

Denial of the means of subsistence as an equality violation

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I INTRODUCTION

Poverty is an urgent equality issue for women all over the world. Canada, since the Depression of the 1930s, has had a history of good social programmes. And those programmes have been a central egalitarian force in women's lives. Public health care, childcare, affordable public education, unemployment insurance and social assistance have all provided ways of ameliorating women's inequality, shifting some of the burden of unpaid care-giving to the state, and making available more opportunities for women to engage in paid work, education and community life. Income security programmes, like employment insurance and social assistance have also softened women's dependence on men, ensuring that women have independent income at crucial times in their lives.

But this has changed in Canada. For some time now we have been experiencing restructuring 'Canadian-style', including a race to the bottom among provincial governments to eliminate the entitlement to social assistance, narrow eligibility rules and reduced welfare benefits. In recent years, successive governments have hacked away at the social safety net. The cuts to social programmes have hurt women.¹

The picture of women's poverty and overall economic inequality is shocking in a country as wealthy as Canada. Women have moved into the paid labour force in ever-increasing numbers over the last two decades,² but they do not enjoy equality there, not in earnings, in access

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¹ Paul Martin, the current Prime Minister, has been a key player in the International Monetary Fund, and implementer of the IMF formula of downsizing government, cutting social programmes and increasing privatization. Prime Minister Martin is on record as saying that he knows that women are hardest hit by restructuring. As Finance Minister he presided over the elimination of the Canada Assistance Plan. The CAP established enforceable national standards for social assistance, and a formula for intergovernmental cost sharing for social assistance.

² Statistics Canada *Women in Canada 2000: A Gender-Based Statistical Report* (2000) [hereinafter *Women in Canada 2000*] at 12.

to non-traditional jobs and managerial positions,³ or in benefits.⁴ The gap between men's and women's full-time, full-year wages is due in part to occupational segregation in the workforce, which remains entrenched, and to the lower pay that is accorded to traditionally female jobs. Although the wage gap has decreased in recent years, with women who are employed on a full-time, full-year basis now earning about 72 per cent of comparable men, part of the narrowing of this gap is due to a decline in men's earnings, and not to an increase in women's.⁵

Women's annual average income from all sources is about 62 per cent of men's.⁶ This significant difference in income is partly attributable to the wage gap, but also partly attributable to the fact that women work fewer hours than men in the paid labour force because they cannot obtain full-time work⁷ and because they carry more responsibility for unpaid care-giving duties.⁸ In 1999, 41 per cent of women, compared to 29 per

³ Ibid 12 and 107. *Women in Canada 2000* notes that '[t]he majority of employed women continue to work in occupations in which women have traditionally been concentrated. In 1999, 70 per cent of all employed women were working in teaching, nursing and related health occupations, clerical or other administrative positions and sales and service occupations.' The report also notes that 'women continue to account for large shares of total employment in each of these occupational groups. In 1999, 87 per cent of nurses and health-related therapists, 75 per cent of clerks, 62 per cent of teachers, 59 per cent of sales and service personnel were women.' The report also notes that 'women tend to be better represented among lower-level managers as opposed to those at more senior levels. In 1999 women made up only 27 per cent of senior managers, compared with 36 per cent at other levels' (at 107).

⁴ Ibid 278. *Women in Canada 2000* states that private employment-related retirement pensions provide 13 per cent of the income of senior women, as opposed to 27 per cent of the income of senior men. While payments from public pension plans provide about the same percentage of the income of senior women and men, since benefit amounts are tied to earnings senior women receive less per year than senior men. Monica Townson also notes in *Independent Means: A Woman's Guide to Pensions and a Secure Financial Future* (1997) at 98-100, that pension rules that discriminated against women in the 1970s and 1980s, by requiring women to work longer to be eligible for a pension, or to retire earlier than men, still have a lingering effect on the amount of women's pension benefits or on access to a pension because when the rules were changed those changes were not retroactive.

⁵ See I Bakker 'Introduction: The Gendered Foundations of Restructuring in Canada' in I Bakker (ed) *Rethinking Restructuring: Gender and Change in Canada* (1996) 13-14; P Armstrong 'The Feminization of the Labour Force: Harmonizing Down in a Global Economy' in Bakker *Rethinking Restructuring* 29-54; *Women in Canada: A Statistical Report* 3ed (1995) 86. See also K Scott & C Lochhead *Are Women Catching Up in the Earnings Race?* (1997) 2. Scott and Lochhead state that '[p]reliminary analysis shows that the women who made wage gains over the last decade were the beneficiaries of a pool of good jobs in the health, education and social service sectors. However, as the structure of the economy continues to change, with the continuing polarization of job opportunities, there is a real danger that women's economic advances will be halted. And such a situation would herald greater economic insecurity for all Canadians.'

⁶ *Women in Canada 2000* (n 2) 13.

⁷ In 1999, 25 per cent of part-time workers indicated that they wanted full-time work but could not find it. Ibid 104.

⁸ Women's care of children affects their participation in employment and, consequently, their incomes. Women with preschool-aged children are less likely than those with school-aged children to be employed. In 1999, 63 per cent of women with children under age six were employed, compared to 74 per cent of women with children aged six to fifteen. Single

cent of men, held non-standard jobs⁹ – that is, they were self-employed, had multiple jobs, or jobs that were temporary or part-time. These jobs are unlikely to be unionized and unlikely to provide pensions or benefits.¹⁰

Some groups of women in Canada are more marginalized than others in the labour force. Aboriginal women are heavily concentrated in low-paying sales, service, and clerical jobs. They also have higher unemployment rates and lower earnings levels than other women.¹¹ Women of colour have higher education levels than other women, but not better jobs and better earnings. Instead, they too have higher unemployment rates and lower earnings than other women and than their male counterparts.¹² Immigrant women also generally earn less than other women and initially accept employment for which they are overqualified. They are more likely than other women to be employed in manual work.¹³ Women with disabilities earn less than their male counterparts and less than other women in most age groups.¹⁴ Even though women's earnings are substantially lower than men's, women play a significant role in keeping their families out of poverty through their earnings. Without women's earnings, poverty rates would rise dramatically and the number of poor families would more than double.¹⁵ In addition to diminished rewards for their labour, women do not enjoy an equal share of wealth, including property, savings, and other resources.¹⁶

The extreme manifestation of women's economic inequality is women's disproportionate poverty. More women than men are poor. Between 1983 and 2002, the poverty rate for women fluctuated between 20,4 per cent and 14,8 per cent, always higher than the rate of poverty for men.

