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Teresa Scassa*  
Social Welfare and Section 7 of the Charter: Conrad v. Halifax (County of)

The recent case of *Conrad v. Halifax (County of)*

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1. (1993), 124 N.S.R. (2d) 251, 345 A.P.R. 251 (N.S.S.C.) [hereinafter *Conrad* cited to *N.S.R.*]. The case was appealed to the Nova Scotia Court of Appeal on a number of procedural and evidentiary grounds. The Court of Appeal judgment (delivered April 5, 1994) focussed on these grounds, and did not address the Charter issues. In this comment I will discuss the Charter issues and the treatment of the complainant by the lower court. As a result, I will focus primarily on the decision of the Nova Scotia Supreme Court.

tions were met. Mrs. Conrad subsequently obtained a maintenance order and supplied another address for her husband; her social assistance was reinstated. On August 30, Mrs. Conrad was again cut off from her benefits because the County believed she was living with her husband. She retained counsel through legal aid. Her lawyer filed a notice of appeal to the appropriate appeal board and threatened a Supreme Court action on an emergency basis if interim assistance pending appeal was not provided. Before either the appeal or the action proceeded, the County reached an agreement with Mrs. Conrad to reinstate the benefits on October 5, 1989. On November 2, 1989, the County again concluded that Mr. and Mrs. Conrad were cohabiting and, for the third time, Mrs. Conrad was cut off from social assistance. Her lawyer initiated the same proceedings. Once again, he and the County were able to resolve the matter by agreement, and social assistance was reinstated on November 27, 1989. Mrs. Conrad ultimately became eligible for provincial social assistance.

Each time Mrs. Conrad was reinstated, the County paid the arrears for the period during which she had been cut off from social assistance. Thus, she and her children received the same amount of money from the County as they would have received had they never been cut off. Nevertheless, the plaintiffs brought an action under ss. 7 and 24(1) of the Charter for a declaration and for damages suffered as a result of, and during the two periods when, payments were discontinued for cohabitation. They claimed that the terminations without benefit of a hearing violated their rights under s. 7.

Gruchy J. rejected the plaintiffs' application on a number of grounds. First, he found that Mrs. Conrad was not a credible witness. He also found that her conduct was such that, in spite of the agency's decisions to reinstate, she had not been, in his view, eligible for social assistance and thus her security of the person had never been in issue. These findings of fact allowed Gruchy J. to avoid making definitive conclusions about the scope of s. 7 of the Charter. Nevertheless, he used strong language to indicate that any right to social welfare was economic in nature, and thus could not attract the application of s. 7 of the Charter. Gruchy J. further

3. Section 7 provides:

7. 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.

4. Section 24(1) reads:

24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
determined that the County acted in good faith throughout, such that the principles of fundamental justice were not violated. In the remainder of this comment, I will deal with the Charter issues first, before exploring the issues raised by the factual findings.

Section 7 of the Charter: Security of the Person

Any challenge under s. 7 has two elements.\(^5\) First, it must be established that the affected right of the plaintiff is one of life, liberty or security of the person. Secondly, it must be shown that the plaintiff has been denied that right in a manner not in accordance with the principles of fundamental justice. These principles include the ideas of natural justice and procedural fairness, but are not limited to them.\(^6\)

In dealing with the first branch of the s. 7 claim, the plaintiffs' lawyer made two arguments. The first was that the plaintiffs' s. 7 rights were violated when the County twice ruled Mrs. Conrad ineligible for social assistance due to cohabitation. This argument was based on the premise that s. 7 places an affirmative duty on government to provide the means necessary to sustain one's physical and emotional security. This right to "security of the person" could only be denied in accordance with the principles of fundamental justice. The manner in which Mrs. Conrad was removed from social assistance on two occasions was thus argued to be a violation of s. 7 because the removals were not in accordance with the principles of fundamental justice.

The second argument was that once Mrs. Conrad had been found eligible for social assistance, she and her children had a security of the person interest in receiving the regular assistance payments. Consequently, they could not be deprived of those payments except in accordance with the principles of fundamental justice. According to this argument, the deprivation of social assistance would give rise to a violation of the security of the person. However, the security of the person argument was not based on an affirmative right to welfare. Rather, it was framed in terms of the fact that, as a social assistance recipient, Mrs. Conrad had already been adjudged by the municipality to be a person in

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6. Ibid. at 402; see also Reference Re Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, [1985] 2 S.C.R. 486 at 512.
need such that her security of the person would be affected by an arbitrary or erroneous withdrawal of assistance.

The argument that there is an affirmative right to welfare protected by s. 7 is a very difficult one to make, and has not been accepted by the courts of any other province. Gruchy J. was reluctant to find that such an affirmative right existed. Unfortunately, he effectively decided the issue on this point without giving appropriate consideration to the second, more nuanced argument. He also went further than was necessary on the first point, finding that the plaintiffs' rights to welfare were primarily economic in nature, thereby categorically shutting the door explicitly left open by the Supreme Court of Canada in Irwin Toy v. Quebec.

