Starving In The Shadow Of Law: A Comment on *Finlay v. Canada (Minister of Finance)*

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By none of the standard measures of poverty, do income assistant recipients in any Canadian province receive support that raises them out of statistical poverty.[1] What is remarkable about this national embarrassment is that very little political will seems to exist to do anything to remedy the injustice. One might expect to hear expressions of governmental concern over the level of economic suffering to which large numbers of our citizens are condemned[2] or even pledges to increase income support levels so that assistance would in fact offer more than impoverishment. Instead, responses of a different sort predominate. Thus, members of the recent federal Conservative government focused on the redefinition of poverty itself, illustrating that by numerical manipulation we can reduce the number of Canadians we count as poor while leaving untouched the current distribution of income and wealth.[3] Or, in the case of our current federal government, promises are made to review social programmes but primarily, it appears, from the perspective of efficiency and restraint, with the probable result that what inadequate amounts we do give recipients will be made all the more stigmatized, and difficult to receive.[4] Even those provinces led by governments we once thought of as social democrat are often on the wrong end of the welfare reform movement. So, Ontario, reeling from its own form of income reduction, appears to be choosing to share that hardship with those least able to bear it — linking welfare reform to re-training initiatives and delaying reform until almost the end of its electoral term.[5] British Columbia, although notable under its recent government for some positive welfare reform, has given way to the temptation of taking a tough stand on "welfare fraud" to placate those opposed to more humane welfare regimes. Thus, British Columbia's Social Services Minister speaks not of lessening the hardship of those on welfare but, rather, of increasing the accountability of the system and of "getting tough on abuse."[6] And, all of these recent governmental responses to poverty and to the provision of social programmes have occurred against the backdrop of international concern and apparent puzzlement about our governments' failure to deal effectively with the poverty issue.[7]

In the face of such political reluctance to address the real concerns of those reduced to second-class citizenship through economic deprivation,[8] poverty activists have turned to the courts to attempt to force governmental adherence to at least those minimum expressions of obligation towards the economically disadvantaged our legal system contains. An example of such legal manoeuvring is the recent case, *Finlay* v. *Canada*.[9] In this decision, one sees a depressing indication that the struggle for economic justice is likely to meet with no more sympathetic or understanding an environment in our courts than it has in the legislatures across our land. This comment is a brief discussion of the Court's findings in *Finlay*. In particular, the implication of the legal issues raised in the case for future anti-poverty litigation will be explored.

The Supreme Court of Canada's decision in March 1993 brought to an end Robert James Finlay's extended trek through the Canadian courts. The journey began in 1982 when Finlay sought a declaration in the Federal Court that payments made by the federal government to the Manitoba government pursuant to the *Canada Assistance Plan*[10] were illegal. The *Canada Assistance Plan* (CAP), enacted in 1966, authorizes the federal government to enter into agreements with individual provinces to share up to fifty percent of the cost of eligible provincial social assistance programmes.[11] Finlay claimed that because the provincial social assistance plan to which the federal payments were contributory did not comply with the conditions CAP imposed on federal cost-sharing arrangements, these payments lacked statutory authority. He maintained that they failed to conform for two reasons. First, Finlay argued that CAP allowed federal cost sharing only if the province provided assistance that at least fully met the basic requirements of recipients.[12] Finlay charged that Manitoba's *Social Allowances Act*[13] (SAA) which authorized, in certain circumstances, the reduction of a social assistance recipient's monthly allowance below the level of basic requirements as set by the province's own rate, was in breach of CAP.[14] Finlay pointed to his own situation where, because of the provincial government's desire to recoup

previous overpayments of benefits, his monthly assistance rate was reduced below the level required to meet his basic needs. This alteration of Finlay's benefits began in February of 1974 and amounted to a 5 per cent deduction from Finlay's monthly living allowance. The deduction plan was to continue for the next ten years — at which point the overpayment would be recovered. Left without an adequate income to live on, Finlay was forced to go without food for three days a month. Only after Finlay lost sixty pounds did the deductions stop.[15] Finlay's second argument was that CAP stipulated that the provincial government set assistance rates. In Manitoba's case, municipalities often set the rates.

