CCPI

Charter Committee on Poverty Issues

PART I - NATURE OF THE MATTER

(a) Background

1. By Order of Madame Justice L'Heureux-Dubé dated November 25, 1992, the Charter Committee on Poverty Issues (CCPI) was granted intervenor status in this appeal and permitted ten minutes of oral argument before this Court.

2. CCPI is a national coalition of low income activists and equality advocates, including all major anti-poverty coalitions in Canada. The mandate of CCPI is to ensure that the rights of low income Canadians are recognized in the courts' interpretation and application of the Charter.

3. The case at bar requires the Court to consider, for the first time, the broad parameters for the application of section 15 in the social and economic sphere. CCPI has intervened in this case in order to assist the Court's understanding of the equality issues raised as they pertain to low income people.

(b) Statement of Facts

4. CCPI accepts, for the purposes of this appeal, the facts set out in the Appellant's Factum.

PART II - ISSUES AND LAW

The Decision of the Federal Court of Appeal

5. In allowing the present Respondent's appeal, the Federal Court of Appeal decided three fundamental issues regarding the application of section 15 in the social and economic sphere. If the decision of the Court below were upheld by this Court on these points, poor people would be deprived of the equal benefit and protection of the Charter.

(a) Statutory Interpretation Consistent with the Charter "Overshoots" the Charter

6. The Federal Court of Appeal held that to interpret all social and economic legislation in a manner consistent with the Charter value of ameliorating disadvantage would be to "trivialize" and "overshoot" the Charter. CCPI respectfully submits that statutory interpretation of social and economic legislation, as of all other legislation, must ensure consistency with the Charter and, wherever possible, ameliorate rather than perpetuate disadvantage. The position of CCPI is that the appeal ought to be upheld on the basis of an interpretation of sections 9(1), 18(1)(a) and 18(1)(h) of the Income Tax Act consistent with promoting equality for women with child care responsibilities.

Reasons for Judgement of Décary, J.A., Case on Appeal, pp. 144-146.

(b) Courts Should Defer to Parliament in the Social and Economic Sphere

7. The Federal Court of Appeal held that courts ought not to apply section 15 to "fish" in "troubled socio-economic waters", but rather should defer to Parliament in the social and economic domain. CCPI respectfully submits that the Charter ought to be applied with the same rigour in the socio-economic sphere as in others. Judicial deference to Parliament may be a relevant consideration at the remedial level, but should not dissuade the Court from reviewing legislation for conformity with substantive Charter rights. The appeal ought to be allowed on the basis of an interpretation of the statutory regime governing business expense deductions which alleviates the relative disadvantage of women arising from unequal child care responsibilities.

Reasons for Judgement of Décary, J.A., Case on Appeal, pp. 147-148.

(c) The Charter Imposes no Obligation to Redress Social and Economic Inequalities

8. The Federal Court of Appeal held that Section 15(1) of the Charter imposes no positive obligations on governments to ameliorate social and economic disadvantage. CCPI respectfully submits that on the contrary, equality rights under the Charter establish significant positive obligations on governments to take measures to promote equality for disadvantaged groups. The courts may therefore be required to review, in the context of section 15 claims by disadvantaged Canadians, the adequacy of measures undertaken by Parliament through taxation benefits, social programs or other initiatives to remove obstacles to equality for disadvantaged groups. The present Appellant's case, however, is not based on a claim of this nature. The Appellant does not challenge the adequacy or inclusiveness of the child care deduction but rather the equity of application of deductions for business expenses between women and men. In CCPI's respectful submission, the Court below erred in deciding, in the context of the present case, the extent of positive obligations

of Parliament.

Reasons for Judgement of Décary, J.A., Case on Appeal, p. 148.

PART III. ARGUMENT

A. STATUTORY INTERPRETATION CONSISTENT WITH THE CHARTER

9. The Federal Court of Appeal rejected the "consistency" principle requiring statutory interpretation that is informed by and consistent with the Charter value of promoting equality for disadvantaged groups. The Court reasoned that because equality issues are engaged by most legislation in the social and economic domain, such a broad interpretive reach would "overshoot" and "trivialize" the Charter.

> Reasons for Judgement of Décary, J.A., Case on Appeal, pp. 147-148.

10. This Court has affirmed on several occasions that the Charter provides an over-riding framework of values for all statutory interpretation. It has further stated that where there is any ambiguity as to the meaning or application of legislation, the interpretation which promotes Charter values is to be preferred. Where legislation allows for the exercise of discretion in its application, discretion is to be exercised in a manner that is consistent with the values enshrined in the Charter.

> Schachter v. Canada, [1992] 2 S.C.R. 679 at p. 702.
>
> Hills v. Canada, [1988] 1 SCR 513 at p. 558.
>
> Slaight Communications Inc. v. Davidson, [1989] 1 SCR 1038 at p. 1078.
>
> R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606 at p. 660.

11. Lower courts, however, have been reluctant to apply these important interpretive principles in the social and economic domain, perhaps because of a fear that to do so would improperly expand the role of the judiciary.