In Irwin Toy, the Court found that while the legislative history of s. 7 indicated that property rights, and by extension economic rights, were deliberately excluded from protection, this did not mean that no "right with an economic component" could fall under the protection of s. 7. The Court went on to say:

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—contract rights. . . . 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.

7. The Social Assistance Act, R.S.N.S. 1989, c. 432 defines a person in need as follows:

4.(d) "person in need" means a person who, by reason of adverse conditions, requires assistance in the form of money, goods or services."

Under s. 9(1) of the same statute, the social services committee is under a positive obligation to "furnish assistance to all persons in need."

8. Arguably, this approach does not require proof of continuing eligibility for there to be a foundation for a Charter claim. In other words, once an individual is adjudged a person in need for the purposes of receiving social assistance, the principles of fundamental justice must be complied with before that person's social assistance payments can be terminated. This is a significant point since Gruchy J. tied his findings of Mrs. Conrad's ineligibility to his s. 7 findings.


10. Ian Morrison states: "There is little chance that s. 7 will be interpreted as creating an absolute right to welfare" (I. Morrison, "Security of the Person and the Person in Need: Section Seven of the Charter and the Right to Welfare" (1988), 4 J.L. & Social Pol'y 1 at 1).


12. Ibid. at 1003-04. However, Gruchy J. is not the only judge to deny the application of s. 7 in a social welfare case since Irwin Toy. See, for example, Gosselin, supra note 9; Fernandes v. Manitoba (Director of Social Services (Winnipeg Central)) (1992), 93 D.L.R. (4th) 402 (Man. C.A.).
Thus, in spite of the fact that the Supreme Court left open the possibility of differentiating between so-called economic rights, Gruchy J. chose not to engage in this process of distinction. Instead, he relied on the view of Peter Hogg that extending the meaning of security of the person to the social welfare context "would bring under judicial scrutiny all of the elements of the modern welfare state." Yet Hogg makes these comments in response to what he calls "suggestions" for a broad interpretation of s. 7. These so-called "suggestions" are, in fact, dicta of the Supreme Court of Canada and, as such, should be given more weight. Further, the kind of "floodgates" argument put forth by Hogg seems to be premised on an extremely broad interpretation of s. 7—one which, for example, might posit an affirmative right to welfare. Rather than seek a middle ground, the position of Hogg, adopted by Gruchy J., is to shut the door entirely.

The exclusion of Charter protection of interests which arise in the social welfare context thus appears to be premised overtly on their "economic" nature, and more covertly on a reluctance of the judiciary to involve itself in difficult policy choices. This, at least initial, reluctance has been typical of courts in all areas of Charter application even though the Charter has profoundly transformed the role of the courts in our constitutional order. However, the Supreme Court of Canada, rather than limiting or constraining the principles enshrined in the Charter, has mandated an approach which seeks to give an expansive meaning to the protected rights. Deference to legislative and policy choices can be shown in the process of balancing under s. 1. It is therefore inappropriate for the courts to use deference to the legislature as a reason for restricting a Charter right at the threshold level. Moreover, to invoke

15. For example, the Supreme Court of Canada has repeatedly stated that courts should give Charter rights a broad and liberal interpretation. In Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357 at 366–67, Estey J. stated:
   Narrow and technical interpretation, if not modulated by a sense of the unknowns of the future, can stunt the growth of the law and hence the community it serves. All this has long been with us in the process of developing the institutions of government under the B.N.A. Act, 1867 (now the Constitution Act, 1867). With the Constitution Act, 1982 comes a new dimension, a new yardstick of reconciliation between the individual and the community and their respective rights, a dimension which, like the balance of the Constitution, remains to be interpreted and applied by the Court.
16. In McKinney v. University of Guelph, [1990] 3 S.C.R. 230 at 288, La Forest J. for the majority of the Court wrote: "the reconciliation of claims not only of competing individuals or groups but also the proper distribution of scarce resources must be weighed in a s. 1 analysis."
deference in the specific context of the social welfare system is particularly troubling in that it risks exacerbating class-based barriers to access to the courts in general and to Charter remedies in particular. 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.

Consequently, of the two premises on which courts have thus far based their exclusion of s. 7 claims in the social welfare context, one is a "threshold" problem (that of the nature of the right asserted), while the other relates to the relationship of the courts to the legislature and bears significant consequences for access to justice. I will argue that only the first concern is relevant to the s. 7 argument; concerns about the appropriate role of the courts are more properly a factor in an assessment of the legislative scheme under s. 1 of the Charter.