Even the lower rate is still extremely high. It means that, in one of the wealthiest countries in the world, one in seven women is living below

mothers are considerably less likely than women in two-parent families to be employed. 37,6 per cent of single mothers with children under three were employed, compared to 63,1 per cent of women in two-parent families with children the same age. Ibid 98 and 101.

⁹ Ibid 103.

¹⁰ M Townson 'Non-Standard Work: The Implications For Pension Policy and Retirement Readiness' unpublished report from the Women's Bureau, Human Resources Development Canada (1996) 1 and 3.

¹¹ *Women in Canada 2000* (n 2) 257–8.

¹² Ibid 224–30.

¹³ Ibid 197–203.

¹⁴ Ibid 166.

¹⁵ Ibid 146.

¹⁶ Bakker 'The Gendered Foundations of Restructuring in Canada' (n 5) 18–19; L Philipps 'Tax Policy and the Gendered Distribution of Wealth' in Bakker *Rethinking Restructuring* (n 5) 141–62.

the poverty line. Further, the overall poverty rates mask the high rates of poverty of particular groups of women.

Single mothers and other 'unattached women' are most likely to be poor. In 2002 51,6 per cent of single mothers, 41,5 per cent of unattached women over 65, and 35 per cent of unattached women under 65 were living below the poverty line. Unattached men have significantly lower poverty rates.¹⁷

The shockingly high rate of poverty among single mothers is even higher when the figures are disaggregated by race and by the mothers' ages. In 1996, 73 per cent of aboriginal single mothers were living below the poverty line.¹⁸ In 1998, 85,4 per cent of single mothers under 25 were living in poverty.¹⁹

Also, aboriginal women, immigrant women, women of colour and women with disabilities are significantly more vulnerable to poverty than other women in Canada. In 1997, 43 per cent of aboriginal women, 37 per cent of women of colour and 48 per cent of women who are recent immigrants (those who arrived between 1991 and 1995) were living below the poverty line.²⁰ Aboriginal women and women of colour also have higher rates of poverty and substantially lower incomes than their male counterparts.²¹ Women with disabilities had a poverty rate of 25,1 per cent in 1991.²²

The fact that women are economically unequal to men and more likely to be poor is not mere coincidence. It is the result of women's work not being properly valued; of women being penalized because they are the principal care-givers for children, old people, men and those who are ill or disabled; and of systemic discrimination in the workforce which

¹⁷ Statistics Canada *Persons in low income before tax* CANSIM table 202-802 and Catalogue no. 75-202-XIE <http://www.statcan.ca/english/Pgdb/famil41a.htm> (date accessed: 4 November 2004).

¹⁸ *Women in Canada 2000* (n 2) 259.

¹⁹ National Council of Welfare *Poverty Profile 1998* (2000) 32.

²⁰ *Women in Canada 2000* (n 2) 205, 232 and 259.

²¹ *Ibid* 231, 233, 258 and 259. Forty-three per cent of aboriginal women were living in poverty in 1996, compared to 35 per cent of aboriginal men and 20 per cent of non-aboriginal women. Wherever their place of residence, the incomes of aboriginal women were less than those of aboriginal men. Thirty-seven per cent of visible minority women were living in poverty in 1995, compared to 35 per cent of visible minority men, and 19 per cent of other women. In 1995, the average incomes of visible minority women were 70 per cent of their male counterparts.

²² G Fawcett *Living with Disability in Canada* (1996) 131. Documentation of this pattern of women's poverty can be found in S Day & G Brodsky 'Beyond the Social and Economic Rights Debate: Equality Speaks to Poverty' (2002) 14 *Canadian Journal of Women and the Law/Revue Femmes et Droit* 185 at 190 – 193 [hereinafter 'Beyond the Social and Economic Rights Debate']. A similar account of poverty among women in Canada can be found in the 2004 report of the Feminist Alliance for International Action *A Decade of Going Backwards: Canada in the Post-Beijing Era* http://www.fafia-afai.org/docs/B10_shadow_10CCE.6.doc accessed 30 September 2005. That report was written by S Day & N McMullen.

devalues the work of women, and marginalizes women workers who are aboriginal, of colour, immigrants or disabled. Income and poverty data not only reveal a general picture of material inequality in relation to the distribution of the society's wealth. They show the lower value that is assigned to women and women's work.

In an article published by the *Canadian Journal of Women and the Law* in 2002,²³ we advanced the argument that a substantive approach to equality under the Canadian Charter of Rights and Freedoms²⁴ requires recognition of positive constitutional rights compelling governments to ensure that everyone has adequate food, clothing, and housing. To be clear, this is an interpretive argument. This is not a call to amend the Canadian Charter to add explicit references to social and economic entitlements, such as those that appear in the South African Constitution, but rather an argument that equality rights guarantees are capable of doing this work. We argued more particularly that the idea of a hierarchy between civil and political rights and economic, social and cultural rights comes from an outmoded constitutional paradigm, which clings to a negative rights model of constitutional rights, envisioning them only as restraints on harmful state action.

We suggested that a formal conception of equality rights fits well within such an outmoded negative rights paradigm, but that a substantive conception of equality rights does not. Rather, substantive equality, by definition, requires governments to take positive steps towards remedying group disadvantage, including the poverty of women. We put forward an analysis of women's poverty as a sex equality issue on the basis that it is a manifestation of discrimination against women, that affects women, and particular groups of women disproportionately, by exacerbating every form of social and sexual subordination that women experience. We concluded that women's right to substantive equality must be understood to encompass a basic right to income security because without that security, profound deprivations of personal autonomy and of physical and psychological integrity – which are incompatible with women's equality – result. A short-handed way of summarizing our position might be: social and economic rights are civil and political rights. We note that in the South African context there is also commentary to the effect that equality rights must be interpreted to address women's actual conditions of social and economic disadvantage.²⁵

²³ 'Beyond the Social and Economic Rights Debate' (n 22).

²⁴ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act (1982) being Schedule B to the Canada Act 1982 (UK) cl 11.

²⁵ See, for example, C Albertyn & B Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *SAJHR*

A primary focus of our 2002 article was the case of *Gosselin v Quebec (Attorney General)*,²⁶ which at the time was pending in the Supreme Court of Canada. Louise Gosselin's was the first Charter case concerning social assistance to reach the Supreme Court of Canada.

