consequence is no longer a voice heard only from the neo-conservative fringes. In fact, perhaps the single greatest influence on the Canadian welfare state has come from the American welfare state, which recently has taken concrete measures to remove all entitlements to ongoing social assistance from its federal welfare funding as part of a hugely popular campaign "to end welfare as we know it." It is for this reason that the American experience with "welfare rights" is instructive.

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141. The letter and its implications are discussed in detail in Scott, *ibid* at 79-80.



V. *The Rise and Fall of Welfare Rights:  
Lessons from the American Experience*

It is no coincidence that the CHST emerged at the very moment that the Republican Congress and President Clinton agreed to “end welfare as we know it” and enacted the *Personal Responsibility and Work Opportunity Reconciliation Act of 1996*.<sup>142</sup> As with the CHST, while this appears as a measure intended to promote flexibility for welfare program design in the states, its greatest impact will be on the recipients of social welfare. A brief description of the American shift from cost-sharing to block funding may shed light on the future of the CHST and its impact on the Canadian welfare state.

Despite the generally accepted view that Canada’s social welfare policy is more “generous” than that of the U.S., these two countries have long travelled a roughly parallel path in the development of welfare state programs.<sup>143</sup> Both Canada and the U.S. inherited the English legacy of the Poor Laws, and an ambivalence to the provision of state assistance to those in need.<sup>144</sup> Both countries share a political culture characterized by liberalism and individual rights that viewed poverty as primarily a result of poor work ethics not social conditions or business cycles.<sup>145</sup> Both first experimented with national social welfare with the introduction of mother’s aid and veteran’s pensions to those deemed “worthy” in the early twentieth century.<sup>146</sup> Both countries attempted to create a minimal,

142. Public L. No. 104-193, 110 Stat. 2105 (August 22, 1996).

143. See P. Collins, “American-Canadian Welfare: Parallel Journeys through Dead-Ends, Debts and Detours! Lessons from the North” (1993) 11 *Wisc. Int’l L.J.* 445; C. Watson, “Machiavelli and the Politics of Welfare, National Health, and Old Age: A Comparative Perspective on the Policies of the U.S. and Canada” (1993) *Utah L. Rev.* 1337; R.M. Blank & M.J. Hanratty, “Comparison of Social Safety Nets in Canada and the U.S.” in *Small Differences That Matter*, eds., D.Card & R.B. Freeman (Chicago: University of Chicago Press, 1993); D. Fraser & A. Freeman, “What’s Hockey Got to Do With It, Anyway? Comparative Canadian-American Perspectives on Constitutional Law and Rights” (1987) 36 *Buffalo L. Rev.* 259; R. Kurdle & T. Marmor, “The Development of the Welfare State in North America” in P. Flora & A. Heidenheimer, eds., *The Development of Welfare States in Europe and America* (New Brunswick, NJ: Transaction, 1981) 81; C. Leman, *The Collapse of Welfare Reform: Political Institutions, Policy and the Poor in Canada and the United States* (Cambridge: M.I.T. Press, 1980). See also, generally, S. Lipset, *Continental Divide: The Values and Institutions of the United States and Canada* (New York: Routledge, 1990).

144. See S. Webb & B. Webb, *English Poor Law History* (Hamden, Conn.: Archon Books, 1963).

145. See G. Esping-Andersen, *Three Worlds of Welfare Capitalism* (Cambridge, U.K.: Polity Press, 1990) at 50-54.

146. On Canada, see *The Emergence of Social Security in Canada*, *supra* note 26. On the U.S., see T. Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge: Harvard University Press, 1992) at 30-38; and L. Gordon, *Pitied but Not Entitled: Single Mothers and the History of Welfare, 1890-1935* (New York: Free Press, 1994) at 37.

national system of state intervention to ameliorate poverty in response to the Great Depression of the 1930s, and governments in each country had to overcome constitutional opposition from its Supreme Court to institute such a system.<sup>147</sup> A sharp increase in social welfare benefits occurred in both countries in the 1960s. Under the banner of President Johnson's "Great Society," and Prime Minister Trudeau's "Just Society," new programs such as medicaid, medicare and food stamps in the U.S. and CAP in Canada were intended to transform welfare benefits from discretionary privileges to legal entitlements.