The threshold problem which remains is that of the proper characterization of social welfare rights, which, in Conrad, Gruchy J. dismissed as being "economic" in nature. The position that "economic rights" are not protected under s. 7 of the Charter was set out in an earlier decision of the Nova Scotia Court of Appeal, Bernard v. Dartmouth Housing Authority. In Bernard, 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 in circumstances that would not have sufficed under the Residential Tenancies Act. The Court found that “the right asserted was a proprietary right which bestowed a direct economical benefit on the appellant and as such has no constitutional protection afforded under s. 7 of the Charter.” This is a very narrow construction of the scope of s. 7 and the nature of the right to public housing, a construction that focuses exclusively on the economic benefit to public housing tenants of having lower rent. The plaintiff’s presence in public housing was characterized in the case as a “choice,” thereby further removing the plaintiff and her claim from the realm of basic human needs. This artificial distance created by the Court between the plaintiff and the reality of her poverty serves to distort the facts in order to avoid engaging with the real question of the nature of the rights of tenants in public housing.

The fact that welfare payments involve money should not be taken to mean that they are purely an economic interest. In a recent article, Professor Jackman argues that the outright dismissal of s. 7 claims

18. Ibid. at 196.
relating to social welfare "misconstrues both the interests asserted by the plaintiffs, and the legislative history of s. 7 itself." It has also been argued that since most areas of human activity or endeavour have economic and non-economic aspects (and this is especially so in a market society), the characterization of something as a purely "economic right" is a "result-oriented process in the context of s. 7 where the characterization of the interest determines whether it is eligible for constitutional protection or not." In other words, the courts can exclude areas from Charter application simply by labelling them as "economic." Similarly, rights with an economic component can be brought under the umbrella of s. 7 by emphasizing their other, non-pecuniary aspects. Thus, it is open to the court to identify and emphasize only the economic aspects of welfare in order to exclude it from s. 7 protection.

The potential for result-oriented approaches to the characterization of rights as economic or non-economic for the purposes of the application of s. 7 is troubling. Ideally, it should lead courts to take a far more purposive and context-sensitive approach to evaluating the nature of rights and interests. Under s. 7, the effects-oriented approach to Charter interpretation mandated by the Supreme Court of Canada in R. v. Big M. Drug Mart Ltd. and echoed by the Nova Scotia Court of Appeal in Dartmouth/Halifax County Regional Housing Authority v. Sparks would require a consideration of security of the person in light of the effects on individuals of the deprivation of the benefit, rather than on the nature of the benefit. Thus, instead of characterizing welfare payments as "economic rights" because they are effected through a transfer of money, the focus of the court should be on the relationship between those payments and the security of the person. Where the suspension of welfare payments may leave an individual in a state of poverty, it is difficult to see

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23. (1993), 119 N.S.R. (2d) 91, 330 A.P.R. 91 (C.A.) [hereinafter Sparks cited to N.S.R.]. Although this is a case decided under s. 15 of the Charter, it is useful for the approach taken to the Charter question by the Nova Scotia Court of Appeal.
how the continuation of payments are not directly related to the security of the person.24

Gruchy J.'s finding that the plaintiffs' right to social assistance was economic in nature and therefore outside the scope of s. 7 of the Charter25 is a gross oversimplification of the meaning of "economic rights" as discussed by the Supreme Court of Canada in Irwin Toy. The court in that case recognized the nuances implicit in the term "economic rights."26 Most things in life have an economic aspect. Indeed, economists make a living ascribing costs and benefits to a range of factors many of which are not traditionally thought of as economic, and some of which are clearly intangible. In order to avoid this sinkhole of economic analysis, it is necessary to consider the term "economic" in a more purposive manner. For example, if one were to substitute "pecuniary" for economic, it would be fair to say that the Charter is not meant to protect purely pecuniary interests. Where a right or interest combines pecuniary and non-pecuniary elements, it is necessary to assess the relative importance of the non-pecuniary interests. In the context of social welfare, Morrison argues:

Although welfare obviously involves an economic component, the nature and purpose of welfare payments is unique. Denial or termination of welfare benefits is a deprivation of an expectation of an economic commodity but . . . it is also a direct and serious threat to fundamental noneconomic interests, the protection of which is the direct purpose for provision of the economic commodity.27

Thus, the economic dimension of welfare payments is neither determinative of the "classification" of welfare for Charter purposes, nor is it the fundamental characteristic of social assistance.

24. In Blackburn v. Social Assistance Appeal Board (N.S.) (1987), 80 N.S.R. (2d) 30 (N.S.S.C.) at 35, the Court held that clear evidence of cohabitation was needed "[f]or the Department to take the drastic action of removing essential support for a person in need of benefits and her two children." The characterization of the benefits as "essential support," and of their removal as a "drastic action," indicate a recognition by the Court that welfare benefits have more than a purely economic dimension.
25. Supra note 1 at 271.
26. For example, the Court found that some so-called economic rights were "fundamental to human life or survival," while others were more "corporate-commercial" in nature (supra note 11 at 1003-04). Under other sections of the Charter, the Supreme Court of Canada has recognized multiple dimensions to so-called economic rights. For example, in Rocket v. Royal College of Dental Surgeons of Ontario, [1990] 2 S.C.R. 232, a case dealing with freedom of expression and commercial advertising, McLachlin J., for the unanimous Court, stated at p. 241: "The argument against applying s. 2(b) to commercial speech rests on the proposition that the Charter was not intended to protect economic interests. This argument has been rejected by this Court on the ground that advertising involves more than economics."
In other cases under s. 7 the courts in Nova Scotia and elsewhere have recognized "non-pecuniary" dimensions to other activities involving economic gain. In Wilson, the British Columbia Court of Appeal recognized important non-pecuniary dimensions to the right to practice one's profession in the region of one's choice. In Khaliq-Kareemi, a similar issue was treated in the same manner by the Nova Scotia Court of Appeal, which cited with approval the following passage from the reasons of Dickson C.J.C. in Reference Re Public Service Employee Relations Act (Alta.):