It took Finlay four years, until December 1986, to establish that he could get standing to bring such an action. The Supreme Court granted Finlay public interest standing, accepting that "there [was] no other reasonable and effective manner in which the issue of statutory authority raised by the respondent's statement of claim may be brought before a court."[16] An additional six and a half years later, the Supreme Court of Canada ruled on Finlay's substantive claims, holding that the federal government, in making contributory payments to the Manitoba social assistance scheme, was not in contravention of CAP.

This comment will not discuss Finlay's argument that the provincial government alone must set the rates of any cost-sharing programme under CAP, nor will it review the Court's rejection of this point. Instead, this comment focuses on the argument that CAP authorizes federal contribution to only those plans which fully cover claimants' necessities, a concern that speaks more directly to the issue of levels of economic support our society guarantees to economically disadvantaged individuals.

Finlay's claim was successful in both the Federal Court, Trial Division and the Federal Court, Appeal Division. At trial, Justice Teitelbaum concluded that CAP and the federal government's agreement with Manitoba did indeed make cost-sharing contingent upon provincial assistance rates fulfilling a recipient's basic needs.[17] As the deduction of overpayments reduced support below this level, provincial obligations under CAP were not met. The provincial governments had argued that CAP required only that provincial assistance rates reflect a simple consideration of individuals' basic requirements. Allowances levels could otherwise be arbitrarily set; the provincial governments have no duty to meet fully basic needs. The Trial decision was upheld on appeal by Justice MacGuigan in the Federal Court of Appeal. Provincial assistance schemes were determined to be required by CAP to "fulfil" or "meet" a recipient's basic requirements.[18]

The majority opinion of the Supreme Court of Canada — written by Justice Sopinka and concurred in by Chief Justice Lamer and Justices Gonthier, Iacobucci, and Major — overturned these lower court results. The decision is notable for the compromise position it reached between the provincial governments' claim that CAP demands only cursory attention to a claimant's basic requirements and Finlay's position that a complete fit between basic requirements and provincial assistance levels is mandated. The Court addressed the issue in two stages: it first assessed CAP's requirements and, second, it evaluated the extent to which Manitoba's legislative scheme met such requirements.

Sopinka J. began the first stage of analysis by stressing the purposive nature of the current interpretive inquiry, presumably because of the special nature of CAP as a federal spending statute.[19] As an aid to this task, he identified the general objectives underlying the statute as expressed in CAP's preamble. The preamble reads as follows:

> WHEREAS the Parliament of Canada, recognizing that the provision of adequate assistance to and in respect of persons in need and the prevention and removal of the causes of poverty and dependence on public assistance are the concern of all Canadians, is desirous of encouraging the further development and extension of assistance and welfare services programs throughout Canada by sharing more fully with the provinces in the cost thereof ....

In framing what he saw to be CAP's objective, Sopinka J. focused on only the last portion of the preamble. Thus he read the first clause of the statement as merely supporting the statute's objective of encouraging the further development and extension of assistance programmes throughout Canada by way of cost-sharing agreements. The recognition in the preamble of a shared concern about poverty, dependence, and adequate assistance did not, for Sopinka J., function as a statement of parliamentary purpose informing the legislative provisions. By so limiting the statute's purpose, Sopinka J. was able to give a more restricted range to the remedial aspirations of the statute, and to allow more flexibility to federal/provincial agreements reached under it. He set the stage for allowing substantial provincial variance under CAP.

Having thus identified the underlying statutory purpose, Sopinka J. turned to the question of the level of assistance CAP obligates provinces to provide if federal cost-sharing is desired. The key provision with respect to this question is section 6(2)(a) of CAP. The section states that the province will provide financial assistance to any person in need in an amount that "takes into account" the basic requirements of that person. At issue was what that phrase requires participating provinces to do. Sopinka J. compared this section with similar wording contained within section 2(6)(b): provinces in their determination of who constitutes a person in need must "take into account" the budgetary requirements and resources of that person. Convinced that these two sections imply different standards of consideration on the part of the provincial governments, despite the similarity of their phrasing, Sopinka J. looked to the statute's French text for assistance. Here the phrases are indeed rendered differently,[20]

enabling Sopinka J. to conclude that section 6(2)(a) requires assistance to be provided in a manner that is simply "compatible" or "consistent" with an individual's basic requirements,[21] as opposed, that is, to demanding that assistance fulfil or equal basic needs. So, on the basis of the section at stake in Finlay's claim — section 6(2)(a) — an exact fit between assistance levels and basic needs is not required.