> Jackman, Martha, "Poor Rights: The Use of the Charter to Pursue Social Welfare Claims" 18:2 Queen's Law Journal, (1993), (forthcoming).

12. Statutory interpretation, however, is clearly the role of the judiciary in all areas of the law, including in the social and economic sphere. The question before this Court pertains not to the proper role of the courts but rather to the proper approach to statutory interpretation and to the over-riding and constitutionally entrenched value of equality. The fact that issues of disadvantage are so frequently encountered in the social and economic sphere suggests that Charter-informed interpretation of legislation in that domain, far from overshooting the Charter, respects its purposes.

13. If the decision of the Court below prevails, the result will be that social and economic legislation, the primary area of relations between poor people and Canadian governments, will be interpreted without promoting Charter values. This will deprive poor people of the full benefit and equal protection of the Charter.

14. In CCPI's respectful submission, the Court below misunderstood or misapplied this Court's cautions against over-extending the reach of section 15 of the Charter. This Court cautioned that section 15 should not be used by advantaged groups to "deny the community at large the benefit associated with sound and desirable social and economic legislation." This does not mean that section 15 should not be used as a guide to interpreting legislation so as to promote equality for disadvantaged groups in the social and economic sphere.

> Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at p. 154 and pp. 168-69, 194.

15. The Appellant in the present case does not challenge a classification or distinction which has been invoked by Parliament to promote equality. She does not, for example, challenge section 63 of the Income Tax Act on the basis that it discriminates or differentiates on the basis of the family status of taxpayers. Rather, the Appellant simply urges the Court to consider the broad purposes of section 15 in applying provisions governing business expense deductions and to favour an interpretation which promotes Charter equality values. In CCPI's respectful submission, there is nothing "trivializing" about such an approach to interpreting social and economic legislation.

> Appellant's Factum, par. 61.

16. In legislation affecting poor people and other disadvantaged groups, there is often ambiguity and room for discretion to be exercised by those in positions of authority. The principle of statutory interpretation, as established by this Court, that discretion must be exercised in conformity with the Charter is one of the most important aspects of the Charter's protection for poor people. Poor people face significant barriers to access to the courts to challenge the constitutionality of legislation. Yet if courts and administrative bodies were to interpret legislation in light of the values embodied in section 15, the Charter could have a real and positive impact on the ability of the most disadvantaged Canadians to participate as full and equal members of Canadian society.

> Slaight Communications, supra.

B. JUDICIAL DEFERENCE

(i) Approach to Section 15

17. This Court has identified equality as one of the fundamental values of our society, against which the objects of all legislation must be measured. This Court has also stated that "the section 15(1) guarantee is the broadest of all guarantees. It applies to and supports all other rights guaranteed by the Charter."

> Andrews, supra, at 185.

18. It would be a complete contradiction of the supremacy of the Charter over all laws and the special status of the equality guarantees if judicial deference to Parliament were to result in section 15 being applied with less rigour to the vast array of legislation and action falling in the social and economic domain.

19. It is respectfully submitted that on the question of judicial deference, a fundamental distinction must be drawn between issues of infringements of substantive rights in the social and economic domain, and choices of remedies for non-compliance. The fact that legislative action by Parliament may be required should not dissuade the Court from finding non-compliance with the Charter and ensuring or encouraging legislative action by way of the remedy ordered.

Schachter, supra, at p. 709.

20. Moreover, this Court has held that Charter rights should be given a generous and purposive interpretation. In order to achieve substantive equality the court should give primary consideration to what best achieves the purposes of section 15(1) of the Charter. In this connection, this Court has identified groups which have historically experienced disadvantage as the object of the protections embodied in section 15.

> R. v. Gamble, [1988] 2 S.C.R. 595 at p. 641.
>
> Andrews, supra, at pp. 170-172.
>
> Brooks v. Canada Safeway Limited, [1989] 1 S.C.R. 1219 at p. 1238.
>
> McKinney v. University of Guelph, [1990] 3 S.C.R. 229 at p. 278, per La Forest J., and at pp. 389 to 393, per Wilson, J., dissenting on other grounds.

21. To defer to Parliament in the social and economic sphere would be to abandon constitutional equality principles in those areas where they are relied on most heavily by disadvantaged groups, and thereby to abandon the Andrews approach that has guided this Court.

(ii) Democratic Legitimacy of Applying Section 15 in the Social and Economic Domain

22. One reason sometimes offered for the reluctance of the lower courts to apply the Charter with equal rigour in the social and economic sphere is a concern that as an unelected body, the judiciary does not have the democratic legitimacy to "meddle" in social and economic policy. CCPI respectfully submits that on the contrary, the efficient and proper functioning of Canada's democracy relies on a rigorous application of the Charter in the social and economic domain.