It has been suggested that associational activity for the pursuit of economic ends should not be accorded constitutional protection. If by this it is meant that something as fundamental as a person's livelihood or dignity in the workplace is beyond the scope of constitutional protection, I cannot agree. If, on the other hand, it is meant that concerns of an exclusively pecuniary nature are excluded from such protection, such an argument would merit careful consideration. In the present case, however, we are concerned with interests which go far beyond those of a merely pecuniary nature.

The non-pecuniary aspects of liberty in both Wilson and Khaliq-Kareemi included the "sense of identity, self-worth and emotional well-being" which flowed from a person's employment. Thus, important intangible elements relating to self-esteem may supersede the pecuniary component of an interest in order to trigger the application of s. 7 of the Charter.

Just as the right to practice medicine in the place and manner of one's choosing involves pecuniary and non-pecuniary dimensions, the provision of social assistance, apart from its pecuniary aspects, has significant non-pecuniary dimensions for the recipient. In fact, Canada's international obligations recognize basic social security as an important human right which is inextricably linked to other fundamental rights of individuals. For example, Article 22 of the Universal Declaration of Human Rights provides that:
22. Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.33

The qualified right to social security recognized in this article is clearly acknowledged to be related to aspects of dignity and self-realization which are similar to those recognized in Wilson and Khaliq-Kareemi as being protected under s. 7. The "sense of identity, self worth and emotional well being" protected by the courts in Wilson and Khaliq-Kareemi are related as much to the ability to work in one's chosen profession as they are to the ability to feed and clothe oneself and one's children. Indeed, to find otherwise is to locate s. 7 rights in an elitist (and sexist) conception of identity and autonomy where that which is valued relates to activity outside of the home, and is directed to self-fulfilment rather than to the ability to meet the basic needs of oneself and one's dependents.

In the last decade or so, courts in Canada have begun to recognize the importance of the social welfare scheme and the rights of welfare recipients.34 Further, it has been argued that entitlements to social assistance in Canada are "viewed as integral to and reflective of values which are profoundly social in nature."35 These values are argued to 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. These values, and the programs through which they are concretized, are essential aspects of the s. 7 right to "life, liberty and security of the person," understood in its proper social, philosophical, and historical context.36

Thus the "security of the person" aspects of social welfare not only implicate concerns for individual autonomy and dignity, but also form part of shared national and international values.37

34. This trend is documented by Morrison, supra note 10 at 5-9.
35. Jackman, supra note 19 at 78.
36. Ibid. at 79.
For example, in Gosselin, while finding that s. 7 did not guarantee an affirmative right to social assistance, the Quebec Superior Court nevertheless identified a relationship between poverty and the loss of security of the person: “Ultimement, la pauvreté porte atteinte à la sécurité psychologique, intellectuelle et morale et entrave indirectement l’exercice de la liberté.” Destitution, which is the condition sought to be remedied or avoided by social assistance payments, is clearly more than a red line on an accountant’s page. It is a condition which fundamentally affects the physical, psychological and emotional security of the person. Because the arbitrary withdrawal of social assistance by the state directly affects the security of the person in this manner, it is difficult to justify the denial of Charter protection to those who have been adversely affected. It would be a disturbing and blatantly ironic result if relatively affluent professionals such as doctors can draw on s. 7 to protect their “rights” to practice medicine, while individuals in poverty have no similar protection because of the alleged “pecuniary” character of their rights.

Because of Gruchy J.’s abrupt denial of the application of s. 7 to cases involving social welfare, he did not even consider the plaintiffs’ second argument. The effect of this argument would be to guarantee certain rights of procedural fairness to individuals who have been adjudged by the organs of the state to be persons in need of the most basic kind of assistance and thus individuals whose security of the person would be jeopardized by any arbitrary withdrawal of support. In Gosselin, the Superior Court, after establishing the link between poverty and the loss of security of the person, went a step further:

Si l’insécurité causée par la pauvreté était directement attribuable à l’État ou à ses institutions, ne pourrait-on prétendre que l’État aurait porté atteinte à la sécurité de la personne? Il faudrait alors se poser la question de savoir si l’atteinte est ou non contraire aux principes de justice fondamentale.