There was one important distinction, however, in how the two jurisdictions understood the rationale for those welfare entitlements. In Canada, welfare primarily has been approached as the public expression of a social bond. This bond was given legislative form in the *Canada Assistance Plan*. An important feature of this bond as a national symbol is its distinctiveness from the American welfare model. As Andrew Armitage has observed in his discussion of the future of social welfare, "The liberal vision continues to draw its strength from the pride that Canadians have in building a social order in North America that is safer and more just than that of the United States."<sup>148</sup> The argument for a substantive right to social assistance in Canada is rooted in the view that Canada's political culture is amenable to state involvement in social and economic life.<sup>149</sup> Canadi-

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147. See W.H. McConnell, "Some Comparisons of the Roosevelt and Bennet 'New Deals'" (1971) 9 *Osgoode Hall L.J.* 221.

148. A. Armitage, *Social Welfare in Canada Revisited: Facing up to the Future*, 3rd ed. (Toronto: Oxford University Press, 1996) at 184-85.

149. According to Charles Taylor, "Canadians . . . see their political society as more committed to collective provision, over against an American society that gives greater weight to individual initiative . . . There are regional differences in Canada, but generally Canadians are proud and happy with their social programs, especially health insurance, and find the relative absence of these in the U.S. disturbing." See C. Taylor, "Shared and Divergent Values" in R. Watts & D. Brown, eds., *Options for a New Canada* (Toronto: University of Toronto Press, 1991) 53 at 56. George Grant, for example, viewed this as one of the principal tenets of political culture shared by both the English and the French populations in Canada. G. Grant, *Lament for a Nation* (Toronto: McClelland & Stewart, 1965) at 68-9. Allan Moscovitch has gone further, claiming that the collective obligations in Canada to provide for the welfare of all constitute the essence of Canada's identity as a nation. See A. Moscovitch, "The Rise and Decline of the Canadian Welfare State" *Perceptions* (November-December, 1982) 28. This commitment, moreover, is inviolable, despite the neoconservative assault on the welfare state's legitimacy in the 1980s. See for a discussion, K. Banting, *The Welfare State and Canadian Federalism* (Montreal and Kingston: McGill-Queen's Press, 1987) at 185. Observers argued that this is because social welfare programs had become "embedded" in Canadian society, and had become sacred cows to business, labour, bureaucrats and social activists. See A. Cairns, "The Embedded State: State-Society Relations in Canada" in K. Banting, ed., *State and Society: Canada in Comparative Perspective* (Toronto: University of Toronto Press, 1986) 53 at 55-58.

ans, on this view, are more preoccupied with government's failure to adequately address its citizens' needs than are Americans who accept the state's more limited role in social well-being.<sup>150</sup> In Canada, social programs additionally have served as a tool to shore up the weakening links of federalism. According to Alan Cairns and Cynthia Williams, "In Canada, the welfare state has not only had the task of preserving stability in the face of potential class tensions, but also the task of fostering national integration in a regionalized society of continental extent."<sup>151</sup>

In the U.S., by contrast, welfare was not understood as a social bond but as an extension of individual rights. This view was reflected in the rise of the "New Property" movement in the 1960s,<sup>152</sup> popularized by Charles Reich in his 1964 article of the same name.<sup>153</sup> Reich argued that welfare entitlements were not a privilege which could be granted or taken away with impunity, but rather a form of property, like land and other forms of "old property," which could not be interfered with or expropriated from its owners without due process. By this conceptual leap, welfare rights activists sought to transform the receipt of public assistance from an

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150. Jackman elaborates:

While governmental programs designed to guarantee adequate levels of health, housing, unemployment security, and social assistance clearly have an economic dimension, entitlements to such programs are not perceived in our society solely in economic terms. Rather, in the Canadian social welfare tradition, such entitlements are viewed as integral to and reflective of values which are profoundly social in nature—values which define the relationship between individual, community and state. These include the ideas that Canada is an interdependent community; that individual Canadians are not the sole guarantors of their own social and economic well-being; and that there is a minimum level of welfare below which no Canadian will be allowed to fall.

