The Equality and Liberty Rights of the Destitute: A Canadian Charter Case Example

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1. Introduction: The Core Values of the Canadian Charter

This paper argues that there is a constitutional right to social justice under the Canadian Charter of Rights and Freedoms (1982). The proposition is further advanced that there is a positive obligation on the State deriving directly from Canadian Charter principles to ensure social justice. This issue is examined in the context of the Supreme Court of Canada decision in Gosselin. The latter case concerned the protected security of the person and equality rights of welfare recipients as related to the Canadian Charter and the Quebec Charter of Human Rights and Freedoms (1975). The Supreme Court of Canada majority judgment in Gosselin, when stripped to its essence, expresses the erroneous view that infringements of social justice in Canada can be constitutional; at least in certain instances. Although the discussion which follows regarding Gosselin concerns what, in this author’s view, is a welfare scheme inconsistent with Canadian Charter values, the issue more broadly addressed is the people’s fundamental human and constitutional right to basic economic security in a democracy.

Let us turn first then briefly to a consideration of the values which give life to the Canadian Charter. Chief Justice Dickason in Oakes articulated the values underlying the Canadian Charter of Rights and Freedoms as follows:

"Respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation for a wide variety of beliefs, respect for cul-

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4 Gosselin case, supra note 2.

5 Gosselin case, ibid.
tural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.”

These fundamental principles relating to full societal participation for all, equity, and social justice thus reflect democratic values. As stated in Oakes: “The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which the limit on a right or freedom must be shown, despite its effects, to be reasonable and demonstrably justified.”

In a democratic society then there would seem to be no acceptable basis for the marginalization of individuals or groups of individuals. Hence, the democratic State invests, for instance, in welfare schemes to assist in the reintegration of those on the fringes of society due to financial hardship. It expends a level of resources on such programs that it contends will maximize the effectiveness of the reintegration effort for the most welfare recipients. The fact, however, that some people may yet be marginalized or fall through the ‘safety net’ is considered by both government and the Courts as to be expected as indicated by the following statement by the majority in Gosselin: “The fact that some people may fall through a program’s cracks does not show that the law fails to consider the overall needs and circumstances of the group of individuals affected, or that distinctions contained in the law amount to discrimination in the substantive sense intended by s. 15(1).”

There appears in Gosselin then little recognition of the fact that without government willing to assume a positive obligation to ensure reasonable access to subsistence welfare under an existing legislative scheme there will always be significant numbers of persons ‘falling through the cracks’. The latter situation, on the view presented here, constitutes a violation of democratic principles relating to universal full societal participation. In order to allow for the integration of all in the society, the State must then not simply refrain from depriving people of constitutional protections, but also assume a positive obligation in this regard. Section 15(2) of the Canadian Charter involves the State assuming such a positive obligation via affirmative action programs designed to right historical injustices and promote equity. The plight of Indigenous Peoples in Canada, however, provides one of the most striking examples of the State’s failure to meet its positive obligations in regard to the s. 7 Charter right to security of the person as it relates to economic security of

2 Oakes case, ibid.
3 Gosselin case, supra note 2, para. 55.
4 Gosselin case, ibid., case summary.
6 The term Indigenous Peoples refers to members of the non-dominant society who have an “historical continuity with pre-invasion or pre-colonial societies that developed in their territories, [and] consider themselves distinct from other sectors of society now prevailing in those territories, or parts of them.” See United Nations Development Program, About Indigenous Peoples: Definition 2000). <www.undp.org>, visited on 1 November 2004.