In other words, while rejecting an affirmative right to welfare, the Quebec Superior Court conceded that where the State is directly responsible for the poverty of the individual, the individual’s right to security of the

38. Supra note 9 at 1670.
39. The security of the person argument in this case is also bolstered by the approach of the Nova Scotia Court of Appeal in Sparks. In that case, the Court took the approach that the existence of legislation to assist a particular group of individuals (in that case public housing tenants) was an indication of their particular disadvantage: “In fact, the Legislature recognized the group of persons who qualify for public housing as being disadvantaged; a subsidized housing scheme was created to alleviate their disadvantage” (supra note 23 at 99). Similarly, it can be argued that the legislature has recognized the dire circumstances of persons in need of social assistance by establishing a legislative scheme to assist them.
40. Supra note 9 at 1670.
person has been violated, and the analysis must then shift to consider whether the violation was in accordance with the principles of fundamental justice. While the arbitrary withdrawal of social assistance is clearly not the root cause of someone's poverty, it would seem nonetheless reasonable to consider that such a withdrawal, by removing the "safety net," would violate the right to "security of the person."

In shying away from a recognition of an affirmative right to welfare, it is unnecessary to completely cut off social welfare recipients from access to the Charter to protect their fundamental rights. An analogy can be drawn with the medical services cases. It would be unreasonable for any doctor to argue that state regulation of medical services is an unjustifiable violation of the right to liberty. Section 7 makes it clear that the right to liberty can always be constrained, so long as any constraints accord with principles of fundamental justice. Similarly, the right to security of the person can be circumscribed by the same principles. The structure of s. 7 allows for state regulation and intervention; its one prescription is that any such intervention must comply with the principles of fundamental justice. There may be no absolute right to welfare, nor may there be a right to a certain quantum of welfare, in the same way that doctors have no absolute right to the unregulated practice of medicine. Nevertheless, in either case there is a requirement of conformity with the principles of fundamental justice, which include rights of procedural fairness.

**Principles of Fundamental Justice**

Although Gruchy J. did not find a security of the person dimension to social welfare that would attract the application of s. 7 of the Charter, he nonetheless chose to consider whether the administrative system in place had infringed the principles of fundamental justice. The plaintiffs had argued that the discontinuation of interim social assistance should not take place without according a recipient "a full hearing and full disclosure of all relevant facts." In other words, the plaintiffs argued that, rather than discontinue the social assistance because of a belief that Mrs. Conrad

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41. However, Reeves J. of the Superior Court went on to significantly circumscribe the situations where the state could be said to be responsible for an individual's poverty. The court found that individuals are largely responsible for their financial situation, in conjunction with factors which are beyond the control of the state such as geographic location and economic cycles (supra note 9 at 1676). The state is only responsible in exceptional circumstances, such as in the cases of victims of universal vaccination programs and military victims of armed conflict, where the state owes individuals some form of material security (supra note 9 at 1670).

42. Conrad, supra note 1 at 258.
was cohabiting with her husband, the defendant, at a minimum, should have approached Mrs. Conrad with its evidence of cohabitation in order to ascertain its validity. The municipality countered by arguing that the full evidentiary hearing provided for an appeal of a decision to discontinue satisfied the requirements of procedural fairness.  

In his analysis of the principles of fundamental justice, Gruchy J. chose to undertake a fairly superficial assessment of the administrative procedures in place. He found that there had been no breach of the principles of fundamental justice. He stated: “The personnel administering the procedure appeared to me to be well trained, thoughtful and competent. Their motivation was clearly to render assistance to those in need.” However, good faith is by no means determinative of procedural fairness. All the good intentions in the world do not substitute for fundamental justice where the system in place allows for the arbitrary withdrawal of assistance. Gruchy J.’s further finding that “[t]he legislation, regulations and policy all contemplated the rights of the individual to appeal” does not address the fact that assistance is withdrawn pending any such appeal. Indeed, there was evidence in the case, cited by Gruchy J., that social assistance workers strongly criticized the process and “recommended that in the future emergency assistance should be continued until an appeal is heard.”

The requirements of fundamental justice may depend on the place of the plaintiff within the administrative scheme. In Re Webb and Ontario Housing Corporation, the Ontario Court of Appeal made a distinction between the procedural rights of someone who was merely an applicant for public housing, and the rights of someone who had already been accepted into such housing:

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43. Evidence in the case established that the normal waiting period between discontinuance of social assistance and the hearing of an appeal ranged from five to eight weeks (supra note 1 at 264).
44. Supra note 1 at 272.
45. Of the two welfare workers who testified before the court, Gruchy J. stated that they “wrote a memorandum dated December 12, 1989, concerning this entire case and in a critique of the entire procedure involved in it, recommended that in the future emergency assistance should be continued until an appeal is heard. In that manner, they concluded, the threat of inappropriately depriving maintenance to children would be avoided” (ibid. at 266). Nevertheless, Gruchy J. relied on the decision of the Nova Scotia Court of Appeal in Carvery v. Halifax (City of) (1993), 123 N.S.R. (2d) 83, 340 A.P.R. 83, in which the Court found that under the relevant legislation there was no right to the continuance of social assistance pending appeal. Instead, there was merely a discretion on the part of the Director which was unconstrained by the need to take into account any particular factors or considerations (Conrad, supra note 1 at 268).
Once the appellant became a tenant she acquired a very real and substantial benefit because of her reliance on and eligibility for welfare. The determination to grant her this benefit was made when she was accepted as a tenant. That decision was one which, in my view, could be made by O.H.C. without any intervention of a rule or principle of procedural “fairness”. However, once she became a tenant and thus “qualified” for and received the very real benefit of a reduced and subsidized rent, the situation changed.  