23. While legislatures may be "representative" institutions in the sense that they are popularly elected, they may not be representative in other important ways. While the Charter guarantees the right to vote and to hold office, these rights came relatively late to poor people. Poor people were barred from voting in many elections by property qualifications long after the principle of "universal suffrage" had been accepted. They continue to be barred from voting and holding office in Canada's parliamentary system, both constructively and directly. Those who are homeless or who are unable to read and write are often unable to vote. Financial and credit requirements to run in an election preclude a poor person being a candidate. The Constitution Act itself bars poor people from the office of senator by means of property qualifications. Poor people's relationship to democratic institutions is still, essentially, that of petitioners from the outside rather than full participants within.

> Canada Elections Act, R.S.C. 1985, c. E-2, s.81(1)(k).
>
> Constitution Act 1987 (U.K.) is reproduced in R.S.C. 1985, Appendix II, No. 5, s. 23.
>
> Martha Jackman, "Poverty as a Protected Ground Under the Charter and Canadian Human Rights Law", Faculty Seminar, Faculty of Law, University of Victoria, February 1, 1993 (Unpublished), at pp. 18-23.
>
> Anita Hodgkiss, "Petitioning and the Empowerment Theory of Practice," 96 Yale Law Journal(1987) 569 at p. 584.

24. The position of poor people in relation to legislatures parallels that of other minorities protected by the Charter from the biases of majoritarian governance. Attitudes toward poor people, as toward other minorities, have included assertions that they are "lazy", "genetically inferior," "have too many children," and "make undesirable neighbours." Political representatives frequently describe themselves as representing "taxpayers" or "ratepayers", policing poor people on behalf of taxpayers or restricting the amount of low income housing in a community on behalf of more affluent residents. The poor, therefore, require the most thorough legislative protections, yet, as Rosenblatt states, "the poor face unusual and large difficulties in organizing and financing political action."

> Jackman, "Poverty as a Protected Ground", supra at pp. 22-23.

Jim Taggart, "Overcoming the Myths about Public Housing," Canadian Housing Vol.9, No.4 (Winter, 1993) at p. 4.

People on Welfare for Equal Rights (POWER) v. Constable Michael Spurr, October 15, 1991 (Nova Scotia Police Review Board) at p. 3.

Rand E. Rosenblatt, "Social Duties and the Problem of Rights in the American Welfare State," in The Politics of Law 90, (David Kairys ed. 2d. ed. 1990) at p. 102.

25. As Mr. Justice Parrett, referring to this Court's decision in Andrews, noted with respect to people relying on social assistance:

> It may be reasonably inferred that because recipients of public assistance lack substantial political influence, they comprise "those groups in society to whose needs and wishes elected officials have no apparent interest in attending."

Federated Anti-Poverty Groups of British Columbia et al. v. Attorney General of British Columbia. (June 15, 1990), Vancouver Registry, No. A893060 (B.C.S.C.) at pp. 29-30.

26. Poverty is the extreme form of inequality in the social and economic domain which, as John Kenneth Galbraith wrote in 1958, ostracizes those affected by it from their communities:

> People are poverty-stricken when their income, even if adequate for survival, falls markedly behind that of the community. Then they cannot have what the larger community regards as the minimum necessary for decency; and they cannot wholly escape therefore, the judgement of the larger community that they are indecent. They are degraded, for, in a literal sense, they live outside the grades or categories which the community regards as acceptable.

J.K. Galbraith, The Affluent Society (Boston: Houghton Mifflin, 1958) at pp. 323-4.

27. Galbraith currently writes of his growing alarm at the social and economic inequities which result from a democratic politics increasingly dominated by the interests of a relatively affluent majority, what he refers to as the "Contented Electoral Majority."

> They rule under the rich cloak of democracy, a democracy in which the less fortunate do not participate.

J. K. Galbraith, The Culture of Contentment (Boston: Houghton Mifflin, 1992) at p. 15.

28. The mechanism for the oppression of minorities by majorities has shifted, in recent years, from

the civil and political realm to the social and economic domain. The rights of a minority living in severe poverty are increasingly vulnerable to the economic interests of the electoral majority:

> What is new in the so-called capitalist countries - and this is the vital point - is that the controlling contentment and resulting belief is now that of the many, not just the few. It operates under the compelling cover of democracy, albeit a democracy not of all citizens but of those who, in defense of their social and economic advantage, actually go to the polls. ...
>
> ... legislative action or, more seriously, inaction, however adverse and alienating the effect on the socially excluded - homelessness, hunger, inadequate education, drug affliction, poverty in general - is under the broad sanction of democracy.
>
> The Culture of Contentment supra, at pp. 10, 151.

29. Galbraith and others warn of dire consequences for democracy if a permanent under-class of impoverished citizens is excluded from social, economic and political life while the majority grows increasingly complacent about the plight of this minority. As the United Nations Special Rapporteur on the Realization of Economic, Social and Cultural Rights has recognized:

> The problem with poverty seems to be that people other than the poor get used to it and that the very notion of poverty conveys a certain idea of passivity.
>
> Danilo Türk, U.N. Commission on Human Rights, Preliminary Report on the Realization of Economic, Social and Cultural Rights, U.N. Doc.E/CN.4/Sub.2/1989/19 (1989) at p. 14.