"Poor Rights," *supra* note 85 at 78-9. See also R. A. Samek, "Untrenching Fundamental Rights" (1982) 27 McGill L.J. 755 at 773.

151. A. Cairns & C. Williams, "Constitutionalism, Citizenship and Society in Canada: An Overview" in A. Cairns & C. Williams, Research Coordinators, *Constitutionalism, Citizenship and Society in Canada* (Toronto: University of Toronto Press, 1985) 17.

152. This movement developed as a response to dissatisfaction with the manner in which discretionary authority under social assistance statutes was being exercised. See M. Davis, *Brutal Need: Lawyers and the Welfare Rights Movement, 1960-1973* (New Haven: Yale University Press, 1993) at 122-3. For a discussion of the interplay between welfare rights and discretion, see M. Sosin, "Legal Rights and Welfare Change, 1960-80" in S. Danziger & D. Weinberg, eds., *Fighting Poverty: What Works and What Doesn't* (Cambridge: Harvard University Press, 1986); R. Rabin, "The Administrative State and its Excesses: Reflections on the New Property" (1990) 24 U.S.F. L. Rev. 273 at 360.

153. See Charles Reich, "The New Property" (1964) 73 Yale L.J. 733. Reich wrote, "Inequalities lie deep in the administrative structure of government largess. The whole process of acquiring it and keeping it favours some applicants and recipients over others. The administrative process is characterized by uncertainty, delay, and inordinate expense; to operate within it requires considerable know-how." See also C. Reich, "Individual Rights and Social Welfare: The Emerging Legal Issues" (1965) 74 Yale L.J. 1245.

arbitrary act of political generosity to a constitutionally protected right enjoyed and enforceable by any person receiving social assistance.<sup>154</sup>

Victories for welfare advocates in the U.S. came in a number of important fields in the 1970s, mostly dealing with the process of establishing eligibility for welfare benefit. The rise of welfare rights, however, led to unintended consequences that were ultimately harmful to welfare recipients.<sup>155</sup> While the formal, procedural guarantees achieved as a result of the welfare rights movement contributed to the empowerment of welfare recipients in their interaction with the state, it came at the expense of increased dependency of the poor on increasingly rule-bound and “red-tape” filled bureaucracies.<sup>156</sup> The spectre of this dependency on public assistance and the failure of recipients to escape grinding poverty, moreover, made an “end to welfare” not only conceivable but desirable across a wide swath of the U.S. electorate. The focus on the entitlement to welfare deflected attention from the inadequacy of welfare benefits and the punitive features of the bureaucracy administering those benefits.<sup>157</sup> For this reason, the sufficiency of welfare benefits to allow individuals and families actually to escape poverty was overshadowed by the alleged causal link between entitlements on the one hand and dependency on the other.

The result of the shift in the discourse on welfare in the U.S., with its emphasis away from entitlement and dependency on the state and

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154. The source of “welfare rights” in the U.S. was traced to the Fifth Amendment to the U.S. Constitution, which provides that “No person shall . . . be deprived of life, liberty, or property, without due process of law,” and the Fourteenth Amendment which prohibits the States from infringing such interests without due process. The Supreme Court of the United States relied on the Fourteenth Amendment in *Goldberg v. Kelly*, 397 U.S. 254 (1970) [hereinafter *Goldberg*], in requiring that a hearing be provided a recipient of welfare whose benefits were going to be terminated. In justifying this decision, however, Justice Brennan took special pains to reject the traditional jurisprudential stance in the U.S. that welfare was a privilege and not a right, declaring (at 262) that welfare benefits “are a matter of statutory entitlement” and later, “welfare provides the means to obtain essential food, clothing, housing, and medical care . . . . Thus . . . termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.”

155. The notion of assistance as an entitlement implicitly legitimates the status quo of social welfare programs. If a single mother is “entitled” to assistance well-below the poverty line, her ability to enforce these inadequate benefits becomes a hollow right. The “welfare rights” movement was handicapped by its assumption that the state, rather than the market, represented the greatest threat to the poor. See W. Simon, “The Invention and Reinvention of Welfare Rights” (1985) 44 Md. L.R. 1.

