

One Step Forward and Two Steps Back: Poverty, the Charter and the Legacy of Gosselin

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In 2002, the Supreme Court of Canada dismissed Louise Gosselin's Charter challenge to a Québec welfare regulation that reduced benefits for those under-30 by two-thirds, forcing them to choose between hunger and homelessness. The article examines the legacy of Gosselin for the rights and constitutional inclusion of people living in poverty. It first considers the important jurisprudential step forward in the case: the Supreme Court's rejection of the argument, at odds with the expectations of disadvantaged groups and with Canada's international socio-economic rights obligations, that s. 7 cannot impose positive obligations on governments. The article then considers the court's two steps back in the Gosselin case: the majority's approach to the evidence and its treatment of Louise Gosselin's substantive argument. The article argues that Charter claimants in poverty cases continue to face prejudicial stereotypes and disproportionate evidentiary burdens. Their s. 7 claims are also consistently reframed by the courts and then found to be non-justiciable. The article concludes that the Supreme Court's failure to revisit Gosselin, or even to grant leave to appeal in any poverty case since then, represents a serious failure of constitutionalism in Canada.

En 2002, la Cour suprême du Canada a rejeté la contestation constitutionnelle déposée par Louise Gosselin à l'encontre d'une réglementation québécoise en matière d'aide sociale ayant réduit de deux tiers les prestations versées aux personnes de moins de trente ans, obligeant ces derniers à choisir entre la faim et l'itinérance. Dans cet article, l'auteure analyse l'impact de la décision rendue dans l'affaire Gosselin sur les droits et l'inclusion constitutionnelle de personnes vivant en situation de pauvreté. Elle considère tout d'abord l'importante affirmation, du point de vue jurisprudentiel, que l'on retrouve dans la décision : le rejet par la Cour suprême de l'argument selon lequel l'article 7 de peut imposer d'obligations positives aux gouvernements, le tout en contradiction avec les attentes des groupes désavantagés et les obligations internationales du Canada en matière de droits sociaux économiques. L'auteure s'intéresse ensuite aux reculs effectués dans l'affaire Gosselin : l'approche des juges majoritaires concernant les éléments de preuve et leur traitement de l'argument de fond articulé par Louise Gosselin. L'auteure fait valoir que les demandeurs qui invoquent la Charte dans des dossiers se rapportant à la pauvreté vont continuer de faire l'objet de stéréotypes défavorables et de subir des fardeaux de preuve disproportionnés. Leurs

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réclamations fondées sur l'article 7 sont également constamment recadrées par les tribunaux et considérées comme étant non justiciables. L'auteure conclut que le fait que la Cour suprême n'ait pas procédé à la révision de la décision rendue dans l'affaire Gosselin, voire de refuser toute autorisation d'appel depuis cet arrêt dans tous les cas soulevant la question de la pauvreté constitue un échec important du constitutionnalisme au Canada.

1. INTRODUCTION

In his 1989 judgment for a unanimous court in *Irwin Toy Ltd. c. Québec (Procureur général)*,¹ former Chief Justice Brian Dickson concluded that the intentional exclusion of property rights from s. 7 of the *Canadian Charter of Rights and Freedoms*² meant that “corporate-commercial economic rights” were not protected. He went on to affirm, however, that s. 7’s guarantee of security of the person could be read to include “economic rights fundamental to human life or survival.”³ As Chief Justice Dickson explained:

Lower courts have found that the rubric of ‘economic rights’ embraces a broad spectrum of interests, ranging from such rights included in international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property rights. To exclude all of these at this early moment in the history of *Charter* interpretation seems to us to be precipitous.⁴

In the late 1980s, Louise Gosselin launched such a socio-economic rights challenge, to a welfare regulation in Québec that reduced benefits for recipients under the age of 30 to one-third the amount the government had determined was required to meet basic needs.⁵ Ms. Gosselin argued the regulation was not only age-discriminatory, but violated Québec and Canadian *Charter* guarantees of security of the person.⁶ Ten years later, in *Gosselin c. Québec (Procureur général)*,⁷ the Supreme Court of Canada dismissed Ms. Gosselin’s claim that setting social assistance rates for young welfare recipients at 80% below the

¹ 1989 CarswellQue 115F, 1989 CarswellQue 115, (*sub nom.* *Irwin Toy Ltd. v. Quebec (Attorney General)*) [1989] 1 S.C.R. 927 (S.C.C.) at 1003 [*Irwin Toy*].

² *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11 [*Charter*].

³ *Irwin Toy*, *supra* note 1 at 1003-1004.

⁴ *Ibid.*

⁵ *Gosselin c. Québec (Procureur général)*, 2002 CarswellQue 2706, 2002 CarswellQue 2707, (*sub nom.* *Gosselin v. Quebec (Attorney General)*) [2002] 4 S.C.R. 429 (S.C.C.) [*Gosselin (SCC)*], affirming 1999 CarswellQue 1203, [1999] R.J.Q. 1033 (C.A. Que.) [*Gosselin (CA)*], affirming 1992 CarswellQue 1685, [1992] R.J.Q. 1647 (C.S. Que.) [*Gosselin (SC)*].

⁶ *Gosselin (SCC)*, *ibid.* (*Factum of the Appellant* at para. 18).