What is required, however, is not clear. Sopinka J. did go on to distinguish between the requirement of compatibility and that of mere consideration, stating that provinces will not meet the standard imposed by section 6(2)(a) by simply and only putting their minds to an individual's basic requirements and then proceeding to furnish whatever level of support they choose, even one that is far from adequate. However, neither is it necessary for provincial assistance to equal or fulfil individuals' basic requirements. Such a rigid stipulation would, Sopinka J. held, clearly belie Parliament's intention to encourage provinces to develop programmes.[22] So the standard lies somewhere between an exact fit and no fit at all.

The Court provided no further articulation of the standard, and thus provincial assistance remains subject only to a broadly constituted standard of "consistency" or "compatibility". However, some further indication of what at least will not be found to be inconsistent was provided by the Court's application of this standard to the Manitoba legislation. The Court did not consider the actual amounts Manitoba pays to its assistance recipients, since Finlay's challenge to the scheme was not directed to the adequacy of regular benefits but to the effect deductions from these benefits had. Sopinka J. did find, however, that since deductions, over time, only recover amounts that should not have been paid out in the first place, there was no issue of non-compliance with CAP.[23] Finlay's challenge fails. Looked at over the whole span of Manitoba's payments to Finlay, the deductions are countered dollar for dollar by the original overpayments such that Finlay's "net" receipt of assistance equals the general Manitoban rate. Moreover, the federal statute contemplates deductions for overpayments, indeed mandates them.[24] And because the provincial statute qualifies the Director's authority to deduct past overpaid amounts from current payments by stipulating that it is to be done only absent imposition of "undue hardship" and provides for review of such deductions by an appeal board, Sopinka J. concluded that such a reduction of an individual's payments did not constitute a violation of the federal section's requirement of compatibility. This was despite the evidence before the Court as to the effects of such a deduction on Finlay's economic situation[25] (and, incidentally, of the incoherence of distinguishing between the hardship all welfare recipients find themselves in and "undue hardship".)

Justice McLachlin's dissent — concurred in by Justices L'Heureux-Dubé, Cory, and La Forest — reached the opposite conclusion, but by way of an analysis that is different in only one major respect from the majority's. McLachlin's judgment is sensitive to the particular sort of legislation CAP is — social welfare legislation — and to the practical realities of life on social assistance. She dealt less abstractly and formally with the interpretive and practical judgements she was called on to make.

Like Sopinka J., McLachlin J. arrives at the starting point that section 2(6)(a) of CAP dictates compatibility between the basic requirements of a person in need and the provincial aid provided. She did this, however, against a backdrop of a more generous parsing of CAP's preamble such that the statute's purpose is both to ensure the provision of adequate basic allowances and to encourage assistance with respect to needs beyond basic requirements. To confirm her interpretation of section 2(6)(a), McLachlin J. looked to the legislative debate around the enactment of CAP and the applicability of the "adequacy principle" — the notion that social welfare legislation should be interpreted to provide for adequacy of assistance. She concluded that this interpretation was best in accord with the spirit of CAP as social welfare legislation and with the preamble.

Where the majority and minority analyses differ in result is over the evaluation of the Manitoban scheme and its administration in terms of this (shared) understanding of CAP's formal requirements. McLachlin J., like Sopinka J., did not examine the adequacy of regular assistance rates under the SAA, as she accepted that the level of assistance necessary to satisfy CAP's requirement was to be fixed by the provinces. However, she did conclude that as Manitoba's allowance for "basic necessities"[26] covers only and exactly those items covered by "basic requirements" in CAP, any reduction in these payments would result in assistance below the minimum level specified in CAP. Thus as long as deductions for overpayment did not deprive recipients of the amount of income the provincial government itself had determined was consistent with their basic requirements (the SAA regular assistance rates), such deductions would be consonant with CAP.[27] In Finlay's situation, this was not the case. Deductions reduced his income below the amount set by general assistance rates in SAA; overpayments had been used to reimburse third parties and thus were not available to be recouped separate from and above his monthly assistance rate. Nor had Finlay any other source of funds to supplement the deficit created by the deductions. McLachlin J. refused to find Finlay's situation anomalous and discountable as simply an improper application of the SAA, instead concluding that, given the scale and scope of provincial deductions demonstrated in evidence,[28] Manitoba's policy with respect to its own statute was clearly in violation of CAP. Such