An analogy can be made to the present case, where it should have been significant that Mrs. Conrad had already been found to be a person in need by the County. Thus, even if there is no affirmative right to welfare, the principles of fundamental justice should apply where a welfare recipient is already receiving benefits. The withdrawal of necessary assistance places the plaintiffs’ security of the person at risk.

Without engaging in any substantive review of quantum of benefits and range of benefits, the courts may still guarantee that the principles of fundamental justice will apply to the process by which individuals are deemed eligible to receive, and to continue to receive, social assistance in their period of need. The “principles of fundamental justice” are flexible enough that courts may well find that different levels of protection are available to those applying for social assistance, and those who are already receiving welfare assistance. Thus, it could be argued that more is required in terms of process where one is about to be cut off from a benefit already received. In Conrad, the argument would be that the plaintiff, because she had already been adjudged a “person in need,” was entitled to certain procedural guarantees such as a hearing, and the continuance of social assistance until the outcome of the hearing, before she could be removed from social assistance.

A possible underlying reason for judicial reluctance to accord s. 7 protection to aspects of the social welfare system is the concern that any such step would unduly burden the system with the costly and time-consuming trappings of adversarial litigation. This appears to have been

46. (1979), 93 D.L.R. (3d) 187 at 195 (Ont. C.A.). Note, however, that in the context of s. 7 rights, Wilson J. in Singh, supra note 37 at 209 appears to reject the idea of a dichotomy as between rights and privileges.

47. In Singh, supra note 37 at 213, Wilson J. indicates a willingness to accept “that procedural fairness may demand different things in different contexts.”

48. For example, in Gosselin, Reeves J. of the Superior Court of Quebec found that there is no affirmative right to welfare (supra note 9 at 1669). In reaching this conclusion, Reeves J. made a specific distinction between rights that require an active intervention and commitment of resources by the state, and rights that require only some accommodation by existing institutions of the state.
a concern of Gruchy J. in Conrad. It is questionable whether, in considering the requisites of the principles of fundamental justice in a given case, courts should weigh the financial burden of any additional procedural safeguards against the right affected and the degree to which it is infringed. This type of "balancing" analysis properly belongs under s. 1. Thus cost, while a potential consideration in attempting to justify a violation of the Charter, should not be a suitable consideration for entirely foreclosing access to the Charter. However, even under a s. 1 analysis, the Supreme Court of Canada has raised serious questions as to whether administrative flexibility is a sufficient reason to warrant overriding a Charter right. In Singh, Wilson J. stated:

The principles of natural justice and procedural fairness which have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in s. 7, implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles.

Wilson J. would seem to require a very stringent standard of review under s. 1 where a violation of s. 7 has been found. In following this proposition from Singh, the Nova Scotia Court of Appeal in Sparks engaged in a careful balancing of the need for administrative flexibility and the rights of public housing tenants. A similar approach is necessary in this case, where the withdrawal of social assistance pending any form of appeal allows for unfettered administrative flexibility in complete disregard of the needs of social welfare recipients.

49. See, for example, his comments in Conrad, supra note 1 at 266–67, 271–72. These concerns are shared in the United States Supreme Court cases of Goldberg v. Kelly, 397 U.S. 254 (1970) [hereinafter Goldberg], and Mathews v. Eldridge, 424 U.S. 319 (1976) [hereinafter Mathews]. Goldberg involved a constitutional challenge to a welfare system which did not provide for a pre-termination hearing for social assistance recipients. The Court, in concluding that some pre-termination process was warranted, carefully weighed the rights of the plaintiffs against the state interest in conserving its fiscal and administrative resources. Similarly, in Mathews, a case which involved a constitutional challenge to the procedural fairness of a process for terminating disability benefits, the United States Supreme Court outlined the factors to be considered in evaluating any such benefits scheme at p. 335:

identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement will entail.