The Culture of Contentment, supra at pp. 154-183.

> Sheldon Wolin, "Democracy without the Citizen" in The Presence of the Past: Essays on the State and the Constitution, (Johns Hopkins University Press, 1989) pp. 180-191.

30. The Charter reflects who Canadians are as a society and who we would like to be. This includes our commitments to social welfare, equitable employment opportunities and international commitments to social and economic rights. Section 15(1) of the Charter clearly mandates a role for the judiciary in safeguarding the interests of disadvantaged minorities in this area.

> R. v. Turpin, [1989] 1 S.C.R. 1296 at p. 1332.
>
> Jackman, "Poor Rights", supra, at p. 2.

31. As John Hart Ely wrote regarding the term "discrete and insular minorities" adopted by this Court from the decision of the U.S. Supreme Court in the Caroline Products case :

> The whole point of the approach is to identify those groups in society to whose needs and wishes elected officials have no apparent interest in attending. If the approach makes sense, it would not make sense to assign its enforcement to anyone but the courts.

John Hart Ely, Democracy and Distrust (Cambridge: Harvard University Press, 1980), at p. 151.

32. Disadvantaged groups rely on the Charter to provide them with a "voice" in the democratic process which they are otherwise denied. Judicial processes under the Charter may often be more respectful of disadvantaged groups than political processes, ensuring that they receive a full hearing. This Court's approach to section 15 creates a form of affirmative action within the democratic process, giving a special voice only to those groups which are most vulnerable to exclusion. Poor people rely on the rigorous application of section 15 in the social and economic domain to ensure that they receive a "hearing" regarding the obstacles to their equal participation in social and economic life.

> Craig Scott and Patrick Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution," University of Pennsylvania Law Review, Vol. 141, No.1 (1992) at pp. 36-39.

33. The social and economic sphere of governments' activities are dominated by administrative bureaucracies with no democratic structures. Elected politicians have little direct knowledge or participation in the creation or administration of social welfare entitlements on which poor people rely. The practical effect of judicial deference to Parliament in the social and economic sphere is actually judicial deference to an unelected and powerful bureaucracy, where poor people have few effective avenues to protect their rights.

Jerry Frug, "Administrative Democracy, 40 U. Toronto L.J., (1990) 559 at pp. 563-73.

Joel F. Handler, "Constructing the Political Spectacle: The Interpretation of Entitlements, Legalization and Obligations in Social Welfare History," 56 Brooklyn Law Review (1990) 899 at p. 943.

34. The values enshrined in the Charter have a far-reaching effect on the workings of Canadian parliamentary democracy and administrative structures. This Court's interpretation and application of these values is also very influential, with the potential to inform and enhance the democratic processes in Canada. This court's application of sections 7 and 15 to women's issues, for example, has encouraged legislatures to give a higher consideration to sex equality issues, to consult more thoroughly with women's groups and to take steps to become more inclusive of women. Those benefits of the Charter would be denied to the women who are most disadvantaged and to others living in poverty if this Court simply deferred to the authority of Parliament in matters of social and

economic policy. If the impoverishment of single mothers, people with disabilities, native people and others were to be excluded from the purview of equality rights because of misplaced judicial deference, the result would be the further disenfranchisement of Canada's most disadvantaged citizens.

> It is the magic wand of visibility and invisibility, of inclusion and exclusion, of power and no power. The concept of rights, both positive and negative, is the marker of our citizenship, our participatoriness, our relation to others.
>
> Patricia J. Williams, "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights," 22 Harvard C.R. - C.L.L. Rev. (1987) 401 at p. 406.

(iii) Judicial Competence in the Social and Economic Domain

35. This Court has held that the legislature's particular expertise or knowledge of complex social programs does not justify an infringement of a Charter right.

> Nevertheless, it is doubtful that the objective of fitting the Act within the government's particular legislative scheme of social programs could, in itself, be sufficiently important to justify the infringement of a Charter right.
>
> Tetréault-Gadoury v. Canada, [1991] 2 S.C.R. 22 at p. 26.

36. It is not the experience of poor people that politicians have any greater competence in social and economic matters than in other areas of law. Elected politicians are more likely to have personal experience and expertise in criminal or civil law than in social or economic policy areas. In CCPI's respectful submission, the issue of relative "competence" of courts and legislatures ought to be of no more concern to this Court in the social and economic domain than in other areas of law.

> "Professions of Members of the House of Commons," Compilations (34-2) No. 3.13(c), Compiled by M. Leger; updated by D. Seguin, Reference Section: Library of Parliament, Information and Technical Services Branch.
>
> Martha Jackman, "The Protection of Welfare Rights Under the Charter," (1988) 20 Ottawa Law Review 257 at pp. 273-283.