⁷ *Gosselin (SCC)*, *ibid.*

poverty line⁸ was unconstitutional. In her majority judgment, Chief Justice McLachlin held that, although s. 7 might one day be interpreted as imposing positive obligations on Canadian governments to guarantee adequate living standards, the evidence was insufficient to prove a *Charter* violation in the *Gosselin* case.⁹

This article will examine the legacy of *Gosselin* for the s. 7 rights and constitutional inclusion of people living in poverty in Canada.¹⁰ After summarizing the facts and outcome in the case, the article will consider the step forward taken by the Supreme Court in *Gosselin*: its rejection of the argument that s. 7 cannot impose positive obligations on governments. The article will then examine the court's two steps back: first, the majority's approach to the evidence and, second, its approach to Louise Gosselin's substantive claim, leading it to conclude that the life, liberty and security of young welfare recipients were not infringed by a provincial regulation that effectively forced them to choose between hunger and homelessness.¹¹ The article will conclude that the legacy of *Gosselin* is a *Charter* being interpreted and applied by the courts to exclude those most in need of its protection.

2. THE GOSSELIN CASE

In a class action brought on behalf of herself and other young welfare recipients in Québec between 1985 and 1989, Louise Gosselin challenged s. 29(a) of the *Regulation respecting Social Aid*.¹² That provision, which came into effect

⁸ In 1987 the benefit rate for those under-30 was \$170/month as compared to Statistics Canada's low-income cut-off of \$914/month for a single person living in a large metropolitan area; *Gosselin* (SCC), *ibid.* at para. 7; *Gosselin* (SC), *supra* note 5 at 1660.

⁹ *Gosselin* (SCC), *ibid.* at paras. 82-83.

¹⁰ For recent overviews of the incidence and impact of poverty in Canada, see: Citizens for Public Justice, *Poverty Trends 2017* (Ottawa: Citizens for Public Justice, 2017) [*Poverty Trends 2017*]; Canadian Centre for Policy Alternatives, *High Stakes, Clear Choices: Alternative Federal Budget 2017* (Ottawa: Canadian Centre for Policy Alternatives, 2017) 118-121. See also: Canada Without Poverty & Citizens for Social Justice, *Dignity for All: A National Anti-poverty Plan for Canada* (Ottawa: Dignity for All, 2015); Melissa Brittain & Cindy Blackstock, *First Nations Child Poverty: A Literature Review and Analysis* (Ottawa: First Nations Children's Action Research and Education Service, 2015); Valerie Tarasuk, Andy Mitchell & Naomi Dachner, *Household Food Insecurity in Canada, 2014* (Toronto: Research to Identify Policy Options to Reduce Food Insecurity (PROOF), 2014); House of Commons Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities, *Federal Poverty Reduction Plan: Working in Partnership Towards Reducing Poverty in Canada* (November 2010) (Chair: Candice Hoepfner); Senate, Subcommittee on Cities of the Standing Senate Committee on Social Affairs, Science and Technology, *In from the Margins: A Call to Action on Poverty, Housing and Homelessness* (December 2009) (Chair: Honourable Art Eggleton, PC).

¹¹ *Gosselin* (SC), *supra* note 5 at 1659.

¹² *Regulation Respecting Social Aid*, R.R.Q., c. A-16, r. 1, s. 29(a) [*Regulation*].

when Québec's *Social Aid Act*¹³ was adopted in 1969, reduced the level of financial assistance for those under 30 to roughly one third of the "basic needs amount" deemed under s. 23 of the *Regulation* to be required to meet a recipient's basic needs for food, clothing, personal and household requirements, and shelter.¹⁴ In 1987, for example, while those over the age of 30 were entitled to the basic needs amount of \$466/month, recipients under the age of 30 received two-thirds less, or roughly \$170/month.¹⁵

Amendments to the social assistance regime introduced by the Québec government in 1984 enabled young welfare recipients to increase their benefits to the basic needs amount — still almost 50% below the poverty line¹⁶ — if they participated in on-the-job training or community work programs. Benefits could be increased to within \$100 of the basic needs amount through participation in remedial education programs.¹⁷ There were, however, significant administrative delays and numerous barriers to participation in all three programs, compounded by an absolute shortage of available placements.¹⁸ By the province's own calculations 85,000 young recipients were vying with recipients over the age of 30 (who could also increase their benefits through program participation) for only 30,000 spaces.¹⁹ As a result, only 11% of recipients under the age of 30 achieved the full basic needs amount while 73%, including Louise Gosselin for most of the relevant period, were forced to subsist on the \$170/month rate.²⁰

(a) Louise Gosselin's *Charter* Claim

Louise Gosselin argued that s. 29(a) of the *Regulation* violated the right to security of the person under s. 7 of the Canadian *Charter*; the prohibition against age discrimination under s. 15; and the right to "an acceptable standard of living" under s. 45 of Québec's *Charter of Human Rights and Freedoms*.²¹ The

¹³ *Social Aid Act*, R.S.Q., c. A-17.

¹⁴ *Regulation*, *supra* note 12, s. 23; *Gosselin* (SCC), *supra* note 5 para. 171; *Gosselin* (SC), *supra* note 5 at 1650-51.