50. Supra note 37 at 219.

51. Supra note 23 at 100.
Another important dimension to this case concerns the findings of fact made by Gruchy J. Because no hearing ever took place regarding the withdrawal of support, there was no evidentiary record before the court. As a result, Gruchy J. made a number of findings of fact in the case. These findings are ones which will necessarily affect any further proceedings, and which would militate against a successful s. 7 claim. They also provide an independent basis for rejecting the s. 7 argument. For example, Gruchy J. found that Mrs. Conrad was not a credible witness, and that her conduct virtually amounted to fraud. In particular, the judge found as a fact that Mrs. Conrad was cohabiting with her husband at the periods of time in which social assistance was suspended. Thus, in spite of the municipality's decision to reinstate in both instances, Gruchy J. effectively found that assistance had been rightfully discontinued. The findings of fact therefore have the impact of removing any basis for a s. 7 Charter claim.

It is important to realize that in this case Mrs. Conrad had fallen into an administrative conundrum. At the heart of the alleged violation of her s. 7 rights was the fact that she had been denied interim assistance pending appeal from the municipality's decision to discontinue her social assistance. Nevertheless, because the municipality chose to reinstate her before either of her two appeals was heard, there could be no record of facts from a hearing. Although it is not to be assumed that the municipal-

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52. This is the reason why procedural and evidentiary matters were made the focus of the Appeal to the Nova Scotia Court of Appeal. An appeal on the Charter issue would be futile in light of such adverse findings.
53. For example, he found that, in Mrs. Conrad's case, the welfare workers had "unearthed what was essentially a fraud" (supra note 1 at 266). He also referred, at several points in his decision, to what he considered to be Mrs. Conrad's untruthfulness (supra note 1 at 265-66).
54. Thus, in the words of Gruchy J.: "I therefore conclude that the plaintiffs had no 'right to' the municipal assistance and, therefore, if such right is included in '... life, liberty and security of the person', then the plaintiffs has [sic] no such right" (supra note 1 at 271.) Interestingly, the Court of Appeal, in its decision, restated the findings of the trial judge in this way: "Even though Justice Gruchy decided the issue of eligibility against the appellants, a review of his reasons for judgment reveals that the ultimate result would not have depended exclusively on this ruling. The fact is that he found the action also failed on constitutional grounds" (Conrad v. Halifax (County of) (5 April 1994), Halifax C.A. No. 02923 at 3). This determination is in contrast to the words of Gruchy J. cited above. While Gruchy J. gives a curt dismissal of the s. 7 arguments, it would appear that he turns the findings into the main focus for his decision. The approach of Gruchy J. creates such an interdependence between the s. 7 argument and the factual findings that any appeal from the decision of Gruchy J. becomes extraordinarily difficult. An appeal of the determination that social welfare rights are not protected by s. 7 becomes pointless in light of the findings of fact; the more difficult appeal on procedural and evidentiary grounds becomes meaningless in light of the s. 7 determination.
ity acted in bad faith, it is clear that similar tactics could be used by any social welfare agency trying to reduce its budget by cutting off recipients and only reinstating those who threaten legal action. The vulnerability of people in such circumstances cannot be underestimated. This vulnerability continues after the fact: Mrs. Conrad’s rights have arguably been violated, but the very manner in which they were violated means she gets no findings of fact from below. In Conrad, this means that the primary finder of fact is a court which lacks the expertise of the agency in assessing the merits of social welfare claims.

The approach of Gruchy J. in making these findings of fact is problematic from a number of points of view. First, he reconsiders the only clear “facts” available from below: the two decisions to reinstate payments. It is questionable whether it is appropriate for the court to effectively reevaluate an agency decision to reinstate, when the foundation for that decision was not contested by the parties. Secondly, his approach shifts the issue from the right not to have social assistance benefits arbitrarily withdrawn, to the issue of the merits of the withdrawal. In a sense, this part of the judgment reads as an “in the alternative” justification for the refusal to consider the case under the Charter.

Thirdly, Gruchy J.’s approach to the facts is closely tied to the issue of cohabitation. He found that Mrs. Conrad was cohabiting with her husband at both points in time when the benefits were suspended. Quite apart from the rather sketchy evidence upon which he based his finding, Gruchy J. makes no clear statement of the law regarding cohabitation. In other words, he sets out no legal principle or test against which he measures his findings of fact. His inquiry into cohabitation does not appear to go beyond the simple sharing of premises by Mrs. Conrad and her husband. Recent case law indicates that for cohabitation to be a factor in the withdrawal of municipal social assistance, there must also be proof of some financial contribution. No such proof is evident in this case.