Since the publication of our earlier article, judgement in the *Gosselin* decision was rendered. Louise Gosselin's claim was unsuccessful. However, the decision was divided, and the majority decision purported to turn on the sufficiency of the evidence rather than legal principle. Therefore, its importance as a precedent may be negligible. However, certain theoretical issues emerged that will be of enduring importance, as the struggle to address the injustices caused by cutbacks to social programmes continues. One crucial issue, which arose in the context of s 15 (equality), is whether discrimination is only about stereotyping. The central goal of this paper is to comment on how the Court dealt with the issue of stereotyping, in light of the analysis advanced in our earlier article. For the future of constitutional jurisprudence and women's equality it is critically important that there was a consensus on the Court – albeit incompletely developed or applied – that equality is not confined to protecting individuals from group stereotypes. The paper also touches upon the Court's decision concerning s 7 rights (life, liberty and security of the person) which confirms that the door is open for the Court to recognize the Charter encompasses a positive obligation to ensure that everyone has a subsistence income.

II *GOSSELIN v ATTORNEY GENERAL (QUEBEC)*: OVERVIEW OF THE DECISION

In 1984, the Quebec government altered its social assistance scheme in an effort to coerce young people into the labour force, through denial of the means of subsistence. Section 29(a) of the Regulation Respecting Social Aid²⁷ set the base amount of welfare for adults between the ages of 18 and 30 at roughly one third of the base amount payable to those 30 years of age and over. In dollar terms, the difference was \$170 per month compared to \$466 per month. \$466 per month was the amount the Quebec Legislature had defined as 'the bare minimum for the sustain-

248; S Liebenberg & M O'Sullivan 'South Africa's New Equality Legislation: A Tool for Advancing Women's Equality?' 2001 *Acta Juridica* 70; S Jagwanth & C Murray 'Ten years of transformation: How has gender equality in South Africa fared?' (2000) 14 *Canadian Journal of Women and the Law* 255.

²⁶ *Gosselin v Quebec (Attorney General)* [2002] 4 SCR 429 [hereinafter *Gosselin*].

²⁷ Regulation Respecting Social Aid RRQ c A-16 r 1 s 29(a).

ment of life'.²⁸ The monthly cost of proper nourishment alone was \$152 per month.²⁹

The under 30s could increase their rate by participating in three different 'employability programs'. But the government's employability programs were structurally incapable of allowing all the under 30 recipients to reach the regular rate of welfare, defined as necessary to meet basic needs. This was so because: not all of the programs provided participants with a full top-up to the basic level; there were temporal gaps in the availability of the various programmes to willing participants; welfare recipients who were illiterate or severely under-educated, or 'over-educated', could not participate in certain programs; and only 30 000 program places were available although there were 75 000 under 30 welfare recipients. Although some people in the under 30 age group were able to access employability programs through which they could get themselves back to the regular rate, for the vast majority, the regular rate was out of reach.³⁰

Living on the reduced rate had severe physical and psychological effects. The reduced rate did not provide enough income to allow the men and women in the under-30 group to meet basic needs for food, clothing and shelter. They resorted to degrading and criminalized survival strategies, such as begging and petty theft. They were often homeless and malnourished. They experienced psychological stress, anxiety and despair.

The reduced rate put women at risk in specific ways. For example, as a survival strategy, some young women on the reduced rate became

²⁸ *Gosselin* (n 26) paras 251, 285 per Bastarache J. Similarly at para 334 Arbour J put it this way: 'This is the amount that was deemed by the legislature itself to be sufficient to meet the "ordinary needs" of a single adult.' At para 372 Arbour J stated:

'On \$170/month, paying rent is impossible. Indeed, in 1987, the rent for a bachelor apartment in the Montreal Metropolitan Area was approximately \$237 to \$412/month, depending on the location. Two-bedroom apartments went for about \$368 to \$463/month. As a result, while some welfare recipients were able to live with parents, many became homeless. During the period at issue, it is estimated that over 5 000 young adults lived on the streets of the Montreal Metropolitan Area. Arthur Sandborn, a social worker, testified that young welfare recipients would often combine their funds and share a small apartment. After paying rent however, very little money was left to pay for the other basic necessities of life, including hot water, electricity and food. No telephone meant further marginalization and made job hunting very difficult, as did the inability to afford suitable clothes and transportation.'

²⁹ *Ibid* para 130, per L'Heureux-Dubé J.

³⁰ *Ibid* para 130, per L'Heureux-Dubé J. Similarly, at para 371, Arbour J stated that '[t]he various remedial programs put in place in 1984 simply did not work: a startling 88,8 percent of the young adults who were eligible to participate in the programs were unable to increase their benefits to the level payable to adults 30 and over. In these conditions, the physical and psychological security of young adults was severely compromised during the period at issue.' At para 254, Bastarache J stated that 'any reading of the evidence indicates that it was highly improbable that a person under 30, with the best intentions, could at all times until he or she was 30 years old be registered in a program and therefore receive the full subsistence amount.'

pregnant and had children in order to become eligible for benefits at the regular rate of social assistance. A number of young women on the reduced rate engaged in prostitution or accepted unwanted sexual advances to try to keep their apartments, to pay monthly expenses, such as heat and electricity, or to buy food.

The appellant, Louise Gosselin, brought a class action on behalf of herself and approximately 75 000 other young people who were affected by the regulation between 1985 and 1989. The constitutional issue before the Supreme Court of Canada was whether the challenged regulation violated ss 7 or 15 of the Charter. Louise Gosselin's claim was rejected on all grounds.

As we have said, the decision was deeply divided. The s 15 decision was particularly close, a five to four split. In its s 15 decision, the majority ruled that cutting the social assistance rate of adults under 30 to a below-subsistence rate was not a violation of s 15. The five-judge majority identified the disagreement with respect to s 15 as not being about the 'fundamental approach' but rather about whether the claimant had discharged her burden of proof. Similarly, regarding the s 7 rights to life, liberty and security of the person, the decision was split (seven to two). That decision features a particularly strong dissenting opinion by Arbour J concurred in by L'Heureux Dubé J. As with s 15, the explanation of the majority for refusing the s 7 claim was that the evidence was insufficient, not that there is no constitutional right to social assistance.

III DISCRIMINATION IS NOT ONLY ABOUT STEREOTYPES

One of the traditional understandings of anti-discrimination and equality guarantees is that their purpose is to protect individuals from the evil of stereotype. The insight that discrimination may result from reliance on stereotype is important. Women have often benefited from the norm against stereotyping, particularly in the employment context, by demonstrating their individual competence and thereby exposing the inaccuracy of generalized assumptions (stereotypes) about what women can and cannot do.