¹⁵ *Gosselin* (SCC), *ibid.* at para. 7; *Gosselin* (SC), *ibid.* at 1650.

¹⁶ *Gosselin* (SC), *ibid.*, at 1661.

¹⁷ *Regulation Respecting Social Aid*, *supra* note 12, s. 35; *Gosselin* (SCC), *supra* note 5 at paras. 159-162; *Gosselin* (SC), *ibid.* at 1652, 1662.

¹⁸ *Gosselin* (SCC), *ibid.* (*Factum of the Appellant* at paras. 114-128); *Gosselin* (SCC), *ibid.* at paras. 158-163, 276-286.

¹⁹ *Gosselin* (SCC), *ibid.* (*Factum of the Appellant* at para. 114); *Gosselin* (SCC), *ibid.*, at para. 283.

²⁰ *Gosselin* (SCC), *ibid.*, at para. 276.

²¹ *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, s. 45 [Québec *Charter*]. Section 45 provides: "Every person in need has a right, for himself and his family, to measures of financial assistance and to social measures provided for by law, susceptible of ensuring such person an acceptable standard of living." See generally: Pierre Bosset & Lucie Lamarque, eds, *Droit de cité pour les droit économiques, sociaux et culturels: La Charte*

evidentiary record submitted by Ms. Gosselin²² in support of her claim included expert evidence from economists and current and former government officials in the fields of social policy, income security, labour, youth services and education, as well as testimony from a social worker, a dietician, a psychologist, and a physician in a community health practice who had worked closely with young welfare recipients. Ms. Gosselin also submitted extensive documentary evidence, including World Health Organization, Canadian and provincial government and non-governmental reports, statistics and studies.²³ Finally, Ms. Gosselin described the impact of the *Regulation* on her own life, including her efforts to survive on the under-30 rate and to access the on-the-job training, community work and remedial educations programs.²⁴

The expert evidence showed that youth living on the reduced rate were malnourished, socially isolated, often homeless, and in poor physical and psychological health.²⁵ In the words of the trial judge: “Leur situation économique précaire les prive de toute vie sociale et affecte leur santé mentale.”²⁶ Young recipients were faced with an impossible choice: “Le dilemme de ces jeunes est de payer un maigre loyer et de quêter la nourriture, ou de se passer de loyer et de s’abriter tant bien que mal afin d’utiliser le petit montant qu’ils reçoivent pour se nourrir.”²⁷ Some recipients resorted to prostitution and selling drugs to earn enough money to pay their rent; others attempted suicide.²⁸ Lack of stable housing, a phone, or presentable clothing made it difficult for recipients to find work. One expert queried: “Quel employeur ira engager une personne qui ne peut pas lui donner un numéro de téléphone pour le rappeler quand des postes ouvrent? Quel employeur ira engager un jeune avec des trous dans ses vêtements?”²⁹

québécoise en chantier (Cowansville : Éditions Yvon Blais, 2011); David Robitaille, *Normativité, interprétation et justification des droits économiques et sociaux: les cas québécois et sud-africain* (Brussels : Éditions Bruylant, 2011) [Robitaille, *Droits économiques et sociaux*].

²² At the Supreme Court of Canada, the record in *Gosselin* totalled 19 volumes and some 5000 pages; see: < <http://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=27418> > .

²³ *Gosselin* (SC), *supra* note 5 at 1655-1661.

²⁴ *Gosselin* (SCC), *supra* note 5 (*Appellant’s Record, Testimony of Louise Gosselin*, vol 1).

²⁵ *Gosselin* (SC), *supra* note 5 at 1658-59.

²⁶ *Ibid.* at 1659 [author’s translation: “Their precarious economic situation deprives them of any social life and affects their mental health.”].

²⁷ *Ibid.* at 1659 [author’s translation: “The dilemma facing these young people is whether to pay for meagre lodging and beg for their food or to forego rent and find whatever shelter they can, in order to use the small amount they receive to feed themselves.”].

²⁸ *Ibid.* at 1658.

²⁹ *Ibid.* at 1659 [author’s translation: “What employer would hire a person who couldn’t provide a telephone number to call when a position opened? What employer would hire a youth with holes in their clothes?”].

Louise Gosselin's direct experience of the *Regulation* was one of acute material and psychological insecurity, deprivation and indignity. She was often hungry, in constant fear of not having enough to eat, and suffering symptoms of malnourishment, including anxiety, fatigue, vulnerability to infections and illness, and lack of concentration.³⁰ In order to obtain food, she was forced to rely on her family and resorted to soup kitchens and other charity-run food programs. As she put it: "Quand quelqu'un me donnait à manger, j'y allais."³¹ Ms. Gosselin lived in unsafe and substandard housing, and was frequently homeless. She described one basement apartment in which she spent the winter: "C'était mal éclairé, il y avait des 'bibittes' partout, ce n'était pas chauffé, j'avais loué chauffé au propriétaire mais on gelait comme des rats, j'avais les pieds bleus l'hiver, j'avais tellement mal aux chevilles que j'avais de la difficulté à marcher, puis j'avais froid."³² At times, she exchanged sex for money, food or a place to stay.³³ Ms. Gosselin testified that, of all the things she lacked, paid employment was what she most wanted: "Des amis, avoir une vie sociale, avoir, travailler, ce n'est pas compliqué, moi tout ce que je pensais c'était avoir un travail."³⁴ But finding and keeping work under such circumstances was virtually impossible:

Bon il n'y a jamais personne qui m'a rappelée, j'étais incapable de me présenter convenablement devant un employeur puis de me vendre comme bonne ouvrière, j'étais complètement démunie au niveau de l'estime de moi-même puis au niveau de la confiance en moi, mes repas n'étaient pas équilibrés, ma vie sociale non plus, je n'avais absolument rien pour être en forme, pour pouvoir travailler premièrement là, alors souvent les endroits étaient complets.³⁵

Ms. Gosselin pointed out that: "Le système d'aide social constitue le dernier recours des personnes dans le besoin. Pour être admissible aux prestations d'aide sociale, une personne doit être totalement privée de moyens de subsistance. Ce n'est pas par choix que ces personnes s'adressent à l'État, c'est par nécessité

³⁰ *Ibid.* at 1658.

³¹ *Gosselin (SCC)*, *supra* note 5 (*Appellant's Record, Testimony of Louise Gosselin*, vol 1 at 134) [author's translation: "When someone gave me food, I went."].

³² *Ibid.*, (*Appellant's Record, Testimony of Louise Gosselin*, vol. 1 at 106) [author's translation: "It was badly lit, there were bugs everywhere, it wasn't heated. I rented it from the landlord heated but we froze like rats, my feet were blue all winter, my ankles hurt so much that I had trouble walking and I was cold."].

³³ *Gosselin (SC)*, *supra* note 5 at 1655.

³⁴ *Gosselin (SCC)*, *supra* note 5 (*Appellant's Record, Testimony of Louise Gosselin*, vol 1 at 111) [author's translation: "Friends, having a social life, having things, working, it's not complicated, all I thought about was having a job."].

³⁵ *Ibid.* (*Appellant's Record, Testimony of Louise Gosselin*, vol 1 at 110) [author's translation: "Well, there was never anyone who called me back. I was unable to present myself properly to an employer and to sell myself as a good worker, I was completely lacking in terms of self-esteem and in terms of self-confidence, my meals weren't balanced, my social life wasn't either, I had absolutely nothing to keep myself together, to work, so often the places were filled."].

absolue.”³⁶ Ms. Gosselin alleged that, by reducing benefits for those under-30 far below the minimum the Québec government itself had determined was required to meet an individual’s basic needs, the *Regulation* infringed the physical, psychological and social security of the person of young welfare recipients in a manner not in accordance with the principles of fundamental justice.³⁷ Ms. Gosselin rejected the province’s argument that the availability of on-the-job training, community work and remedial education programs justified the *Regulation* under s. 1 of the *Charter*, countering that, even accepting the validity of the government’s objectives,³⁸ the regime was not a rational,³⁹ minimal,⁴⁰ or proportionate⁴¹ impairment of young welfare recipients’ equality or security of the person rights. She asked the court to declare the *Regulation* was unconstitutional and to order the government to reimburse claimants the benefits they were denied during the relevant period, totalling roughly \$389 million.⁴²

(b) The Lower Court Rulings in *Gosselin*

In his 1992 Québec Superior Court decision, Justice Reeves concluded that Louise Gosselin’s evidence was insufficient to support her *Charter* claim.⁴³ Justice Reeves took issue with the fact that Ms. Gosselin was the only witness on behalf of the entire class of welfare recipients affected by the reduced rate, and he accepted the government’s characterization of the expert reports and evidence submitted in relation to the circumstances of other young welfare recipients as hearsay.⁴⁴ Justice Reeves also criticized the lack of evidence about the comparative situation of recipients over the age of 30, who received the full basic needs amount.⁴⁵ In terms of Ms. Gosselin’s substantive arguments, Justice Reeves found that the s. 7 right to life, liberty and security of the person did not include a positive right to social assistance from the state.⁴⁶ He also held that the *Regulation* was not discriminatory under s. 15 of the *Charter*, since recipients could obtain parity of benefits by participating in the available education and job training programs, and because the differential regime reflected the actual

³⁶ *Gosselin* (SCC), *supra* note 5 (*Factum of the Appellant* at para. 50) [author’s translation: “The social assistance system is the final recourse for persons in need. To be eligible for welfare benefits, a person must be totally without means. It is not by choice that such persons turn to the State, but from absolute necessity.”].

³⁷ *Ibid.* (*Factum of the Appellant* at paras. 53-54).

³⁸ *Ibid.* at paras. 98-99.

³⁹ *Ibid.* at paras. 100-121.

⁴⁰ *Ibid.* at paras. 122-144.

⁴¹ *Ibid.* at paras. 145-159.

⁴² *Ibid.* at para. 221; *Gosselin* (SCC), *supra* note 5 at para. 9.