37. Legislators may be well situated to balance various viewpoints but the courts, may, as Frank

Michelman suggests, "enjoy a situational advantage over the people at large in listening for voices from the margins." Ensuring that the claims of marginalized groups are heard via section 15 of the Charter enhances the competence of the legislatures by ensuring that the perspective of disadvantaged groups is given appropriate weight when legislatures are, "striking a balance between the claims of competing groups...", as this Court expressed it in Irwin Toys.

> Such petitions have the effect of drawing attention to personal circumstances that reveal failures and problems unknown to or avoided by those responsible for drafting legislation. Such failures and problems may not have been predicted by, or may remain hidden from the view of, legislators or bureaucrats who live a more privileged life than those claiming the benefit of constitutionally entrenched social rights, and who are not institutionally required to listen to individual stories to produce a bridge between life experiences.

Macklem and Scott, "Constitutional Ropes of Sand," supra, at p. 37.

Irwin Toy Ltd. v. Québec (A.G.), [1989] 1 S.C.R. 927 at pp. 993-994.

Frank Michelman, "Law's Republic," 97 Yale L.J. (1988) 1493 at p. 1537.

38. Judges are free from electoral reproach and in this sense are in a better position than the legislator to adjudicate and expand constitutional principles of equality for disadvantaged groups. Just as the courts are in a position to ensure that political representatives do not woo the electorate at the expense of the constitutional rights of the accused, so the courts are able to safeguard the constitutional rights of disadvantaged minorities dependent on certain social or economic programs or benefits.

39. It is respectfully submitted that the courts' enforcement of constitutional rights in the social and economic domain does not require any assertion that either the legislature or the courts are more competent in this area, but rather is based on the recognition that here, as elsewhere, each has its appropriate role to play. A constructive "dialogue of democratic accountability" between the judiciary and the government improves the effectiveness of government in this, as in other, areas. As Macklem and Scott have written, commenting on this Court's decision in Schachter:

> ... Schachter suggests that institutional competence is first and foremost subservient to and conditioned by a commitment to the fundamental values that underlie constitutional rights. Courts create their own competence. The courage to be creative depends on a conviction that the values at stake are legitimate concerns for the judiciary. When the desirability of recognizing such values nonetheless conflicts with perceived institutional inadequacies, the judiciary need not absolve itself of the issue. Instead, it is free to provide an interpretation and a remedy as best as it can do in the circumstances, and hope to provoke a cooperative and constructive dialogue with other organs of government and the citizenry at large.

Macklem and Scott, "Ropes of Sand", supra., pp. 35-36.

Jennifer Nedelsky, "Reconceiving Rights as Relationship," Alberta Law Journal, (forthcoming).

Nitya Duclos and Kent Roach, "Constitutional Remedies as Constitutional Hints: A Commentary on R. v. Schachter" (1991) 36 McGill Law Journal, pp. 24-25.

(iv) Parliament's Fiscal Authority

40. Parliament's authority over spending, like all exercises of governmental power, is subject to the Charter. There is no basis in the Constitution for finding that the Charter has a limited extent which does not reach to all exercises of government authority. The Charter is the supreme law and takes precedence over all legislation.

41. This Court has held that deference to the legislature's authority in fiscal matters should not dissuade the courts from applying equality rights in the area of social programs. Government's budgetary considerations cannot be used to justify infringements of rights.

> ...the question is not whether courts can make decisions that impact on budgetary policy, it is to what degree they can appropriately do so.

Schachter, supra, at p. 709.

42. This Court has established that in ordering compliance with equality rights the courts may require governments to spend money they would not otherwise have spent.

> Any remedy granted by a court will have some budgetary repercussions, whether it be a saving of money or an expenditure of money.

Schachter, supra, at p. 709.

43. Courts have made rulings in the area of civil and political rights which may have a significant

effect on public spending and the allocation of funds. It is respectfully submitted that just as financial consequences are not an obstacle to the court's ability to fashion effective remedies for the right to trial within a reasonable time, the right to a hearing, or language rights, they should not prevent courts from granting effective remedies where equality rights are at stake in the social and economic domain.

> Singh v. Canada (Min. of Employment & Immigration), [1985] 1 S.C.R. 177 at p. 239.
>
> Askov et al. v. The Queen, [1990] 2 S.C.R. 1199 at pp. 1225 and 1258.
>
> Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721 at pp. 780 and 781.

44. Discriminatory attitudes toward the poor are often based on a more acute awareness of the budgetary implications of social welfare programs than of government programs which benefit the more affluent. Comparative information about long term costs of legislative inaction or inadequate social benefits are rarely given appropriate consideration. The exclusion of poor people from equal political participation is often linked to the view that they are simply beneficiaries of the tax system rather than "honest taxpayers". Courts would implicitly affirm these prejudices if judicial deference were disproportionately applied to poverty issues such as social assistance or child care benefits on account of budgetary implications.

> Taggart, "Overcoming the Myths About Public Housing," supra.
>
> Galbraith, The Culture of Contentment, supra, at pp. 44-50.