Similarly, in rental housing situations women have also benefited from the legally established principle that landlords are not permitted to refuse housing to single mothers based on a blanket assumption that single mothers do not pay their rent. Human rights jurisprudence says that the ability of prospective renters must be individually assessed, based on financial criteria, not negative group stereotype. Although this does nothing for the woman who cannot afford to pay for housing, it does afford some measure of protection for those who can afford to pay, but face stereotypes about their reliability.

As we have argued elsewhere,³¹ the challenged legislative scheme in the *Gosselin* case was discriminatory in the very way that discrimination has most traditionally been defined. It rested on a negative stereotype of people who are reliant on social assistance, and of young people reliant on social assistance in particular. Young people are particularly subject to the generalized assumption that laziness is at the root of their reliance on welfare. They are perceived to be the ‘sturdy beggars’ who first appeared in the Elizabethan poor laws.³² ‘Sturdy beggars’ were the ones whom the parish was to punish if they did not work, while other indigents were to be fed and housed. In the *Gosselin* decision, various judges including Lebel J addressed the problem of stereotyping. Lebel J explained that withdrawing social assistance from young people was not related to the needs or abilities of welfare recipients under 30 years of age, but rather flowed from and reinforced a stereotype of social assistance recipients as ‘parasites’. Lebel J pointed out that young people are the first to feel the impact of an economic crisis in the labour market and that the problem in Quebec in the economic crisis in the 1980s was not that young people latched on to social assistance because of laziness but rather that there were no jobs available.³³ The stereotype was disproved by numerous experts. One example identified by Lebel J was the report of Professor Gilles Guérin in which he wrote, inter alia:

‘An estimated proportion of 91% of young people (counting only those capable of working) perceive their situation on social aid as temporary and have a fierce desire to work, to have a “real” job, to collect a “real” wage, and to acquire socio-economic autonomy. An IQOP study shows that young people value being productive workers, that it is preferable in their eyes to hold a job, even one that does not interest them, than to be unemployed. *The myth of the young social assistance recipient who is capable of working and is happy*

³¹ G Brodsky ‘*Gosselin v Quebec (Attorney General): Autonomy With a Vengeance*’ (2003) 15 *Canadian Journal of Women and the Law* 194. See also ‘*Gosselin v Quebec (Attorney General)* Women’s Court of Canada’ forthcoming in *Canadian Journal of Women and the Law* Spring 2006.

³² The Poor Law of 1601 placed every English parish under an obligation to relieve the aged and ill and to provide work for the able-bodied poor. See *An Act for the Relief of the Poor* (1601) 43 Eliz, ch2 (Eng) reprinted in 7 Stat. At Large (Eng 37–37) (Danby Pickering ed (1762)). A 1697 amendment to the English poor laws aimed to distinguish the ‘genuinely deserving’ recipients from ‘the idle, sturdy, and disorderly beggars’. See *An Act for Supplying Some Defects in the Law for the Relief of the Poor of This Kingdom*, 1696–97, 8 and 9 Will 3, ch30, § 2 (Eng), reprinted in 10 Stat. At Large (Eng) 106 (Danby Pickering ed) amending Poor Relief Act 1662, 14 Car 2, ch 12 (reprinted in 8 Stat. At Large (Eng) 94–95 (Danby Pickering ed)). A provision of the Act required all people who received poor relief to wear the letter ‘P’ in red or blue cloth on the right shoulder of their clothing. Refusal to wear the badge resulted in a reduction or elimination of relief, or imprisonment with hard labour for up to twenty days. This amendment introduced the notion, that still has currency today, that it is legitimate to subject beneficiaries of public relief to stigmatizing and humiliating treatment, both as a means of deterring the poor from relying on public relief, and in order to ensure that the non-deserving poor do not receive it.

³³ *Gosselin* (n 26) para 407, per Lebel J.

*with social assistance is therefore completely false; work is what is most highly valued by the people around them, their friends and family and their neighbours, and by the young people themselves.*³⁴

Four of the five judges in *Gosselin* had no difficulty in perceiving the stereotype that was embedded in the regulation of a young person as, by definition, lazy and unwilling to work. Louise Gosselin's story of having repeatedly tried and sometimes succeeded but other times failed at employment and job training, demonstrated the inaccuracy of the generalization. However, apparently the majority did not see this.

In the majority's view, the evidence established that the government's purpose was to help young adults achieve long-term autonomy,³⁵ by creating an incentive to compel young adults to participate in training programs that would increase their employability.³⁶ According to the majority, this purpose was not based on stereotype because it 'corresponded to the actual needs and circumstances of individuals under 30',³⁷ and was 'an affirmation of their potential'.³⁸ Although some under 30 individuals may have fallen 'through the cracks of the system and suffered poverty',³⁹ this fact was not, in the majority's view, sufficient to establish discrimination.⁴⁰ The majority found that the negative financial incentive imposed on the under 30 group 'was not imposed as a result of negative stereotypes'.⁴¹

This conclusion is disturbing. The majority is guilty not only of refusing to closely scrutinize generalized and overly broad assumptions about young people's needs and capacities, and of failing to distinguish theoretical employability from a de facto crisis in the employment market, but also of embracing and perpetuating contempt for a vulnerable and historically marginalized group. However, the main point of this paper is not to argue that the majority should have recognized and rejected both the stereotype—of young welfare recipients as parasites—and the challenged regulation because it was poisoned by that stereotype. Rather, our main point is to reconsider the sufficiency of stereotyping as an understanding of what counts as discrimination and to suggest that discrimination has other dimensions that should be more fully considered and developed.

There are various reasons why we should not treat stereotyping as the sine qua non of discrimination. One important reason is that insistence

³⁴ Ibid para 405. Translation by authors, emphasis added.

³⁵ Ibid paras 27, 43–4, and 65.

³⁶ Ibid paras 41–42.

³⁷ Ibid para 38.

³⁸ Ibid para 19.

³⁹ Ibid para 54.

⁴⁰ *Gosselin* (n 26) paras 55–56.

⁴¹ Ibid para 52, per McLachlin CJ.

on proof of stereotyping can too easily slide into a requirement for proof of malicious intent, contrary to the well-established principle that proving discrimination does not necessitate proving bad motive. Even before the Charter, anti-discrimination law in Canada held that it was not necessary to prove that discrimination was intentional and ill-motivated, and acknowledged that discrimination could result from the adverse effects of a facially neutral rule. It is also settled law that discrimination may result from the adverse effects of a seemingly neutral system of rules and practices, or from a combination of seemingly neutral rules and blatant prejudice. And yet, a decision such as *Gosselin* shows that judges may have difficulty in perceiving a negative stereotype that is embedded in a rule that the respondent believes has been imposed for the claimant's 'own good'.