⁴³ *Gosselin* (SC), *supra* note 5 at 1664.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.* at 1669.

characteristics of the targeted group and was designed to promote the beneficial objective of encouraging young welfare recipients to become financially independent.⁴⁷

In 1999, the Québec Court of Appeal dismissed Louise Gosselin's appeal. Justices Mailhot, Baudouin and Robert agreed with Justice Reeves that Louise Gosselin's claim to an adequate level of assistance involved an economic right that was not included in s. 7.⁴⁸ With regard to Ms. Gosselin's s. 15 argument, Justice Mailhot decided that the differential regime, taken as a whole, did not have a disadvantageous impact on young welfare recipients.⁴⁹ Justice Baudouin found that the *Regulation* discriminated based on age, but was saved by s. 1.⁵⁰ Justice Robert also found the reduced rate was age-discriminatory.⁵¹ But, contrary to Justice Baudouin, he concluded the *Regulation* could not be justified under s. 1 of the *Charter*, since the purported benefit of inciting young people to move off social assistance did not outweigh the severe negative effects of the regime.⁵²

(c) The Supreme Court of Canada's Judgment in *Gosselin*

In her 2002 judgment for the majority of the Supreme Court, Chief Justice McLachlin, joined by Justices Gonthier, Iacobucci, Major and Binnie, upheld the lower and appeal court rulings on the constitutionality of the *Regulation* and dismissed Louise Gosselin's appeal.⁵³ The Chief Justice rejected Ms. Gosselin's argument that the reduced benefit amount for those under-30 violated s. 15 of the Canadian *Charter*, on the grounds that the differential regime was designed to enhance the dignity of young welfare recipients.⁵⁴ In her view: "The age-base

⁴⁷ *Ibid.* at 1681. Justice Reeves dismissed Louise Gosselin's claim under the Québec *Charter* on the grounds that s. 45 is a statement of policy that provides no authority for the courts to review the adequacy of social measures the legislature chooses to adopt; *ibid.* at 1667.

⁴⁸ *Gosselin (CA)*, *supra* note 5 at 1042-43.

⁴⁹ *Ibid.* at 1042.

⁵⁰ *Ibid.* at 1047.

⁵¹ *Ibid.* at 1061.

⁵² *Ibid.* at 1089. Justice Robert further determined the *Regulation* violated s. 45 of the Québec *Charter*. However he found that, in accordance with the remedial and anti-derogation provisions set out under ss. 49 and 52 the *Charter*, s. 45's guarantee of financial assistance "susceptible of ensuring . . . an acceptable standard of living" was not judicially enforceable; *ibid.* at 1119. See generally, Robitaille, *Droits économiques et sociaux*, *supra* note 21 at 197-208.

⁵³ *Gosselin (SCC)*, *supra* note 5, para. 5. The majority of the court also rejected Louise Gosselin's claim under the Québec *Charter* concluding, at para. 88, that while s. 45 required the government to provide social assistance, it placed the adequacy of the particular measures adopted beyond judicial review.

⁵⁴ *Ibid.*, at para. 66. For a critique of this aspect of the decision see: Dianne Pothier, "But it's for Your Own Good" in Margot Young et al eds, *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2007) 40 [Young et al, *Poverty: Rights*]; Diana Majury, "Women are Themselves to Blame: Choice as a Justification for Unequal

distinction was made for an ameliorative, non-discriminatory purpose and its social and economic thrust and impact were directed to enhancing the position of young people in society by placing them in a better position to find employment and live fuller, more independent lives."⁵⁵ The Chief Justice also rejected Ms. Gosselin's s. 7 claim. On the broader question of whether "the right to a level of assistance sufficient to meet basic needs"⁵⁶ fell within s. 7, she opined that: "One day s. 7 may be interpreted to include positive obligations."⁵⁷ However, upholding Justice Reeves' decision at trial, the Chief Justice found there was insufficient evidence to support such a claim in Louise Gosselin's case.⁵⁸

In contrast to the majority, Justices Bastarache, LeBel, Arbour and L'Heureux-Dubé agreed with Ms. Gosselin that the *Regulation* contravened the *Charter's* equality guarantee.⁵⁹ Justice L'Heureux-Dubé summarized the s. 15 violation: "As a result of s. 29(a), adults under 30 were uniquely exposed by the legislative scheme to the threat of living beneath what the government itself considered to be a subsistence level of income."⁶⁰ The dissenting justices further found that this rights violation could not be justified under s. 1 of the *Charter*.⁶¹ In Justice Bastarache's analysis: "In the legislative and social context of the legislation, which provided a safety net for those without means to support themselves, a rights-infringing limitation must be carefully crafted. In this case, the programs left too many opportunities for young people to fall through the seams of the legislation."⁶²

In her dissenting judgment, concurred in by Justice L'Heureux-Dubé, Justice Arbour also accepted Louise Gosselin's argument that the *Regulation* violated s. 7 of the *Charter*.⁶³ Justice Arbour pointed to the physical and psychological health risks flowing directly from living conditions under the reduced rate: inability to pay for adequate clothing, electricity, hot water or shelter;⁶⁴

Treatment" in Margaret Denike, Fay Faraday & M. Kate Stephenson, eds, *Making Equality Rights Real: Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006) 209; Sheila McIntyre, "A Thin and Impoverished Notion of Judicial Review" (2006), 31 *Queen's LJ* 731; Martha Jackman, "Sommes nous dignes? L'égalité et l'arrêt *Gosselin*" (2006), 16 *CJWL* 161; Gwen Brodsky, "*Gosselin v. Québec (Attorney General): Autonomy with a Vengeance*" (2003), 15 *CJWL* 194.