C. POSITIVE OBLIGATIONS TO AMELIORATE DISADVANTAGE

(i) Interpretation of Section 15

45. The court below held that section 15 does not require governments to enact positive measures to alleviate social and economic disadvantage. It held that because section 15(2) "permits" such meausures, section 15(1) cannot "require" them. In CCPI's respectful submission, this represents a manifest error of both logic and of interpretation and application of Section 15.

46. In The Canadian Bill of Rights, Tarnopolsky discusses the nature of constitutional rights:

> "In discussing basic or fundamental rights and freedoms one is concerned with the relationship between the individual or a group and the state. In its simplest form this relationship may be thought of in two ways. It may be that an individual or a group demands non-interference from the state, at least in certain activities: this is a claim for freedom or liberty. It may be, however, that the demand is for state intervention to protect one's way of life against encroachment by others, or to provide it either as a minimum living standard or on the basis of equality with others:

this is a claim for the positive assistance of the state in the securing of certain rights."

W.S. Tarnopolsky, The Canadian Bill of Rights, (McClelland & Stewart: Toronto, 2nd rev. ed. 1975) at p. 1.

47. During the constitutional process prior to the enactment of the Charter, equality seeking groups urged that the wording of section 15 include a reference to "benefits" provided by law. This wording clearly reflected the fact that for the most disadvantaged groups, legislation does not function simply as a potential interference with individual liberty or security but also provides "benefits", through social programs and other government action necessary to the enjoyment of security and equality. The Charter was introduced within the context of a broad political consensus that governments have obligations to provide for the social welfare of disadvantaged citizens. Section 15 was intended to bring the positive components of law within the ambit of equality guarantees.

Anne Bayefsky, "Defining Equality Rights," in Anne Bayefsky and Mary Eberts (eds.) Equality Rights and the Canadian Charter of Rights and Freedoms (Toronto: Carswell, 1985), pp. 21-23.

Jackman, "The Protection of Welfare Rights Under the Charter," supra, at pp. 259-283.

Duclos and Roach, "Constitutional Hints," supra, f.n. 50.

48. Poor people rely on the positive, benefit-conferring aspect of legislation for their survival and would not characterize all legislative intervention in the social and economic domain as an "invasion" of rights, as did the court below. Peter Hogg has pointed out that:

without a decent income, housing, health care and education, an individual cannot be free in the sense of being able to fulfill his or her potentiality, and he or she certainly cannot be equal with those who do enjoy those things.

Peter Hogg, "The Charter of Rights and Social and Economic Reform," in Canadian Institute for Advanced Legal Studies. The Cambridge Lectures: 1983 (Toronto:Butterworths, 1983) 45 at p. 47.

49. A positive conception of equality rights is consistent with this Court's statement that:

the courts must be cautious to ensure that [the Charter] does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons."

Edwards Books and Art Ltd. et al. v. The Queen, [1986] 2.S.C.R. 713 at p. 779.

50. It has been documented that prior to the Andrews decision, section 15 of the Charter was used primarily as an instrument for "better situated individuals". The most important means of making the Charter effective for the most disadvantaged members of enumerated groups is for the courts to adopt a substantive or positive model of equality rights. CCPI respectfully submits that the court below distorted its application of the Charter by conceiving of rights only as more advantaged groups conceive of them, in the "negative" fashion, and ruling out any positive conception of rights which is more relevant to the most disadvantaged groups.

> A judicial policy of formal equality for all will not meet the needs of disadvantaged groups. Instead, it will perpetuate and further entrench their inequality. Substantive equality problems require a substantive model of equality.

> Gwen Brodsky and Sehlagh Day, Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back (Ottawa: Canadian Advisory Council on the Status of Women, 1989) at pp. 56, 117-119, 198.

51. This Court has consistently recognized the positive component of equality rights. In its recent decision in Schachter, it stated that an equality right is:

> a hybrid of sorts, since it is neither purely positive nor purely negative. In some contexts it will be proper to characterize s.15 as providing positive rights.

The court noted that extension of benefits under the law:

> may sometimes be required in order to respect the purposes of the Charter. ... While s. 15 may not absolutely require that benefits be available to single mothers, surely it at least encourages such action to relieve the disadvantaged position of persons in those circumstances."

> Schachter, supra, at p. 702.

52. To date this Court has considered the "positive" components of equality protections in the context of challenges to benefits or programs alleged to be "under-inclusive". The Court has not yet considered challenges to governments for failing to take adequate measures to ameliorate disadvantage through social programs or benefits, reflective of the concerns of the most severely disadvantaged groups in society. In developing its approach to equality rights in the social and

economic domain, it is respectfully submitted that the court should ensure that its approach recognizes the importance of the claims of the most disadvantaged for positive action by the government.

53. A positive rather than negative paradigm of rights is consistent with Canada's international human rights commitments. Unlike the United States, Canada has ratified the International Covenant on Economic, Social and Cultural Rights which recognizes many positive obligations on governments deriving from such rights as, in Article 11, "the right of everyone to an adequate standard of living for himself [or herself] and his [her] family including adequate food, clothing and housing."