Further, stereotyping consists of an unfounded or mistaken generalization about a group that is applied to individual members of the group, denying their individual capacity or needs. However, there are some differences between groups, such as some of those relating to pregnancy, certain disabilities, and historic disadvantages experienced by some groups, that are real and not mistaken. Nonetheless, we do not or at least should not accept those differences, which are real, and not the product of mistaken generalizations, as a legitimate basis for practices that have the effect of reinforcing and perpetuating marginalization, material inequality, and subordination.

There is an additional problem, namely the insufficiency of the responses to stereotyping. The antidotes to stereotyping are usually thought to be facial neutrality, and where necessary, individual assessment. However, when the problem is that social programmes that are vital to women's equality are being eroded, and poverty-reducing benefits that were formerly taken for granted are being cut, facial neutrality and individual assessment are ineffectual responses. Neither a facially neutral welfare scheme nor individual assessment can provide any comfort to a woman, if the scheme has been eliminated or rates have been reduced for all recipients.

We are aided in our endeavour to decenter stereotyping by the fact that in *Gosselin* the Court agreed that the identification of an underlying stereotype is not an essential element of discrimination. On behalf of the majority McLachlin CJ said that the absence of stereotypical thinking is only one factor to be considered and that stereotypical thinking need not always be present for discrimination to be established. Implicit in this comment is the recognition that there are other factors that can give rise to a finding of discrimination. Although McLachlin CJ did not develop this point further, a door has been left open for further developmental work.

Claire L'Heureux Dubé J addressed the point further. Although L'Heureux Dubé J and McLachlin CJ disagreed about whether discrimi-

nation based on stereotype had been proven in this case, there was no disagreement expressed by any member of the Court with L'Heureux Dubé J's comment to the effect that discrimination may exist without stereotypes.

As we have noted, Supreme Court of Canada human rights jurisprudence⁴² has never insisted on proof of stereotyping, intentional or otherwise. Sexual harassment is one example of a practice that has been found to be discriminatory, not because it is premised on a stereotype of women workers, but rather because it is an exercise of power and a form of abuse that reinforces women's inequality in their workplaces. Similarly, in *Meiorin*,⁴³ also known as the women's firefighter case, the Court held that a fitness standard that excluded many women from firefighting work and which had not been shown by the employer to be necessary to job performance, was discriminatory. If one digs deeply enough and examines the assumptions underlying the fitness standard that had been adopted, a sexist stereotype of who is a competent firefighter can be found, but this was not necessary to the Court's analysis.

In *Gosselin*, L'Heureux Dubé J points out that support for a more fulsome understanding of discrimination can be found in the Court's jurisprudence. As one example, she points to the Court's unanimous decision in *Law*⁴⁴ and notes that discrimination may result from differential treatment that reflects stereotyping 'or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society'.⁴⁵

L'Heureux Dubé J states that the Court's concern for human dignity means that the equality guarantee 'is concerned with physical and psychological integrity and empowerment',⁴⁶ and the severe impairment of an extremely important interest – such as physical and psychological integrity – may itself be sufficient to ground a claim of discrimination. Applying the analysis to the facts of the *Gosselin* case, L'Heureux Dubé J concludes that s 29(a) was discriminatory because of the harm to physical and psychological integrity resulting from the fact of poverty and the constant fear caused by poverty. She concludes that Louise Gosselin was treated as less deserving of respect. In keeping with the point that human dignity is not only about stereotyping, but also about physical and psychological integrity, L'Heureux Dubé J also knits together the s 15 right to equality and the s 7 right to security of the person, opining that

⁴² By 'human rights jurisprudence' we mean case law arising under both statutory human rights instruments and the equality provisions of the Charter.

⁴³ *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3.

⁴⁴ *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497.

⁴⁵ *Gosselin* (n 26) para 116, per L'Heureux Dubé J.

⁴⁶ *Ibid* para 121.

where, as in *Gosselin*, harm that is severe enough to give rise to a breach of the right to security of the person, there will be prima facie grounds for a claim of discrimination.

By drawing out the s 15 purpose of preventing the violation of human dignity L'Heureux Dubé J helps us to understand why the denial of subsistence should be considered discrimination. Judging people based on group stereotype rather than individuality is only one possible manifestation of discrimination. A consideration of other ways in which essential human dignity may be violated, and other purposes of s 15, provides a leaping off point from which to identify additional bases for recognizing that a denial of the means of subsistence should be understood to constitute discrimination.

In *Law*, the Court said:

'[the] purpose of s 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.'⁴⁷

Taking a purposive approach, here then are some additional reasons for recognizing that denying social assistance to people in need is discriminatory.

(1) *Equality-constituting benefits*⁴⁸

Equality guarantees are concerned with ameliorating the inequality of major groups in the society, including women. This can be understood

⁴⁷ *Law* (n 44) para 88.

⁴⁸ In 'Dignity, Equality and Second Generation Rights' in *Poverty: Rights, Governance and Social Citizenship* C Boyd, G Brodsky, S Day & M Young eds forthcoming (2006). Denise Reaume argues that social assistance is a 'dignity-constituting benefit'. She asserts that the underlying s 15 value of human dignity grounds an entitlement to social assistance because poverty is so profoundly threatening to identity and autonomy. Dignity can be dishonoured in different ways. But, importantly, the dignity of a person is dependent on material conditions that permit her to participate in social, political and economic life in her society as an equal member; and to make choices about her life, including sexual and reproductive choices, as an autonomous creature. About social assistance, Reaume writes:

'Social assistance recognizes that those unable to find adequate employment nevertheless need a roof over their heads and food on the table. The alternative is life on the streets, having to beg or pilfer, exclusion from most social activities, subjection to the constant risk of violence and disease, the waste of one's talents, and the likelihood of premature death. Someone confined to a hand-to-mouth existence can form no meaningful life plan; she is driven by necessity. The impairment of autonomy is comprehensive and extreme. The additional psychological toll of living such a life, including constantly dealing with the misunderstanding and prejudice of others, is staggering. The need created by poverty is . . . urgent; its alleviation is . . . integral to human dignity.'