government policy did not guarantee to assistance recipients allowances consistent with their basic requirements as understood by the provincial legislation itself. Notably, McLachlin J. refused to adopt an accounting approach that averaged payments over a long term. Rather, her analysis rested on the monthly implications of provincial deductions. To do otherwise, McLachlin J. asserted, would be to overlook the "human reality of persons in need" and to deny basic necessities in direct opposition to CAP's philosophy. At this stage, then, McLachlin J.'s broader reading of CAP's preamble became important.

One other way of understanding the difference in perspectives underlying Sopinka J.'s and McLachlin J.'s opinions lies in the respective stance each appears to take toward the federal spending power. Both Justices agree that the federal involvement with provincial assistance programmes depends entirely upon the federal government's spending power. Spending statutes are peculiar and controversial constitutional entities. What the federal government does through agreements reached under CAP is hold out the carrot of financial assistance to influence or shape provincial policy on matters purely within provincial jurisdiction, thus arguably sidestepping the division of powers as set out in the Constitution. The importance of this fact for the majority is reflected in its refusal to interpret CAP as dictating precise terms to which provincial legislation must adhere. Instead, only substantial adherence to the objectives of CAP, as expressed in a narrowly read preamble, is mandated. Sopinka J.'s reluctance, in this instance, to read CAP as dictating specific, rigid terms for provincial cooperation may reflect a more general sensitivity to the power federal spending gives the federal government to circumvent the formal division of powers in the Constitution.

The dissent, on the other hand, appears less concerned about this potential displacement of provincial powers. McLachlin J. characterized the shared-cost agreement as essentially co-operative, stating that "the provinces may participate; they are not obliged to."[29] Thus, McLachlin J. may, with respect to the politics of federalism, be generally less wary than Sopinka J. about a finding that the provincial scheme in question is more tightly bound to certain conditions. And, while the possibility of differing judicial attitudes on this federalism question did not result in different interpretations of section 2(6)(a) of CAP, it may still have been operative in conclusions reached about the implications of such an interpretation for Manitoba's actual legislative scheme.

What message can those interested in using the legal system to address the needs of welfare recipients take from this case? One possible message is an optimistic one. Despite the majority's failure to recognize and credit the practical effects of Manitoba's deduction scheme — the monthly deprivation and hardship it occasions — and even though the Court did not regard CAP as holding provinces to payments which are exact fits with basic requirements, the Court did make one useful finding. Provincial income assistance rates, to be part of programmes eligible for federal funding, cannot be completely freely set. Provinces cannot arbitrarily determine assistance rates. While the Manitoba legislation was found not to display this kind of problem, more recent provincial assistance rates — some the product of quite dramatic cutbacks — might.

Several provinces are considering changes in income assistance rates and at least one province has already brought in quite severe reductions.[30] Arguably, given that current rates are already under most poverty line measures, new lower rates will be manifestly not consistent with individuals' basic requirements. As absolute reductions, not off-set by higher payments in other months as was the case in *Finlay*, the new rates might well challenge even Sopinka J.'s understanding of "consistent". Of course, such a conclusion would require a quantitative examination of what level of support is entailed by CAP's reference to "basic requirements" — an issue which both the majority and minority opinions in *Finlay* were able to duck, as Finlay was challenging only his allowance after deductions. However, were a province's assistance rates to provide a regular allowance that clearly could not provide for, say, both food and shelter needs, a challenge to such a rate might succeed. After all, Sopinka J.'s judgement says very bluntly that provinces must provide assistance rates that are consistent with basic requirements. Nothing is mentioned about a province's prerogative to determine whether rates are consistent or not.[31] And, were the claimant able also to establish that other factors such as arbitrary budget reductions, political antagonism to assistance recipients, or unreasonable concerns about fraud were primary motivations for the reductions — precisely those motivations currently observable in provincial welfare reform politics[32] — it would be hard to argue that even subjectively, from the province's own perspective, the rates should be considered consistent with basic requirements.[33]