55. In fact, Gruchy J. criticizes Mrs. Conrad for seeking these reinstatements, and states that “the matter ought to have been permitted to proceed through the established appeal route so that the evidence of each of the parties could have been examined in accordance with the correct and established procedure” (supra note 1 at 266).
56. Gruchy J. states: “The fact that the defendant twice reinstated the plaintiffs’ assistance is not, in my view, determinative of the plaintiffs’ entitlement. The reinstatement in these circumstances only shows that the parties’ counsel agreed to the reinstatement” (supra note 1 at 269). The Court of Appeal was in agreement, stating: “the matter of cohabitation was not admitted by the respondent (defendant) prior to trial. This gave the subject of cohabitation the potential to become a live issue at trial” (supra note 54 at 3).
57. Supra note 19.
The findings of fact in this case are troubling at another level. The result of these findings is to conclude that, quite apart from the Charter issues, Mrs. Conrad was not entitled to receive social welfare benefits. In taking this approach, Gruchy J. has effectively reduced an important Charter issue to an individual level. The recipient of social welfare is portrayed as blameworthy, thereby obviating the need to take the Charter claim seriously. This individualization of the Charter claim is similar to that which occurred in the lower court decision in Bernard, where the fact that the plaintiff was described as one who “freely took advantage of the benefits of this housing” diminshed the force of the Charter claim. This pattern is evident in other cases as well. Indeed, Jackman argues that for some courts, there persists a view “that poverty is essentially the product of inherent personality traits in the poor.” This inherent blameworthiness of the poor for their own poverty is disturbing, particularly where it can lead to their exclusion from access to courts or to Charter remedies. In Conrad, the findings of Gruchy J. with respect to Mrs. Conrad’s credibility are so extreme, and in such stark contradiction with the dual decisions of the authority to reinstate her social assistance payments, that some sort of blaming appears to be taking place. It would be troubling indeed if the individualization of Charter claims—a form of blaming the victim—were to occur primarily in the context of social welfare and poverty law.

Conclusion

It is unfortunate that in Conrad Gruchy J. has passed up an opportunity to further develop the context-sensitive approach of the Nova Scotia Court of Appeal in Sparks. Clearly, if there are flaws in the administrative processes which serve as a final safety net for people facing poverty, then

58. From the reasons of MacDonald J. of the Nova Scotia Supreme Court, as reproduced by the Court of Appeal in Bernard, supra note 17 at 197. Similarly, in the decision at trial in Dartmouth/Halifax County Regional Housing Authority v. Sparks (1992), 112 N.S.R. (2d) 389, 307 A.P.R. 309 [cited to N.S.R.] at 401, the court stated: “The restrictions imposed by virtue of the sections in the Act are not imposed as a result of any characteristic of race or sex or source of income, but rather by virtue of having individually applied and individually been accepted for public housing” [emphasis added]. In Gosselin, supra note 9 at 1676, Reeves J. finds that poverty is attributable to a variety of factors intrinsic to the individual, such as, for example, a poorly instilled work ethic.

59. Jackman, supra note 19 at 85. In Fernandes, supra note 12 at 415, the Manitoba Court of Appeal stated in obiter: “Fernandes is not being disadvantaged because of any personal characteristic or because of his disability. He is unable to remain community-based because he has no caregiver, because he must rely upon public assistance and because the facilities available to meet his needs are limited.”

60. Jackman, supra note 19 at 89.
the interests of both those individuals and of the community at large would be served by allowing Charter scrutiny of those processes to ensure they meet the principles of fundamental justice.

The particular situation of the plaintiff in this case places the matter in a context which also raises serious questions about a justice system which is repeatedly accused of a failure to address the poverty faced by women and children in our society, and in a context where poverty is regrettably on the rise. There is a danger, reflected for example in the contrast between the decision in Conrad and that in Khaliq-Kareemi, that recourse, not only under the Charter, but to the courts at all, is something limited to the privileged, not only by reason of their ability to access the courts, but also by reason of the lack of interest of the legal system in the rights and interests of those who live on the margins of poverty. This concern is highlighted by the criticism of the plaintiff expressed by Gruchy J.:

I conclude that had Mrs. Conrad's case been permitted to be handled in a nonadversarial fashion in accordance with established social work procedures, a much more satisfactory result might have been achieved. That did not occur, however, because Mrs. Conrad adopted a legalistic attitude toward the matter which forced the County to respond accordingly. . . . It is my view that the welfare system was turned into some sort of an adversarial process by the parties and that approach had the effect of putting the County on the defensive rather than to allow it to co-operate in the best interests of all concerned.

While judicial deference to administrative decision-makers is generally considered appropriate, the courts do maintain a fundamentally important jurisdiction over procedural fairness and, through s. 7, the principles of fundamental justice. Charter rights are meant to be interpreted and enforced through our judicial system, which is by its nature adversarial. The limiting of the scope of s. 7 to exclude in broad terms the application of the Charter to the administration of the social welfare system, suggests an extreme judicial reluctance to scrutinize the processes by which social welfare benefits are allocated and withdrawn. In drawing the line between administrative efficiency and fundamental rights, Gruchy J. has restricted the Charter rights of welfare recipients in their most significant interaction with the state.

61. In fact, in its decision in Sparks the Nova Scotia Court of Appeal took note of the relationship of gender to poverty: "Single mothers are now know to be the group in society most likely to experience poverty in the extreme" (supra note 23 at 98). The situation of women in poverty has also been recognized by the Supreme Court of Canada in Moge v. Moge, [1992] 3 S.C.R. 813 at 853, where L'Heureux-Dubé J. for the unanimous Court describes the feminization of poverty as "an entrenched social phenomenon."

62. Supra note 1 at 266.