⁵⁵ *Gosselin* (SCC), *ibid.* at para. 70.

⁵⁶ *Ibid.* at para. 76.

⁵⁷ *Ibid.* at para. 82.

⁵⁸ *Ibid.* at para. 83.

⁵⁹ *Ibid.* at para. 134, per L'Heureux-Dubé J. para. 258, per Bastarache J. para. 395 per Arbour J. para. 413, per LeBel J.

⁶⁰ *Ibid.* at para. 130.

⁶¹ *Ibid.* at para. 140 per l'Heureux-Dubé J. para. 290, per Bastarache J. para. 394, per Arbour J. para. 413, per LeBel J.

⁶² *Ibid.* at para. 290.

⁶³ *Ibid.* at para. 385.

⁶⁴ *Ibid.* at para. 373.

malnourishment;⁶⁵ a “spiral of isolation, depression, humiliation, low self-esteem, anxiety, stress and drug addiction”; and a heightened risk of suicide.⁶⁶ She noted that these effects were experienced by Louise Gosselin herself and, as the expert evidence documented, by other young welfare recipients subject to the *Regulation*.⁶⁷ As for the possibility of justifying the *Regulation* under s. 1 of the *Charter*, Justice Arbour averred: “it will be a rare case indeed in which the government can successfully claim that the deleterious effects of denying welfare recipients their most basic requirements are proportional to the salutary effects of doing so.”⁶⁸

3. ONE STEP FORWARD: POSITIVE OBLIGATIONS UNDER S. 7 OF THE CHARTER

(a) Interpretive Context and Expectations

Canada was an active participant in the international post-war movement towards more expansive and effective human rights protection, especially for members of historically disadvantaged groups — the backdrop against which the Canadian *Charter* was proposed, negotiated and ultimately adopted. Beginning with its endorsement of the *Universal Declaration of Human Rights* in 1948,⁶⁹ Canada undertook substantial socio-economic rights commitments culminating in the *International Covenant on Economic Social and Cultural Rights (ICESCR)*⁷⁰ which, with the *International Covenant on Civil and Political Rights (ICCPR)*,⁷¹ was ratified by Canada in 1976 with the consent of the

⁶⁵ *Ibid.* at paras. 374-375.

⁶⁶ *Ibid.* at para. 332.

⁶⁷ *Ibid.* at para. 371.

⁶⁸ *Ibid.* at para. 394.

⁶⁹ GA Res 217 (III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810 (1948) [*UN Declaration*]. In particular, Article 25(1) of the *UN Declaration* affirms that: “Everyone has the right to a standard of living adequate for health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”

⁷⁰ *International Covenant on Economic, Social and Cultural Rights*, December 16, 1966, 993 UNTS 3, Can TS 1976 No 46 (entered into force January 3, 1976, accession by Canada May 19, 1976) [*ICESCR*]. Of direct relevance in the *Gosselin* case, article 9 of the *ICESCR* guarantees the right to social security and social insurance; article 11, the right to an adequate standard of living, including adequate food, clothing and housing; and article 12, the right to the highest attainable standard of physical and mental health.

⁷¹ *International Covenant on Civil and Political Rights*, December 19, 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force March 23, 1976, accession by Canada May 19, 1976) [*ICCPR*]. In tandem with the *ICESCR*, the *ICCPR* abandons the outmoded distinction between positive and negative rights. As the preambles of both *Covenants* affirm: “the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy . . . economic, social and

provinces and shortly before the Trudeau government launched the constitutional reform process that culminated in the enactment of *Constitution Act, 1982* and the *Charter*. In particular, article 11(1) of the *ICESCR* affirms that: “States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right. . .”⁷² In ratifying the *ICESCR*, Canada formally acknowledged that adequate food, housing, health care, education and social security were not simply desirable social policy objectives but were basic human rights, requiring progressive realization “to the maximum of available resources” and effective remedies when governments failed to meet their obligations.⁷³ There was a shared expectation within the human rights community that these international undertakings would inform the interpretation and application of the *Charter*. As the Supreme Court of Canada has repeatedly affirmed: “the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in the international human rights documents which Canada has ratified.”⁷⁴

cultural rights as well as . . . civil and political rights. . .” All subsequent international human rights treaties ratified by Canada similarly reflect the principle of interdependence of all human rights and impose positive obligations on Canadian governments to protect health, welfare and other security of the person related interests without discrimination. See generally Bruce Porter, “International Human Rights in Anti-poverty and Housing Strategies: Making the Connection” [Porter, “Making the Connection”] in Martha Jackman & Bruce Porter, eds, *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) [Jackman & Porter, *Advancing Social Rights*] 33; Leilani Farha, “Committee on the Elimination of Discrimination against Women: Women Claiming Economic, Social and Cultural Rights — the CEDAW Potential” in Malcolm Langford, ed., *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008) 553; Gwen Brodsky & Shelagh Day, “Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty” (2002), 14 *CJWL* 185.

⁷² *ICESCR*, *supra* note 70, article 11(1). Article 28 provides that “The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions”; see generally Porter, “Making the Connection”, *ibid.*; Martha Jackman, “The Protection of Welfare Rights Under the *Charter*” (1988), 20 *Ottawa L Rev* 257 [Jackman, “Welfare Rights”].

