

The Charter: A Missing Element

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The Canadian Charter of Rights and Freedoms is a central component of the constitution and can potentially have a major impact on the relationship between the citizens and the government. The introduction of the Charter was hailed as the protector of human rights as it became a vital instrument for minorities and vulnerable groups to demand equal treatment under the law. However, this seems to only hold true for advocacy groups with considerable financial support. Furthermore, the Charter is regrettably silent on the notion of positive social and economic rights. The ensuing discussion will focus on the how people living in poverty are often neglected among the marginalized groups, and that they require constitutional protection.

The main purpose of Charter litigation is that the common, individual person is equipped with a tool to combat systematic bias and prejudice. Pre-Charter, the government could be considered as an omnipotent entity, far from the reach of the average person. Theoretically, the Charter was designed as a platform for marginalized individuals of race, gender, sexuality, religion, etc., to voice their discrimination or injustices that previously may have been ignored. Charter challenges became a spark for public discourse on difficult and contentious issues, ranging from abortion to indigenous and transgender rights. Furthermore, this power helps balance legislative power as people are presented with another mechanism to compel Parliament to address any laws that may have become antiquated.

A key feature of the Charter conversation is whether it has reduced inequality. Undoubtedly, several significant civil inequalities between various groups have been acknowledged, spurred by the introduction of the Charter. The dramatic surge in rights for homosexuals, First Nations, women, and other previously excluded groups is an admirable

accomplishment and a testament to the Charter. However, there seems to be an omission based on income and class. The problems associated with living in poverty are not addressed in the Charter. Unfortunately, sufficient food, healthcare, education, and adequate shelter are not constitutionally protected as positive social and economic rights.¹ There are no provisions in the Charter that currently affirm these rights.²

S.7 of the Charter, the life, liberty and security of person clause, is often debated about whether there is room for interpretation to include positive social and economic rights.³ The courts have left open the possibility, however, as it stands presently, there are no “free standing” rights to social welfare in the Charter.⁴ It seems wildly inconsistent that a clause relating to aspects that are fundamental to life are not actually included in the definition of life. Effectively, people in poverty have no legal or effective mechanism for combating the government if they feel victimized by a discriminatory law or an abuse of power. This is especially concerning because people living in poverty tend to be lacking in political power, which subsequently makes them vulnerable to having their rights and interests passed over.⁵ As cynical as it sounds, there is a finite amount of resources and perhaps a marginalized group that has a more stable background, at least financially is more politically appealing for support. It seems that by establishing a Charter and not including positive social or economic rights, the government and the courts are creating a hierarchy of rights. For example, the right to freedom of religion might be seen as more important than the right to adequate shelter. It seems that while the Charter does

¹ Vasuda Sinha, “Charter Litigation, Social and Economic Rights & Civil Procedure” (2017) 26: JL & Pol’y 42 at 60.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid* at 61.

⁵ Martha Jackman, “Constitutional Castaways: Poverty and the McLachlin Court” (2010) 50 SCLR (2d) 297 at para 51. [Martha]

an admirable job advocating for rights of different groups, it might be at the cost of averting attention away from the people with the quietest voice.

The other section of the Charter that merits discussion on this matter is s.15, which is “equality before and under law and equal protection and benefit of law.”⁶ This provision lists certain factors that are prohibited as discrimination. It is important to note that poverty is not one of them. A crucial step in bridging the accessibility gap would be to “recognize the social condition of poverty as an analogous ground of prohibited discrimination, rather than simply as a marker of disadvantage.”⁷ It is an undeniable fact that conditions such as poverty, low education, and homelessness are barriers when attempting to access the legal system. This applies to asserting rights, but also, affects a person ability to live a life in dignity and enjoy basic human rights and freedoms.

Finally, a growing concern is that many Canadians are not even financially equipped to launch a Charter litigation challenge, effectively nullifying a primary purpose of the legislation. Without the ability to enforce the rights guaranteed by the Charter, it essentially becomes just a symbolic gesture, lacking the impact it was originally drafted with. This trend only exacerbates the challenge of trying to achieve justice for the poor. Having positive social and economic rights in the Charter will amount to nothing if only the affluent are able to successfully launch a Charter challenge.

The law is constantly evolving, Charter litigation is no exception, and therefore opportunities to expand the scope of the Charter should always be explored as different issues come to the forefront of public discussion. I believe it should finally be the time for the people

⁶ *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [Charter].

⁷ Martha, *supra* note 5 at 54.

living in poverty, for the homeless, and for anyone that has been cast aside to receive constitutional protection. “It must be remembered that poverty is not just an economic issue.

Fundamentally it is a denial of rights.”⁸

⁸ *Ibid* at Heading.