But how probable is it that the judiciary, especially those sitting on the Supreme Court, will find a breach of CAP in these circumstances? Commentators feel that such an outcome is politically unlikely.[34] After all, current income assistance rates, including Manitoba's at the commencement of Finlay's case, are already well below the poverty line established by Statistics Canada's low income cut-off lines. This fact did not seem to give pause to either Sopinka J. or McLachlin J. As well, it is important to remember that underlying this issue is the larger question of the constitutionality of the exercise of the federal spending power. If provinces want federal economic participation in provincial programmes to continue, they are put in the tricky position of arguing for provincial control within the larger context that, by tolerating the use of federal spending to influence provinces somewhat, legitimates a reduction of this control. So provinces, in assertion of their ability under CAP to set assistance rates with only limited

control exercised by CAP's terms, will have to argue for such autonomy without also pushing the courts to find, precisely in defense of provincial autonomy, shared-cost agreements constitutionally untenable. Too rigorous a control exercised by CAP over contrary provincial desires to lower assistance rates might politically doom CAP's programmes by convincing provinces to discard this balancing act and to attempt simply to persuade the courts to curtail constitutionally the exercise of the federal spending power. Federal money might no longer be seen as sufficient enough an incentive or bargain if it came attached with too economically onerous a set of conditions. Thus, were a challenge to provincial rates mounted that promised some chance of success, it is possible that the question of the constitutional legitimacy of the federal spending power — a consideration that, in *Finlay*, Sopinka J. implicitly and McLachlin J. explicitly steered clear of — would directly arise.[35] What Finlay attempted to do, after all, was use the federal spending power, as it has been crystallized in CAP, to force Manitoba's adherence to certain social policy goals not otherwise favoured by the province. Courts themselves might be reluctant to allow such circumvention of the Constitution's jurisdictional assignment if the conflict between the economic coercion the spending power enables the federal government to wield and the provinces' political autonomy became too apparent.

But more important, perhaps, to consideration of the import of *Finlay*, are recent indications that CAP itself is destined to become only an interesting historical artifact. Under the previous federal Conservative government, there were indications that when the current federally-imposed ceiling on CAP contributions to British Columbia, Ontario, and Alberta expired in 1995,[36] the federal government would retire the scheme itself. The new federal government's calls for revision and re-thinking of social programmes hint at a similar threat to CAP's continued existence.[37] Thus with federal/provincial cost-sharing agreements as currently structured by CAP likely on the way out, whatever import the principles established in *Finlay* will have is uncertain and probably irrelevant.

This last point brings consideration of the underlying politics of *Finlay* full circle. Without a more favourable political environment for social welfare issues, attempts to use the courts to force observance or creation of legal (non-constitutional) obligations towards individuals in economic need remain vulnerable to shifts in legislative will.[38] Litigation such as *Finlay* is thus politically contained by what political actors will ultimately tolerate and by what legal opportunities political actors are willing to leave open. Given the current antipathy toward social programmes discussed in the opening paragraphs of this comment, it may be much more effective to engage directly with these politics instead of hoping to circumvent them through legal action.❑