156. See M. Lipsky, *Street-Level Bureaucracy* (New York: Sage, 1980) at 140-151.

157. See L. Sossin, “The Criminalization and Administration of the Homeless: Notes on the Possibilities and Limits of Bureaucratic Engagement” (1996) 22 N.Y.U. Rev. Law & Soc. Change 623.

towards the market and individual responsibility, has been the erosion of the idea of welfare as “New Property” and the due process rights which flowed from this premise.<sup>158</sup> The substantive limits placed on the states under the *Personal Responsibility Act* are all designed to reduce recipients’ dependency on the state and preclude any national entitlement to welfare.<sup>159</sup>

What is the lesson for Canada in the American experience with welfare reform? Block funding does not merely enhance flexibility, *per se*, it introduces greater likelihood of achieving particular purposes which might otherwise not be permitted. In the U.S., it would appear the flexibility is enhanced *in order to* move people off welfare and into the market economy. Joel Handler describes the current American model in these terms:

The proposed abandonment of the European and Canadian welfare state is surely dismaying. These welfare states, with their generosity and inclusiveness, represent collectively one of the crowning achievements of the twentieth century. To follow the American lead is not only dismaying, but also puzzling. The American statistics are familiar. While millions of jobs have been created, they are, for the most part, low-wage, contingent, part-time, and with low or no benefits. As a consequence, the United States is experiencing unprecedented wage inequality and persistent poverty, especially among vulnerable groups.<sup>160</sup>

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158. In his article, “The Due Process Counterrevolution of the 1990s?” (1996) 96 Colum. L. Rev. 1973, Richard Pierce Jr. contends that American courts are poised to return to the pre-*Goldberg* jurisprudence on due process rights for welfare recipients; and R. Epstein, “No New Property” and W. Simon, “The Rule of Law and the Two Realms of Welfare Administration” in “The Legacy of *Goldberg v. Kelly*: A 20 Year Perspective” (1990) 56 Brooklyn L. Rev. 747 and 777, respectively. See also R. Zietlow, “Two Wrongs Don’t Add up to Rights: The Importance of Preserving Due Process in Light of Recent Welfare Reform Measures” (1996) 45 Am. U.L. Rev. 1111. Zietlow argues that passage of the *Personal Responsibility Act* will dramatically curtail due process rights for welfare recipients (at 1126-27).

159. As in Canada, the “quid pro quo” for the federal government, in return for promoting flexibility, is a cap on its welfare contributions for the next five years. Further, to ensure that the cycle of dependency and entitlement is broken, this grant of flexibility to the states is limited by the federal condition that recipients “engage in work” within 24 months of receiving benefits, and that no welfare benefits extend beyond five years. See *Personal Responsibility Act*, *supra* note 142, s.402(a)(1)(A)(i) and (ii). States are permitted to exempt only 20% of the welfare population from these conditions, resulting in a new and invidious competition among welfare recipient constituencies for access to coveted exemptions. See, for example, R. Swarns, “Welfare Family Advocates, Once Allies, Become Rivals” *The New York Times* (29 March 1997) 1. The law further provides financial incentives for states that reduce out-of-wedlock births, and penalties for states whose employment rate for former welfare recipients does not increase annually: *ibid.* at s.403(a)(2) and 407(a).

160. J. Handler, “Welfare Reform in the United States” (1997) 35 Osgoode Hall L.J. 289 at 290-91; see also J.F. Handler & Y. Hasenfeld, *We the Poor People: Work, Poverty, and Welfare Reform* (New Haven: Yale University Press, 1997).

The *Personal Responsibility Act* is explicit in its goal to reshape the content of social welfare legislation at the state level, while ostensibly enhancing the flexibility of the states to design social programs to fit their diverse needs. I would argue the CHST may send a similar, if less explicit, message to the provinces regarding the deterioration of the quality of social welfare programs and the elimination of welfare entitlements. How else can one explain the choice to make the residency requirement a greater priority in the CHST than poverty or need, while at the same time preserving the national standards accompanying federal funding for health care?