> International Covenant on Economic, Social and Cultural Rights, United Nations General Assembly Resolution 220 (XXI), 21 U.N. GAOR, Supp. (No.16) 49, U.N. Doc A/6316 (1966), Articles 10 and 11.

54. Dickson, C.J.C., for the majority of the Court in Slaight Communications looked to Canada's obligations under the International Covenant on Economic, Social and Cultural Rights to interpret the meaning of the Charter, citing his earlier words in Reference Re Public Service Relations Act (Alta)):

> "The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of the 'full benefit of the Charter's protection.' I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada ratified."

> Slaight Communications, supra, p. 1056.

(ii) Section 15 and Human Rights Jurisprudence

55. This Court's approach to section 15 of the Charter has been guided by jurisprudence in the area of human rights. In its first application of section 15 of the Charter to issues of disadvantage, this Court affirmed "the expanded concept of discrimination being developed under the various Human Rights Codes."

> Andrews, supra, at p. 170.

56. It is well established that human rights legislation imposes a positive duty to take measures to remove barriers to equality rather than a merely negative duty to refrain from unequal treatment. Legislatures have intentionally broadened the purview of human rights protections to focus on systemic barriers to equality. The Ontario Human Rights Code, for example, requires positive measures to correct the effect of "any requirement, qualification or factor ... that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a

group of persons who are identified by a prohibited ground of discrimination." The focus on remedial action required to overcome any exclusion of enumerated groups is fundamental to this Court's approach to equality in the context of human rights legislation.

-

Ontario Human Rights Code, R.S.O. 1990, C.H-19, s.11.

Ontario Human Rights Commission and O'Malley v. Simpson-Sears Ltd., [1985] 2 S.C.R. 536.

Central Alberta Dairy Pool v. Alberta Human Rights Commission, [1990] 2 S.C.R. 489.

57. In Canadian National Railways and again in Robichaud this Court established that positive measures to alleviate disadvantage may be required under human rights legislation.

> ... there simply cannot be a radical disassociation of remedy and prevention. Indeed there is no prevention without some sort of remedy.
>
> Canadian National Railway v. Canada (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114 at p. 1142.
>
> ... the Act is directed to redressing socially undesirable conditions quite apart from the reason for their existence ...

- and -

> ... the central purpose of a human rights Act is remedial -- to eradicate anti-social conditions without regard to the motives or intention of those who cause them...
>
> Robichaud v. The Queen, [l987] 2 S.C.R. 84, at pp. 90 and 91.

58. The requirement of positive measures to promote equality under human rights legislation has been found by this Court to be subject to a standard of reasonableness or adequacy. In deriving an appropriate standard, this Court rejected the American threshold "de minimus" test. Canadian jurisprudence "has approached the issue of accommodation in a more purposive manner", establishing that "more than mere negligible effort is required to satisfy the duty to accommodate".

> Central Okanagan School District No. 23 v. Renaud, [1992] 2 S.C.R. 970 at p. 983.

59. In applying human rights legislation the Court has accepted that its role is to evaluate whether positive obligations have been met in different factual circumstances. "What constitutes reasonable measures is a question of fact and will vary with the circumstances of the case". In many instances, this analysis involves assessment of complex budgetary, fiscal and administrative concerns of private respondents. The positive obligations of governments under human rights legislation and the Charter to remove obstacles to the full participation of disadvantaged groups in social and economic life, through such measures as tax credits and social programs, must certainly be of greater magnitude than those placed on private respondents by human rights legislation.

Central Alberta Dairy Pool, supra at p. 521.

60. Human Rights Codes both permit and require measures to ameliorate the disadvantage of particular groups. The Ontario Code, for example, **permits** special programs designed to alleviate "economic disadvantage" and also **requires** positive measures to accommodate the needs of disadvantaged groups. This Court has never interpreted the "shield" for special programs in human rights legislation in such a way as to negate the "requirement" that positive measures be undertaken to ameliorate social and economic disadvantage. Rather, any exemption for affirmative action programs has been seen as encouraging equality promoting initiatives and protecting them from challenge from more advantaged members of society. Affirmative action programs which are permitted or encouraged in one context may be required in another context. In CCPI's respectful submission, the same is true of sections 15(1) and (2) of the Charter.

Ontario Human Rights Code, R.S.O. 1990, c.H19, ss.11, 14.

Canadian National Railway Co. v. Canada, supra.

Robichaud v. The Queen, supra.

Ontario Human Rights Commission and O'Malley v. Simpson-Sears Ltd., supra.

Central Alberta Dairy Pool, supra.

61. In formulating its approach to equality, this Court has ruled that the overriding concern of section 15 relates to the remedial or positive components of the equality provisions, whose purpose is to increase the substantive equality of disempowered, disenfranchised and marginalized groups. While section 15(1) does not guarantee social equality, it is a means to attaining a more equal society. This dynamic or progressive approach to equality is entirely consistent with human rights jurisprudence which understands equality provisions to permit, encourage and, in many instances, require positive measures to alleviate disadvantage.