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Endnotes

1. Statistics from 1991 show that in most provinces single, employable recipients receive less than 50% of Statistics Canada's low income cut-off line. Most other recipients receive amounts clustering around 60 or 70% of this poverty line (National Council of Welfare, *Welfare Incomes 1992* [Ottawa: Minister of Supply and Services Canada, 1993]). How poverty is measured is far from uncontroversial and will, of course, affect the degree to which income assistance rates are considered to raise individuals out of poverty. Two types of approaches are identifiable. The first relies on an absolute measure of poverty that is determined by simple cataloguing of the essentials necessary for physical survival. Whatever items fall within this list are priced, and the resulting sum sets the level below which a person is considered to be living in poverty. Such an indicator is independent of the levels at which others in society are living. For an example of an articulation and defense of an absolute approach to defining poverty, see Christopher A. Sarlo, *Poverty in Canada* (Vancouver: The Fraser Institute, 1992). A less extreme adherence to an absolute measure is illustrated by the Montreal Diet Dispensary Guidelines, issued by the Montreal Diet Dispensary in association with the Montreal Council of Social Agencies. The second type of poverty measurement sets up a relative indicator of poverty. Statistics Canada's "Low Income Cut-Offs" are the most well-known of these and are based on the finding that, on average, Canadians spend 36.2% of their gross income on food, clothing, and shelter. Any family that must spend at least an additional 20% of income on these items, is considered to be in a low income group. The measurement is thus formulated relative to the standard of living others in society enjoy (David P. Ross & E. Richard Shillington, *The Canadian Fact Book on Poverty-1989*, [Ottawa/Montreal: The Canadian Council on Social Development, 1989]).
2. Statistics Canada has reported that the poverty rate in 1992 was 16.8%, compared with a rate of 16.5% in 1991. Thus, an additional 139,000 people fell below Statistics Canada's low income cut-off line in 1992. See Geoffrey Yorke, "Welfare offers radical reform of safety net: Newfoundland to help poorest poor" *The Globe and Mail* (15 December 1993).
3. Geoffrey Yorke, "Tories determined to redraw poverty line" *The Globe and Mail* (14 April 1993); Jonathon Ferguson, "Poverty numbers inflated, PCs say" *The Toronto Star* (9 June 1993).
4. Public opinion seems to indicate support for this approach to reform of social programmes. A public opinion poll conducted by Decima Research in August, 1992 found that only 28% of Canadians believed that income support was a right that should not be linked to education or training requirements. Of those polled, 79% felt it was time for a serious review of social programmes. See "Public seeks welfare changes: More education favoured in poll" *The Globe and Mail* (25 August 1993).
5. Ontario's government has been examining the question of welfare reform for over three years. The government's most recent release of proposals, in a report entitled *Turning Point*, was released on July 8, 1993. Implementation of welfare reform

was recently delayed until Spring 1994. The government hopes to have its reforms in effect by 1995, the year the New Democrats must seek re-election. Welfare advocates are not optimistic that the Ontario proposals will signal a social assistance programme that is more sensitive to the circumstances income assistance recipients face, or the levels of poverty that currently characterize their economic situations. See Martin Mittelstaedt, "Ontario to overhaul welfare: "Penalty planned if recipients don't acquire job skills" *The Globe and Mail* (9 July 1993); Richard Mackie, "Ontario likely to delay bill on welfare reforms: Minister cites cost, complexities of system" *The Globe and Mail* (16 November 1993).

6. Some recent changes to the administration of British Columbia's income assistance system include mandatory job search report cards for single employable individuals and childless couples, pilot programmes of required in-person cheque pick-up from local ministry offices, alteration of the single parent exemption policy such that a single parent will be considered employable when her youngest child is 12 years of age rather than 19. See Ministry of Social Services, *News Release*, January 20, 1994; Keith Baldrey, "Special investigations unit set up to fight welfare fraud," *The Vancouver Sun* (7 May 1993).

7. In June of 1993, the Committee on Economic, Social, and Cultural Rights, acting under the auspices of the Economic and Social Council of the United Nations, conducted its second periodic review of Canada's performance as a signatory under *The International Covenant on Economic, Social, and Cultural Rights*. Specifically, the Committee considered Canada's adherence to articles 10 through 15 of the *Covenant*. These articles provide for a range of social and economic rights including, for example, the right to an adequate standard of living (Article 11). Concern was expressed by the Committee over the persistence of poverty in Canada and the observable lack of progress Canada has made over the last decade in alleviating the severity of poverty, particularly with respect to specially vulnerable groups. The Committee was also concerned that individual Canadians entirely dependant on welfare payments did not thereby derive an income which was at or above the poverty line. The Committee noted that there were no fundamental difficulties impeding Canada's application of the *Covenant*. Despite the fact that it had been affected by the recent recession, Canada still enjoyed one of the highest rates of economic growth during the 1980's (United Nations Economic and Social Council, Committee on Economic, Social, and Cultural Rights, "Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social, and Cultural Rights (Canada)" 10 June 1993).

8. For discussions of the negative consequences of poverty with respect to political resources and participation in civil society, see R. Miliband, "Politics and Poverty" in D. Wedderburn, ed., *Poverty, Inequality and Class Structure* (Cambridge: Cambridge University Press, 1974); Martha Jackman, "'Constitutional Contact with the Disparities in the World': Poverty as a Prohibited Ground of Discrimination Under the Canadian *Charter*" (unpublished manuscript on file with author).

9. [1993] 1 S.C.R. 1080.