Our thinking about 'equality-constituting benefits', and our adoption of this term, is influenced by Reaume's work.

either as another dimension of what it means to prevent the violation of essential human dignity through the imposition of disadvantage or as another s 15 purpose, namely the pursuit of substantive equality. The Supreme Court of Canada has used the terms dignity and substantive equality interchangeably.⁴⁹ Regardless, substantive equality's associations, more so than the term 'human dignity', lie with group disadvantage, marginalization, and subordination. The concept of substantive equality recognizes that certain groups in society suffer from entrenched inequality, and that members of those groups are systematically denied basic rights, freedoms and influence in the political process that others take for granted.

A government denial of the means of subsistence engages the s 15 goal of ameliorating group disadvantage. Poverty affects disadvantaged groups disproportionately. In Canada, the group 'poor people' is disproportionately composed of aboriginal peoples, women, people with disabilities, recent immigrants, people of colour, and single mothers. These groups have higher rates of poverty than average, some shockingly high. The economic inequality, as well as the social and political inequality, of members of these groups is part of the 'fall-out' from complex and deeply rooted forms of discrimination. For this reason, it is necessary to deal with poverty as an aspect of sex, race, and disability discrimination. A central cause of poverty is entrenched patterns of systemic discrimination.

Poverty exacerbates and deepens the inequality of members of already disadvantaged groups. Poor women get sex inequality writ large. As the facts in *Gosselin* showed, poverty forces women to accept sexual commodification and subordination to men in order to survive. They engage in prostitution or 'survival sex' to get by. They lose autonomy to choose freely with whom and when they will have sex, and even whether and when they will have children. They are more vulnerable to rape, assault and sexual harassment because they live in unsafe places, and they are not free to walk away from workplaces that are poisoned. They are not free to leave abusive relationships when destitution is the alternative. Poverty perpetuates women's under-representation in governments and in decision-making and their lack of political influence.

Laws or policies that perpetuate or hold in place the disproportionate poverty of women, aboriginal peoples, people of colour, or people with disabilities necessarily engage s 15 because they maintain or reinforce the disadvantage of already disadvantaged groups. Effective protection of the groups who suffer social, political and legal disadvantage in Canada requires governments to address structural or systemic forms of discrimination and their effects.

⁴⁹ See for example *Nova Scotia (Workers' Compensation Board) v Martin*; *Nova Scotia (Workers' Compensation Board) v Laseur* [2003] 2 SCR 504 para 85.

Viewed from a women's equality perspective, the s 15 guarantee of sex equality, on its own, imposes an obligation on governments to ensure that women are not denied income security adequate to meet basic needs.

We are supported in our analysis of social assistance as an equality-constituting benefit by the comments of the South African Constitutional Court in *Grootboom*.⁵⁰ The South African Constitutional Court held in *Grootboom* that it was a violation of the Constitution for the government to approve a development plan which entailed the displacement of homeless people, without making reasonable provision for people with no access to land, no roof over their heads, and who were living in intolerable situations or in crisis situations. The Court explained in *Grootboom* that, '[t]he realization of rights to housing are a key to the advancement of race and gender equality and the evolution of a society in which men and women are able to achieve their full potential'.⁵¹ The logic of the South African Constitutional Court's decision in *Grootboom*, particularly as it relates to the interdependency of social and economic rights and sex and race equality is also applicable in the Canadian context.

Although the South African Constitution contains explicit guarantees to social and economic rights, including access to housing, the absence of identical provisions in the Canadian Charter is not a persuasive reason for reading such entitlements out of the Charter. On the contrary, our argument is that in the name of realizing women's rights to equality, governments in Canada must provide social programmes, and that the obligation to do so is necessarily incidental to women's rights to equality, and life, liberty and security of the person.

A corollary is that an equality analysis is always relevant to poverty, even though there may be other rights that also apply, including, in the case of South Africa, explicit social and economic provisions, as is suggested by the comments of the South African Constitutional Court in *Grootboom*. Seeing the group dimensions of poverty, and the layers of rights infringements it both causes and reflects, strengthens the claim that there is a societal obligation to address it. When we look at poverty through a group-based equality lens we open up new opportunities to see that poverty is more than an individual problem, because the patterns of who is poor are entrenched and reflect long-standing discrimination in the society. The analytical risk of failing to take account of the particular effects on disadvantaged groups is that the nature and extent of the harm of poverty-producing measures and their potential to reinforce pre-existing disadvantage and compromise fundamental interests may not be

⁵⁰ *Government of RSA and others v Grootboom* 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC).

⁵¹ *Ibid* para 23.

fully appreciated. Purely individualistic and gender-, race-, and disability-neutral explanations of poverty are just too simplistic. Commentary about group-based effects tells more of the truth of what is happening; it can show that there are qualitatively different impacts on certain groups; it may implicate a range of different constitutional rights and treaty provisions; and it can help to call into question the validity of the thesis that poverty is all about individual irresponsibility.

(2) *Equal concern, respect and consideration*

Notwithstanding poverty's group dimensions, we do not suggest that the denial of the means of subsistence is an issue of discrimination only because the group, 'poor people', is disproportionately composed of members of historically disadvantaged groups, such as women.

Embracing the normative value of equality means that each person is understood to be inherently equal in dignity, equally worthy of respect, and equally entitled to share in the decision-making, responsibilities, opportunities, resources and benefits of their society. Conditions that have the effect of obstructing equal participation by groups and individuals in the political, economic, and social life of their society, and equal enjoyment of widely agreed to rights, including the rights to life, liberty and security of the person, contravene the equality principle.

Poverty is one of the conditions that impedes equal participation in society, and puts people at greater risk with respect to the maintenance of life, health, and physical and psychological integrity.

In Canada, social assistance is the established means of ensuring that even the poorest people are not deprived of the means of subsistence and totally banished from the society. Social assistance is a fundamental social institution. In a country as wealthy as Canada, for a government to refuse adequate social assistance to meet basic needs to a person in need is a blatant signal that that person is not regarded as equal in worth and dignity.

IV THE RIGHTS TO LIFE, LIBERTY AND SECURITY OF THE PERSON

Section 7 of the Canadian Charter reads:

'Every person 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.'