⁷³ *ICESCR*, *ibid.*, article 2(1); United Nations Committee on Economic, Social and Cultural Rights, *General Comment 3: The Nature of States Parties Obligations (art 2, para 1 of the Covenant)*, UNCESCROR, 5th Sess, UN Doc E/1991/23, (1990); Porter, “Making the Connection”, *ibid.*

⁷⁴ *Reference re Public Service Employee Relations Act (Alberta)*, 1987 CarswellAlta 580, 1987 CarswellAlta 705, [1987] 1 S.C.R. 313 (S.C.C.) at para. 59; *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, 2007 CarswellBC 1289, 2007 CarswellBC 1290, [2007] 2 S.C.R. 391 (S.C.C.) at para. 70 [Health Services Assn]; *Fraser v. Ontario (Attorney General)*, 2011 SCC 20, 2011 CarswellOnt 2695, 2011 CarswellOnt 2696, [2011] 2 S.C.R. 3 (S.C.C.) at para. 92; *SFL v.*

Emerging domestic rights-based approaches to social justice also fed into debates about the language and content of the new constitutional guarantees.⁷⁵ United in their criticism of the courts' negative and circumscribed reading of the *Canadian Bill of Rights*,⁷⁶ women's, disability and other equality seeking groups mobilized in support of a new rights paradigm — one that would see the *Charter* and Canadian courts directly engage with government obligations to institute programs and benefits to address historic patterns of exclusion and disadvantage.⁷⁷ Building on Canada's international obligations and drawing on remedial jurisprudence under provincial and federal human rights legislation, it was expected that access to housing, health care, food, jobs, child care and social assistance for those in need would be accorded as much importance as negative guarantees against unreasonable government interference with life, liberty, security of the person and other individual rights. Francine Fournier explained: "face à la discrimination individuelle et systémique, des recours existent ou sont possibles. Ils doivent être développés, raffinés et renforcés. Mais ces interventions doivent aller de pair avec la reconnaissance concrète des droits économiques et sociaux. L'égalité réelle exige le développement de ceux-ci."⁷⁸

Feminist constitutional lawyers and scholars, including Marilou McPhedran, Mary Eberts, Tamra Thomson and Beverley Baines, were articulate proponents of this understanding of the *Charter*, working successfully with women's and other equality seeking organizations to reframe s. 15 in particular, to require affirmative measures to address socio-economic marginalization and remedy disadvantage. As Mary Eberts described it: "full substantive equality . . . was the groups' goal."⁷⁹ The expectation the *Charter* would require positive action by

Saskatchewan, 2015 SCC 4, 2015 CarswellSask 32, 2015 CarswellSask 33, (*sub nom.* Saskatchewan Federation of Labour v. Saskatchewan) [2015] 1 S.C.R. 245 (S.C.C.) at paras. 62-65; see generally Porter, *ibid.*; Martha Jackman & Bruce Porter, "Introduction: Advancing Social Rights in Canada" in Jackman & Porter, *Advancing Social Rights*, *supra* note 71 at 5-6.

⁷⁵ See Jackman & Porter, *ibid.* at 6-10; Martha Jackman & Bruce Porter, "Social and Economic Rights" in Peter Oliver, Patrick Macklem & Nathalie DesRosiers, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) 843 [Oliver, *Oxford Handbook*]; Bruce Porter, "Expectations of Equality" (2006), 33 Sup Ct L Rev 23 [Porter, "Expectations of Equality"].

⁷⁶ S.C. 1960, c. 44.

⁷⁷ See Kerri A. Froc, "A Prayer for Original Meaning: A History of Section 15 and What it Should Mean for Equality" (2018), 38 NJCL 35 [Froc, "Original Meaning"]; Bruce Porter, "Expectations of Equality", *supra* note 75.

⁷⁸ Francine Fournier, "Égalité et droits à l'égalité" in Lynn Smith et al eds, *Righting the Balance: Canada's New Equality Rights* (Saskatoon: The Canadian Human Rights Reporter, 1986) [Smith, "Righting the Balance"] 25 at 36.

⁷⁹ Mary Eberts, "The Fight for Substantive Equality: Women's Activism and Section 15 of the *Canadian Charter of Rights and Freedoms*" (2015/2016). 37:2 *Atlantis: Critical Studies in Gender, Culture & Social Justice* 100 at 104; Audrey Doerr & Micheline Carrier, eds, *Women and the Constitution in Canada* (Ottawa: Canadian Advisory

governments to ensure the substantive benefit and equal enjoyment of *Charter* rights, especially for members of historically disadvantaged communities, was shared beyond the nascent feminist legal academy. In a 1982 review of the newly enacted *Charter*, Rod Macdonald dismissed the idea that the *Charter* entrenched a purely negative concept of freedom.⁸⁰ In an echo of Frank R. Scott,⁸¹ Macdonald argued that “the most fundamental right for the majority of Canadians is not a right to be free from certain kinds of governmental activity, but rather the right to be free to benefit equally from the advantages that organized government fosters.”⁸²