10. R.S.C. 1980, c. C-1.

11. Manitoba and the Federal government reached such an agreement in March 20, 1967. Federal funding to provincial and territorial programmes takes a variety of forms in addition to CAP. Other forms include equalization payments through which the federal government effects wealth transfers from the wealthier to the poorer provinces, grants for specific programmes or projects, and block-funding calculated according to a per-capita formula.

12. Basic requirements are defined in section 2 of CAP as covering food, clothing, shelter, fuel, utilities, household and personal supplies.

13. C.C.S.M., C. s. 160.

14. Finlay was not arguing for a right to a particular level of income assistance. Rather, he argued that the Manitoba government, having made a decision about what was adequate assistance when it set its assistance rates, could not pay individuals below this level.

15. Presumably, the deductions stopped for compassionate reasons. SAA allows that overpayments are to be recovered except in circumstances where such recovery would occasion hardship for the assistance recipient. See *infra* text associated with notes 24-25.

16. *Finlay* v. *Canada (Minister of Finance)*, [1986] 2 S.C.R. 607.

17. (1989), 57 D.L.R. (4th) 211.

18. [1990] 2 F.C. 790.

19. For a discussion of the federal spending power, see *infra* text on p.35 and accompanying notes.

20. The phrase "dans une mesure ou d'une manière *compatibles* avec ses besoins fondamentaux" (emphasis added) appears in subsection 6(2)(a) and the requirement that the province "*tiendra compte* ... de ses besoins matériels et des revenus et ressources" (emphasis added) constitutes paragraph 6(2)(b).

21. Section 6(2)(b) on the other hand, according to Sopinka J. establishes the requirement that the factors it lays out are to be "considered" in the resulting determination.

22. Of course, had Sopinka J. read the preamble so as to allow its initial recognition of concern over the adequacy of assistance to persons in need to inform the purpose of CAP, simple encouragement of programme development — regardless of the support levels — could not be properly understood as Parliament's goal. That is, the objective would have to be to encourage adequate and effective programmes, not simply a greater number of programmes.

23. Sopinka J. looked generally at the provisions in SAA and its accompanying regulations. Section 20(3) of the *Act* currently allows deduction from social allowance payments of overpayments, provided that such deduction does not amount to undue hardship.

24. Provisions for re-payment are included within the federal statute: section 5 of CAP provides for federal and provincial sharing of the cost of overpayments, while section 3 requires provinces to make provision for recovery of such overpayments.

25. See *supra* text associated with notes 14-15.

26. Section 1 of the Manitoba legislation uses the term "basic necessities".

27. Like Sopinka J., McLachlin J. found the overpayment recovery provisions of SAA formally consistent with CAP.

28. It was shown that 11% of the 5,000 recipients of aid were reduced below the basic requirement level set by the principal legislation due to provincial administration of the statutory power to deduct overpayments.

29. Commentators have expressed concern about such a simple and voluntaristic understanding of the force the federal spending

power lends to federal government initiatives in otherwise provincial areas of control. A conditional offer of federal funds is of course formally voluntary; provinces are free to reject the offer. However, realistically, such offers are politically difficult to turn down, particularly since provincial residents will continue to pay federal taxes which fund the shared programme for other provinces (Peter Hogg, *Constitutional Law of Canada, 3rd Edition* [Scarborough: Carswell, 1992]). As well, the federal government continues to occupy the tax room required to co-fund such programmes, thus depriving provinces of the availability to generate funding on their own for their own programmes through provincial taxes. See Andrew Petter, "Meech Ado About Nothing? Federalism, Democracy and The Spending Power" in K.E. Swinton & C.J. Rogerson, eds., *Competing Constitutional Visions: The Meech Lake Accord* (Toronto: Carswell, 1988) at 191.

30. Alberta has recently lowered its social assistance rates. In an attempt to reduce the provincial deficit, the Alberta government has cut $39 million dollars from welfare payments. This has meant a very substantial reduction of monthly rates. The new rates will give a single, employable adult $427 a month for basic requirements as compared with $521 before. The allowance a single parent with one child receives has gone from $1013 to $899. See Jim Morris, "Poor will suffer under welfare cuts, agencies contend" *The Vancouver Sun* (21 August 1993); "Alberta cuts welfare, justice and farm programs" *The Vancouver Sun* (20 August 1993).