If Canada is not to continue down the same path as the Americans with block funding and welfare reform, it is imperative to anchor the increased flexibility of the CHST to clear and unshifting national norms. At the same time, however, there is good cause to be wary of indiscriminately transforming social bonds into individual rights. With these concerns in mind, the Canadian welfare state must chart its own course through these conflicting tendencies. This requires that the Canada's welfare state programs must be re-anchored to the common ground on which our legal and political system has been constructed. While Parliament and the provincial legislatures have the responsibility for sorting through the Canadian electorate's ambivalence towards welfare programs and welfare recipients, the Courts should assume the responsibility for ensuring the fundamental tenets of our legal and political system are not compromised in the process. In my view, the courts' narrow and restrictive approach to this critical task threatens to impoverish judicial review and leave the Canadian welfare state rudderless in uncertain seas.

### *Conclusion*

Having considered the judicial review of the CHST from a broad range of perspectives, some difficult conclusions must be faced. To those concerned that the CHST has resulted in the loss of fundamental aspects of the welfare state, judicial review would appear to provide cold comfort. Judicial review cannot substitute standards where Parliament has seen fit to take them away. In short, judicial review cannot make the CHST into something that it is not. What judicial review may accomplish, however, is to affirm that some core elements of the welfare state are inviolable. Our legal system imposes a variety of duties on governments which they cannot exempt themselves from through legislation or executive action—the duty to act in good faith is one example, respecting democratic rights is another. Is there a similar *sine qua non* with respect to social welfare?

As alluded to in the introduction, there is both a positive and a normative answer to this question. The positive answer would appear to be that there are not judicially enforceable obligations on the federal government to facilitate minimum entitlements to social welfare through the exercise of the spending power. The normative answer is that such obligations are essential, for without them, the welfare state is rendered contingent and defeasible.

In my view, the substantive foundation of the welfare state (from which the national standards contained in CAP emerged as well as the aborted agreement on a social contract in the Charlottetown Accord) begins from a shared commitment that no one dependent on the state in Canada should be denied the basic requirements of food, shelter, clothing, education, social services, health care and other basic necessities of life. While there may be both valid and invalid reasons to see individuals and families “get off” welfare, the *purpose* of welfare ultimately must be to ensure that all citizens live with a minimum of human dignity. A social welfare program such as the CHST, which deprives all Canadians of this guarantee arguably cannot be consistent with human dignity. It is for this reason I contend the CHST could jeopardize the substantive foundation of the Canadian welfare state. Thus, the CHST represents Canada’s version of an “end to welfare as we have known it.” The CHST fails to articulate a vision of social welfare compatible with human dignity to replace the one contained in CAP.

The vision the CHST does articulate relates to the future of Canadian federalism. However, while many would agree that the provinces should and have become the driving force behind the welfare state, the CHST appears to take cognizance of this in an inconsistent and incoherent fashion. While national standards are removed from social welfare, they are retained for health care. However, if flexibility is the goal, why continue to constrain provincial decision-making in one area of social policy but not another? Furthermore, why remove the substantive standards relating to welfare which were quite vague and left significant room for flexibility (as evidenced by the disparities in welfare programs across the provinces) while leaving in place the residency requirement for welfare (which leaves the provinces no flexibility)? The choices Parliament has made disclose a selective approach to “flexibility” and, at least as far as social welfare recipients are concerned, one which reinforces their vulnerability.

While Parliament can (and perhaps should) expand the flexibility of the provinces to design new approaches to welfare, this should not preclude the courts from meaningfully participating in the clarification of the federal government’s obligations under the welfare state. The goal of

judicial review of the CHST is not for the judiciary to restore to welfare recipients the national entitlement to social assistance contained in CAP, but hopefully to serve as a catalyst to impel the federal government to define its commitment to some basic standards in the realm of social welfare.<sup>161</sup> It is in this sense that judicial review has the potential to salvage the Canadian welfare state. This “dialogue” between the courts and the legislatures on important social and economic questions is a beneficial feature of Canada’s legal and political system.<sup>162</sup>

Based on the cursory analysis of administrative and constitutional law set out above, I would like to suggest certain shared principles and objectives already exist in Canada’s legal system capable of providing normative guidance to government action taken under the CHST. These include, but would not be limited to the following:

- (1) CHST funds directed towards social programs should be disbursed in a manner consistent with the purpose of responding to those in need.