Andrews, supra, at p. 174.

Brooks v. Canada Safeway Limited, [1989] 1 S.C.R. 1219 at p. 1238.

R. v. Turpin, [1989] 1 S.C.R. 1296 at p. 1329.

(iii) Remedial Approaches to Positive Obligations

62. Where equality rights place obligations on governments to provide benefits or to create social programs, this Court has alluded to a remedial approach ranging from "encouraging" improvements to social programs to "requiring" them.

Schachter, supra at p. 15.

63. A number of commentators point out that a narrow approach to remedy encourages a narrow interpretation and application of constitutional rights, particularly in the social and economic sphere. A more constructive, participatory approach is proposed in the public policy arena, recognizing the role that courts can play in "prodding" or encouraging legislatures to act to ameliorate disadvantage.

> Duclos and Roach, "Constitutional Hints," supra, at p. 19.
>
> Sturm, Susan P., "A Normative Theory of Public Law Remedies," 79 Georgetown L. J. [1991] pp. 1355-1444.
>
> Nedelsky, "Reconceiving Rights as Relationship," supra.

64. Rather than retreat from a finding of a rights violation when the Charter imposes a positive obligation on government, this Court has shown a willingness to adopt innovative approaches to remedy, drawing on appropriate expertise where required. When the Court invalidated the Province of Manitoba's English only legislation as offending against the constitutional requirement of bilingualism in that Province, the Court found that it was unable to determine the period during which it would be possible for the Manitoba legislature to comply with its constitutional duty. The Court ordered that the Attorney General of Canada or Manitoba could request a special hearing at which the court would accept submissions from both the Attorneys General and from intervenors concerning the logistics of translation requirements. This Court subsequently issued a detailed order providing for a schedule for translating the laws in stages reaching to 1990 and providing for re-application by any of the parties to ensure the orders were carried out.

> Reference re Manitoba Language Rights, supra, at p. 780.

65. A similar remedial approach can be adopted by the courts where necessary in the area of social and economic policy. Through a variety of remedial strategies outlined in Schachter, the courts are able to safeguard and promote constitutional values without appropriating Parliament's legislative and fiscal authority.

> Schachter, supra.

Duclos and Roach, "Constitutional Hints," supra.

PART III. APPLICATION TO THE CASE AT BAR

66. A child care deduction has been enacted by Parliament through section 63 of the Income Tax Act. Whether or not this deduction represents an adequate measure to address the disadvantage of women with child care responsibilities need not be decided by the Court in the present case. The Appellant does not challenge section 63 on the basis of either its adequacy or its inclusiveness. The Appellant challenges the constitutionality of section 63 only to the extent that it affects the Court's interpretation and application of other provisions governing business expense deductions.

67. Thus, CCPI respectfully submits that the Court below erred in deciding issues of the adequacy and inclusiveness of the child care deduction in section 63 of the Act. The sole issue before this Court is the interpretation of the provisions regarding business expenses under the Act, and the conformity of such interpretation with section 15 of the Charter.

68. In CCPI's respectful submission, this Court ought to decide in favour of the Appellant on the basis of statutory interpretation in conformity with the Charter and with the furtherance of Charter values. In it unnecessary to decide in this case what positive measures are required by section 15 to alleviate the disadvantage of women and parents within the tax system.

69. CCPI respectfully submits that this Court ought to recognize in the present case, as it recognized in its recent decision in Moge v. Moge, that child care responsibilities are the greatest obstacle to equality for women in the social and economic domain. Over half a million women with children and one million children live in poverty in one of the wealthiest countries in the world. Over 60% of single mothers in Canada are living in poverty, an extraordinarily high percentage when compared to other industrialized countries. Although the present Appellant does not represent one of the more than one and a half million women living in poverty in Canada, her case raises an equality issue that is of utmost importance to the most disadvantaged women in Canadian society. Under the current tax system, low income women in particular often find themselves unable to adequately care for their children and pursue their own personal development in social and economic life.

Moge v. Moge Court No. 21979.

Poverty Profile: A Report by the National Council of Welfare (Autumn, 1992) at p. 68.

Women and Poverty Revisited: A Report by the National Council of Welfare, at p. 7.

Unequal Futures: The Legacies of Child Poverty in Canada (1991) (The Child Poverty Action Group and the Social Planning Council of Metropolitan Toronto) at pp. 17-20.

Child Poverty in Canada: Report Card 1992 Campaign 2000.

70. In CCPI's respectful submission, these systemic inequities in the social and economic domain must be of paramount concern to this Court in interpreting all legislation in what the court below referred to as "troubled socio-economic waters."

PART IV - RELIEF REQUESTED

71. It is respectfully requested that the appeal be allowed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Raj Anand

Counsel for the Intervenor

Charter Committee on Poverty Issues