31. McLachlin J. does, in her minority opinion, note that the level of assistance felt necessary to meet basic requirements is fixed by the provinces. However, McLachlin J. speculates that provinces cannot arbitrarily reduce payments below the amount required for "basic requirements" and still claim under CAP.

32. See *supra* text associated with notes 5-6.

33. Arne Peltz, "The *Finlay* Decision: What Next?" (on file with author).

34. See for example, Peltz, *ibid.*

35. The Supreme Court has yet to rule directly on the issue of the constitutional legitimacy of the federal spending power. In *Re Canada Assistance Plan*, [1991] 2. S.C.R. 525, British Columbia brought a constitutional challenge to federal legislation amending CAP which placed a five per cent annual cap on growth of federal contributions to the three economically healthy provinces of Ontario, Alberta, and British Columbia. The result of such amendment was unilaterally to alter the terms of the agreements the federal government had reached under CAP with each of these provinces. In answering one particular argument raised by the intervening province of Manitoba, Sopinka J. for the unanimous Court said that the CAP cost-sharing scheme and the fact that the CAP amendments resulted in the withholding of federal money previously granted to fund a matter within provincial jurisdiction did not amount to federal regulation of that provincial matter. A number of cases have been dealt with this issue in the lower courts, the most recent of which is *Winterhaven Stables* v. *Canada*, (1988) 53 D.L.R. (4th) 413 (Alta. C.A.), in which CAP was upheld as constitutional.

36. See discussion *ibid.*

37. Recent newspaper accounts cite unnamed federal sources as indicating that the CAP programme could be replaced within the next two years in favour of more direct delivery of federal money to the poor. See Geoffrey Yorke, "Fishery may be test of social reforms" *The Globe and Mail* (12 February 1994).

38. Commentators have argued that the solution to this problem is to constitutionalize social welfare rights, thus insulating such protections from political alteration. However, it is far from uncontroversial that the judiciary is a reliable overseer of the interests of the economically disadvantaged. As evidence of this, one need only be reminded of the obliviousness exhibited by the majority in *Finlay* to the hardship individuals like Finlay experience when monthly assistance rates are reduced. In any case, the issue of constitutionally entrenched social rights has been discussed quite extensively, see, for example: Havi Echenberg *et al.*, *A Social Charter For Canada: Perspectives on the Constitutional Entrenchment of Social Rights*, (C.D. Howe Institute, 1992); Joel Bakan and David Schneiderman, eds., *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992).

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too, or that there are alternative regimes available. As will be discussed below, the Alberta regime (which is modelled on Ontario's in many ways) is designed to achieve other goals than those that have always been at the heart of the federal regime. For comparisons of the rationales for and forms of regimes see F. Leslie Seidle, *Provincial Party and Election Finance in Canada* (Toronto: Dundurn Press, 1991).

16. Richard Johnston, André Blais, Henry E. Brady and Jean Crête, *Letting the People Decide* (Montreal, McGill-Queen's, 1992). The authors were also suspicious that "lag effects" might be in play, which would mean that any effect would appear only after a lag, and would not be reflected in correlations of action and attitudes at a single point in time.

17. Indeed, in subsequent pages they came back to the problem from another direction, performing an analysis which led them to conclude, for example, that "if news drove the immediate aftermath of the debates, advertising dominated the endgame", and each boosted support for the FTA. Johnston *et al.*, *Letting the People Decide*, *ibid.* at 166.

18. K.Z. Paltiel, *Political Party Financing in Canada*, *supra* note 8 at 142.

19. It is worth noting that all forms of expression by "third parties" are not limited. Internal communications within organizations (companies, trade unions, associations) are not — and never have been — prohibited under the federal regime.

20. F.L. Seidle and K.Z. Paltiel, "Party Finance, the Election Expenses Act, and Campaign Spending in 1979 and 1980" in Howard R. Penniman, ed., *Canada at the Polls, 1979 and 1980: A Study of the General Elections* (Washington: AEI, 1981) at 276-79.

21. The Alberta legislation also differs from Ontario in significant ways: it does not set spending limits, for example. Nonetheless, the Legislative Assembly explicitly saw its regulations as forming a package, which included disclosure, designed to regulate the contributor-recipient relationship in the direction of transparency.

22. RCEFPF, *Reforming Electoral Democracy*, Vol. 1 (Ottawa: Supply and Services, 1991) at 328.