While administrative law principles do not permit a Court to substitute its own view for the wisdom or efficacy of a law, they do require a Court to inquire into the purposes of an impugned law and ensure that the law is being applied in a fashion consistent with those purposes. The conditional aspect of the CHST with respect to social welfare prohibits residency requirements in the provision of social assistance programs. Social assistance programs, in turn, are defined as aid to or in respect of those in need. While indirect, the presence of the term “aid to . . . those in need” in the definition of social assistance suggests the federal government has retained at least implicit standards in its funding of provincially administered social assistance programs. If a purpose of the CHST is to fund social assistance programs which aid those in need, than those programs which can be shown not to aid those in need should not be eligible for the CHST funds.

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161. Judicial review served a similar role in the income tax reform context after the decision in *Thibadeau*, *supra* note 96. As Howse concluded following a discussion of this case, “Even where they may stop short of finding a set of self-standing social rights in existing *Charter* guarantees, the courts—in applying core constitutional norms of autonomy and equality to the social sphere—may have a not insignificant impact on a system that is already in evolution . . . *Charter* litigation may therefore provide an important informational or “signalling” function for policy reformers in government.” Howse, *supra* note 85 at 102.

162. See P. Hogg & A. Bushell, “The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn’t Such a Bad Thing After All)” (1997) 35 *Osgoode Hall L.J.* 75.



- (2) CHST funds should only be disbursed to provinces whose social assistance programs ensure that welfare recipients live with human dignity.

Both section 7 and 15 of the *Charter* emphasize the primacy of human dignity in the protection of fundamental freedoms. A government disbursing funds to be spent on programs to aid those in need, which is indifferent as to whether those programs respect or erode human dignity, offends Canada's most basic constitutional norm.

- (3) CHST funds should be disbursed with respect for equality between provinces, and spent by the provinces with an equitable distribution of funds apportioned between health care, postsecondary education and social welfare and in a manner that does not discriminate against any recipient groups.

Section 36 of the *Constitution Act, 1982*, establishes regional equality as another constitutional norm in Canada. This provision represents constitutional recognition of the value of national standards in social programs. Further, section 15 of the *Charter* confirms that the ideal of "providing essential public services of reasonable quality to all Canadians" also means that one recipient group should not be discriminated against based on their vulnerability or marginalization from the mainstream of social, economic or political life.

- (4) Welfare recipients should have standing to enforce these principles and objectives.

If the government is to remain accountable for its funding decisions, welfare recipients must remain vigilant in scrutinizing those decisions. Welfare recipients are unlikely to be a formidable force in the electoral process. The Courts remain the last resort for the protection of their interests. As the Supreme Court confirmed in *Finlay*, no group is more affected by the federal government's spending power in the sphere of social welfare than recipients of welfare.

These may not constitute existing, judicially enforceable obligations, but together, they do represent a modest starting point for the project of re-anchoring federal social funding to the common ground and shared aspirations that characterize Canada's welfare state. They could form the basis of tangible obligations and duties on the part of government to ensure these norms are respected in the design and implementation of social welfare policies. They are consistent both with section 36 of the *Constitution Act, 1982* and with Canada's international commitments regarding the protection and promotion of social rights. While these do not amount to "national standards," they do recognize that the federal

government's spending power must be differently viewed when it affects those already dependent on the state.

These norms are consistent with the framework advanced by Courchene, the leading commentator on the CHST. In his influential essay on the CHST entitled *ACCESS: A Convention on the Canadian Economic and Social Systems*, Courchene suggests twelve "framework axioms" intended to guide the development of social policy.<sup>163</sup> With these axioms in mind, Courchene advances an "interim ACCESS" model which would retain the status quo currently in place with the CHST (*i.e.*, the residency requirement). The "full ACCESS" model would invest the provinces with responsibility for the design and delivery of social assistance but within the context of an enforceable, interprovincial accord committing the provinces to certain principles and standards. In the social welfare context, these principles and standards would require, among other things, that social programs be accessible to and protect Canadians in need, and promote the well-being of children and families.<sup>164</sup>