The Court's handling of s 7 of the Charter was also significant in *Gosselin*. The majority chose not to apply s 7 in this case, not because they decided that s 7 does not include positive obligations, but rather because, in the majority's view, the evidence was insufficient to warrant

the application of s 7. The majority left the door open for future s 7 challenges based on government inaction, saying that ‘it would be a mistake to regard s 7 as frozen, or its content as having been exhaustively defined in previous cases’, and stated that ‘[o]ne day s 7 may be interpreted to include positive obligations’.⁵² McLachlin CJ said, ‘I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances’.⁵³

Arbour J, with the concurrence of L’Heureux Dubé J went much further. Even though her decision regarding the application of s 7 is a dissent and even though it is about s 7 rather than s 15, it is relevant to our topic, and it is a potentially resource for future litigation because it ‘deconstructs the various firewalls’⁵⁴ that are said to preclude the courts from finding that there is a legal obligation on the state to provide basic protection for life, liberty, and security of the person. Much of the analysis is just as applicable to s 15 as it is s 7 of the Charter because Arbour J addresses centrally the question of negative vs positive rights and the requirement of state action. Here lies a terrain of dispute that is vital not only to s 7 jurisprudence but also to s 15 and to the Charter as a whole. Thus, Arbour J’s comments have helpful implications for the interpretation of s 15.

Arbour J acknowledges that it is commonly said that s 7 contains only negative rights of non-interference and therefore cannot be implicated, absent any overt state action. However, she examines this common view, framing the question this way:

‘One should first ask, however, whether there is in fact any requirement, in order to ground a s 7 claim, that there be some affirmative state action interfering with life, liberty or security of the person, or whether s 7 can impose on the state a duty to act where it has not done so. (I use the terms “affirmative”, “definitive” or “positive” to mean an identifiable action in contrast to mere inaction.) No doubt if s 7 contemplates the existence only of negative rights, which are best described as rights of “non-interference”, then active state interference with one’s life, liberty or security of the person by way of some definitive act will be necessary in order to engage the protection of that section. But if, instead, s 7 rights include a positive dimension, such that they are not merely rights of non-interference but also what might be described as rights of “performance”, then they may be violable by mere inaction or failure by the state to actively provide the conditions necessary for their fulfillment. We must not sidestep a determination of this issue by

⁵² *Gosselin* (n 26) para 82.

⁵³ *Ibid* para 83.

⁵⁴ *Ibid* para 309.

assuming from the start that s 7 includes a requirement of affirmative state action. That would be to beg the very question that needs answering.⁵⁵

Arbour J points out that it is often not clear whether the theory of negative rights underlying s 7 is intended to be one of general application, extending to the Charter as a whole, or one that applies strictly to s 7. She concludes that as a theory of the Charter as a whole, any claim that only negative rights are constitutionally protected is 'patently defective'.⁵⁶ She points to other Charter provisions that all impose positive obligations of performance on the state, including but not limited to: rights to vote (s 3), to trial within a reasonable time (s 11(b)), to be presumed innocent (s 11(d)), to trial by jury in certain cases (s 11(f)), to an interpreter in penal proceedings (s 14), and minority language education rights (s 23). She also points to leading ss 2 and 15 jurisprudence, noting that the Court has found there to be a positive dimension to the s 2(d) right to associate,⁵⁷ and that decisions like *Schachter v Canada*⁵⁸ and *Friend*,⁵⁹ confirmed that '[i]n some contexts it will be proper to characterize s 15 as providing positive rights'.⁶⁰

Arbour J also notes that in *GJ*⁶¹ the Court held that s 7 provided a positive right to state-funded counsel in the context of a child custody hearing. Arbour J points out that Lamer CJ put the proposition quite baldly saying: 'The omission of a positive right to state-funded counsel in s 10 . . . does not preclude an interpretation of s 7 that imposes a positive constitutional obligation on governments to provide counsel in those cases when it is necessary to ensure a fair hearing.'⁶² Arbour J says, 'It is in the very nature of such obligations that they can be violated by mere inaction, or failure to perform the actions that one is duty-bound to perform.'⁶³ Arbour J emphasizes that it is important not to dilute the obvious significance of *GJ* by attempting to locate the threat to security of the person in state action. She notes that Lamer CJ said that it was not the *action* of the state in initiating the proceedings per se that gave rise to the potential s 7 violation, but rather the *failure* of the government to provide the appellant with state-funded counsel after initiating child protection proceedings.

⁵⁵ Ibid 319.

⁵⁶ Ibid 320.

⁵⁷ *Dunmore v Ontario (Attorney General)* [2001] 3 SCR 1016, 2001 SCC 94.

⁵⁸ [1992] 2 SCR 679.

⁵⁹ *Friend v Alberta* [1998] 1 SCR 493.

⁶⁰ *Her Majesty the Queen and Canada Employment and Immigration Commission v Shalom Schachter* [1992] 2 SCR 679 at 721.

⁶¹ *New Brunswick (Minister of Health and Community Services) v G (J)* [1999] 3 SCR 46.

⁶² *Gosselin* (n 26) para 324.

⁶³ Ibid.

Arbour J then turns to *Dunmore*,⁶⁴ and points out that in that case, the Court held that ‘exclusion from a protective regime may in some contexts amount to an affirmative interference with the effective exercise of a protected freedom’. Arbour J finds that *Dunmore* confirms that state inaction – the mere failure of the state to exercise its legislative choice in connection with the protected interests of some societal group, while exercising it in connection with those of others – may at times constitute ‘affirmative interference’ with one’s Charter rights. Thus in certain contexts, Arbour J reasons, the state is under a positive duty to extend legislative protections where it fails to do so inclusively.

Arbour J says further that,

‘... it may well be that in order for such positive obligations to arise the state must first do *something* that will bring it under a duty to perform. But even if this is so, it is important to recognize that the kind of state action required will not be action that is causally determinative of a right violation, but merely action that “triggers”, or gives rise to, a positive obligation on the part of the state. Depending on the context, we might even expect to see altogether different kinds of state action giving rise to a positive obligation under s 7. In the judicial context, it will be natural to find such a state action in the initiation by the state of judicial proceedings. In the legislative context, however, it may be more appropriate, following cases like *Vriend* and *Dunmore*, to search for it in the state’s decision to exercise its legislative choice in a non-inclusive manner that significantly affects a person’s enjoyment of a Charter right. In other words, in certain contexts the state’s choice to legislate over some matter may constitute state action giving rise to a positive obligation under s 7.’⁶⁵

Arbour J acknowledges that justiciability issues regarding the allocation of scarce resources may arise in some cases, but finds that this does not preclude consideration of the claim in this case, namely that the state is under a positive obligation to provide basic means of subsistence to those who cannot provide for themselves. On the facts of this case, finds Arbour J, the Court does not need to determine what would satisfy a basic level of welfare because that determination had already been made by the legislature.⁶⁶

Arbour J concludes, that ‘any acceptable approach to Charter interpretation – be it textual, contextual, or purposive – quickly makes apparent that interpreting rights contained in s 7 as including a positive component is not only possible, but necessary’.⁶⁷

Regarding the application of s 7 to the facts of the case, Arbour J says,

⁶⁴ Note 57.