While Courchene's ACCESS model would ultimately see national standards restored to the CHST as part of Canada's new social and economic union, these standards would remain to be developed and enforced through an interprovincial accord. The notion that the provinces could, working together, adopt a national vision of a shared social union has been characterized as Courchene's "heroic assumption."<sup>165</sup> As critics of ACCESS point out, there is little evidence that the provinces have either the will or sufficient incentives to voluntarily fetter their discretion in the social policy realm in this fashion.<sup>166</sup> Indeed, the recent provincial initiative to lobby the federal government to increase CHST funding is

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163. These are: accountability, transparency, efficiency, equity, citizen rights, the principles of subsidiarity (*i.e.* delegation of power to lowest level of government), the federal principle (*i.e.* provinces must be free to experiment with their own vision of socioeconomic programs), the spending power provision (*i.e.* federal government must retain flexibility as well, uniform application, duality and asymmetry, non-discrimination and standstill provisions (*i.e.* prevention of backtracking or "slippage")). See *ACCESS*, *supra* note 1 at 7-11. For a commentary on this proposal, see the proceedings of a conference held on Courchene's proposals entitled *Assessing ACCESS: Towards a New Social Union* (Kingston: Institute of Intergovernmental Relations, 1997).

164. See *ACCESS supra* note 1 at Table 3.

165. S. Kennet, "Securing the Social Union: A Commentary on the Decentralized Approach" (Canadian Institute of Resource Law, January 7, 1997) at 16.

166. *Ibid.* at 17-34. See also C. Cohn, "The Canada Health and Social Transfer: Transferring Resources or Moral Authority Between Levels of Government?" in P. Fafard & D. Brown, eds., *Canada: The State of the Federation 1996* (Kingston: Institute of Intergovernmental Relations, 1996) 181.

notable for its silence on national standards.<sup>167</sup> Michael Mendelson of the Caledon Institute for Social Policy observed that while the provinces are interested in restoring social policy funding to the levels it reached under CAP, there is no interest in the conditions that once attached to this funding.<sup>168</sup> While the debate over the future of fiscal federalism will determine the ultimate division of responsibility for “national standards” under the CHST, it is clear to even the CHST’s supporters such as Courchene, that funding social welfare should not remain divorced from the purposes of providing social welfare. There appears to be a consensus that federalism alone cannot provide the vision essential to the welfare state. For this reason, even an interim model under which the CHST subsidizes the provinces’ social welfare programs, without regard to the quality of those programs, is unacceptable. Welfare recipients, caught in the middle, suffer the most.

Judicial review represents a partial and preliminary forum in which to subject fiscal federalism to heightened public scrutiny and to refocus the Canadian welfare state with respect to its normative purposes. Former Prime Minister Pierre Trudeau wrote that “[t]here are areas in which even the courts cannot provide enlightenment: no matter how clear one’s rights, the federal system must ultimately rest upon a basis of collaboration.”<sup>169</sup> This is undoubtedly true. However, for collaboration to work, all parties must know what is on the table for negotiation and what cannot be delegated or compromised. In the final analysis, courts should establish the scope of what is not up for discussion. Canada’s federal system is now inextricably linked with Canada’s welfare state. There are elements of both systems that, absent some new constitutional change, must remain non-negotiable. Minimal protections for those unable to survive without state assistance, in my view, should represent one such element of the welfare state.

Subjecting the CHST to judicial review may not lead to short term solutions. However, it may shift some of the public spotlight away from deference, decentralization and devolution and towards the issues of need, poverty and the purposes of the welfare state. Judicial review is not an optimal instrument with which to establish and enforce the bottom line of the Canadian welfare state and thereby salvage its future; it may, however, serve as a viable and necessary departure point for this end.

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167. See E. Greenspon, “Provinces to Ask for \$6-billion” *The [Toronto] Globe & Mail* (15 June 1998) A1.

168. Quoted in *ibid.* at A13.

169. P. Trudeau, “Federal Grants to Universities” cited in Petter, *supra* note 32 at 473.