⁶⁵ *Gosselin* (n 26) para 329.

⁶⁶ Para 334.

⁶⁷ Para 335.

'[A] minimum level of welfare is so closely connected to issues relating to one's basic health (or security of the person), and potentially even to one's survival (or life interest), that it appears inevitable that a positive right to life, liberty and security of the person must provide for it.'⁶⁸

Arbour J then explains that what is at stake in *Gosselin* is not exclusion from the *particular* statutory regime but, more basically, the claimants' fundamental rights to security of the person and life itself.⁶⁹ She finds that there was ample evidence that the 'lack of government intervention "substantially impeded" the enjoyment of their s 7 rights'.⁷⁰ Government intervention was necessary to render their s 7 rights meaningful.

Arbour J concludes that the state does have an obligation to address basic needs relating to the personal security and survival of indigent members of the society.

Arbour J's opinion is a well reasoned argument grounded in the Court's own jurisprudence, holding that there is a positive obligation on the state to provide a minimum level of assistance to persons in need. The state action requirement was satisfied by the existence of the Social Aid Act which was directed at addressing basic needs, but Arbour J did not make the existence of the Social Aid Act a precondition for her decision. Rather, she said, 'It is almost a cliché that the modern welfare state has developed in response to the obvious failure of the free market economy to provide these basic needs for everyone.'⁷¹

There is a significant cross-over in logic between L'Heureux Dubé J's s 15 opinion and Arbour J's s 7 opinion in *Gosselin*. Both judges are concerned to ensure that Charter rights are understood to have positive content so that the rights are capable of giving effect to the values that underlie the rights.

Arbour J's insights about the potential for s 7 rights to be violated by state inaction are more than a potential source of enrichment for s 7 of the Charter. They also provide a trajectory for equality jurisprudence: to move beyond stereotyping and to contend with women's inequality of conditions. Such conditions that cannot be properly addressed unless governments are understood to have positive obligations to act and equality rights are understood to have positive content.

V CONCLUSION

The decision in *Gosselin* provides clear openings for equality jurisprudence to move beyond the limitations of a conception of discrimination

⁶⁸ Para 358.

⁶⁹ Ibid para 368.

⁷⁰ Ibid para 370.

⁷¹ Ibid para 383.

as consisting only of stereotyping and of constitutional rights generally as consisting only of negative restraints on governments. The Court was unanimous in its agreement that discrimination may exist without the presence of a stereotype. In addition, the majority agreed that the door should be left open for a claim that governments have a positive obligation to sustain life, liberty, or security of the person. In the opinions of L'Heureux-Dubé and Arbour JJ lie some particularly useful resources for the consolidation of an understanding of equality rights as imposing a positive obligation on governments to take measures to ensure that everyone has access to a subsistence income.

However, the story of *Gosselin* is not only a story of these agreements. It has also been felt as a direct insult to poor people and few of those who are familiar with the record accept the majority's view that it was insufficient to support a finding of discrimination. The decision has caused great concern in Canada that the Court has decided to turn its back on the stark realities of the poorest residents, preferring to back away when equality guarantees raise distributive issues. Concerns about the divisions on the Court that *Gosselin* reveals, the underlying conceptual tensions, and the unsettled jurisprudence are also intensified by the fact that the composition of the Court has changed very significantly since *Gosselin*. Four of the judges who sat on *Gosselin*, including L'Heureux-Dubé and Arbour JJ, who wrote most imaginatively, are no longer on the Court. L'Heureux-Dubé J has retired and Arbour J recently became the new High Commissioner for Human Rights at the United Nations.

The newly composed Court is positioned at a crucial cross-roads. Will it revert to a narrow, negative, formalistic, conception of equality that is indifferent to material conditions of inequality and deprivation or move forward with a substantive conception of equality? The choice will determine whether Canadian women's constitutional rights can speak to poverty. Should our Court choose the narrow, formalistic course, it will betray the inherent logic, and promise, of the rights.

This paper is primarily about equality theory rather than institutional relationships between courts and governments. However, in closing, a word about institutional responsibilities may be in order. The purpose of having constitutional equality guarantees is not only to establish a mechanism for judicial review. The point is to set a standard that governments agree to live up to, whether or not they are taken to court. In Canada this is declared by s 32 of the Constitution which states that the Charter applies to the Parliament and the government of Canada and to the legislature and governments of the provinces and the territories, in all matters within their authority.

The result of adopting a constitutional guarantee of equality, in any country in the world, should be that governments monitor and assess their own legislative programmes and decisions about resource allocation, to ensure that they do not make women worse off, but rather improve their situation.⁷² Unfortunately, women in Canada have not been able to count on governments to engage in voluntary compliance.⁷³ On the contrary, governments in Canada have persistently refused to reverse the train of neo-liberal economics and social programme cut backs, even though they are well aware of the implications of their conduct for women's equality, and even though they have been criticized for the harms caused by policies by United Nations treaty bodies that oversee compliance with the international human rights agreements that Canada has ratified. In such a circumstance of blatant government refusal to live up to its rights obligations, without doubt, women should be able to turn to the domestic constitutional human rights framework for a principled determination of their rights and remedies, and for assistance in recalling governments to the equality-promoting tasks that governments agreed to when they made the commitment to women's equality.

As Canada implements neo-liberal economic formulas, distributional fairness is out of fashion. At such a time, courts, which should have a longer view, have a heightened obligation not to turn their backs on the human rights of the most vulnerable groups. However, recently, Louise Arbour, speaking in Canada in her new role as United Nations High Commissioner for Human Rights, expressed her concern about the 'timidity' of the Canadian judiciary in tackling claims emerging from the right to be free from want.⁷⁴ We share her concern.

Women in Canada look forward to a continuing collaboration with women in South Africa to achieve recognition, in all quarters, that the commitments that our governments have made to women's equality requires them to address, and eradicate, the poverty of women.

⁷² K Norman 'The Charter as a Barrier Against Welfare Roll Backs: A Meditation on the "Difference Principle" as a "Bedrock Value" of the Canadian Democratic Project' in *Poverty: Rights, Social Citizenship and Governance* (n 48).

⁷³ This is a point that Mary Eberts has made in various meetings of equality seeking groups and lawyers in Canada, including at the 2003 annual meeting of the Court Challenges Programme in Winnipeg, Manitoba.

⁷⁴ Louise Arbour, United Nations High Commissioner for Human Rights, LaFontaine-Baldwin Symposium 2005 Lecture.