In his 1983 analysis of s. 7 of the *Charter*, John Whyte likewise argued against a narrow interpretation of s. 7 that would offer safeguards only against negative state action, or that would restrict constitutionally protected life, liberty and security of the persons’ interests to those at risk in the criminal justice system.⁸³ In proposing a substantive understanding of the principles of fundamental justice, Whyte observed that: “It is now commonplace to think of the state’s imposition of burdens and benefits (relating to, among other things, life, liberty and security of the person) as either promoting social justice or, on the contrary, as being fundamentally unjust.”⁸⁴ In terms of the range of interests protected under s. 7, Whyte contended:

Council on the Status of Women, 1981); Anne F. Bayefsky & Mary Eberts, eds, *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985); Lynn Smith, “A New Paradigm for Equality Rights” in Smith, “Righting the Balance”, *ibid.*, 353; The Charter of Rights Educational Fund, *The Study Day Papers* (Toronto: Charter of Rights Educational Fund, 1985); Sheila L. Martin & Kathleen E. Mahoney, eds, *Equality and Judicial Neutrality* (Toronto: Carswell, 1987); Gwen Brodsky & Shelagh Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989); Marilou McPhedran, Judith Erola & Loren Brault, “‘28 - Helluva Lot to Lose in 27 Days’: The Ad Hoc Committee and Women’s Constitutional Activism in the Era of Patriation” in Lois Harder & Steve Patten, eds, *Patriation and Its Consequences Constitution Making in Canada* (Vancouver: UBC Press, 2015) 203; and see generally Froc, “Original Meaning”, *supra* note 77; Beverley Baines & Ruth Rubio-Marin, “Feminist Constitutionalism in Canada in Oliver, *Oxford Handbook*, *supra* note 75 at 965; Porter, “Expectations of Equality”, *supra* note 75.

⁸⁰ Roderick A. Macdonald, “Postscript and Prelude — The Jurisprudence of the *Charter*: Eight Theses” (1982), 4 Sup Ct L. Rev. 321 [Macdonald, “The Jurisprudence of the *Charter*”].

⁸¹ As Scott himself argued: “to allow the still unresolved problems of our economic system to deprive [people of . . . essentials to the good life] without taking steps to alleviate the deprivations, is to take away human rights.”; Frank R. Scott, “Expanding Concepts of Human Rights” in *Essays on the Constitution* (Toronto: University of Toronto Press, 1977) 353 at 357.

⁸² Macdonald, “The Jurisprudence of the *Charter*”, *supra* note 80 at 344.

⁸³ John Whyte, “Fundamental Justice: The Scope and Application of Section 7 of the *Charter*” (1983), 13 Manitoba LJ 455 [Whyte “Fundamental Justice”].

⁸⁴ *Ibid.* at 28.

Assuming that the *Charter* is dedicated to granting rights over matters of fundamental importance, “security of the person” will include conditions necessary for life, such as food and shelter. Hence governmental actions which take away shelter and food, (or the capacity to obtain shelter and food), would be subject to court review under section 7.⁸⁵

(b) The Argument Against S. 7 as a Source of Positive Obligations

It is, however, Peter Hogg’s contrary view of s. 7⁸⁶ that was largely embraced by Canadian courts called upon to decide early *Charter* claims brought by people living in poverty.⁸⁷ Although s. 32 states that the *Charter* applies “in respect of all matters within the authority of” federal and provincial governments,⁸⁸ Hogg affirmed that: “Section 7, like all the other *Charter* rights, applies only to ‘governmental action’, as defined in s. 32 of the *Charter*.”⁸⁹ Acknowledging that: “It has been suggested that ‘security of the person’ includes the economic capacity to satisfy basic human needs”⁹⁰ Hogg warned that: “The trouble with

⁸⁵ *Ibid.* at 40.

⁸⁶ Peter Hogg, *Constitutional Law of Canada*, 2nd ed. (Toronto: Carswell, 1985) at 44.5 [Hogg, *Constitutional Law*].

⁸⁷ See for example *Masse v. Ontario (Ministry of Community & Social Services)*, 1996 CarswellOnt 338, 134 D.L.R. (4th) 20 (Ont. Div. Ct.) at 43, leave to appeal refused 1996 CarswellOnt 1453 (Ont. C.A.), leave to appeal refused (1996), 40 Admin. L.R. (2d) 87 (note) (S.C.C.) and see generally: David Wiseman, “Methods of Protection of Social and Economic Rights in Canada” in Fons Coomans, ed., *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Antwerpen: Intersentia, 2006) 173; Brodsky & Day, “Beyond the Social and Economic Rights Debate”, *supra* note 71; Martha Jackman & Bruce Porter, “Women’s Substantive Equality and the Protection of Social and Economic Rights Under the *Canadian Human Rights Act*”, in Status of Women Canada, *Women and the Canadian Human Rights Act: A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, 1999) 43; Martha Jackman, “Poor Rights: Using the *Charter* to Support Social Welfare Claims” (1993), 19 Queen’s LJ 65.

⁸⁸ *Charter*, *supra* note 2, s. 32(1). The argument that s. 32(1) demands government action was rejected by the Supreme Court in *Vriend v. Alberta*, 1998 CarswellAlta 210, 1998 CarswellAlta 211, [1998] 1 S.C.R. 493 (S.C.C.). Citing Dianne Pothier, “The Sounds of Silence: *Charter* Application when the Legislature Declines to Speak” (1996), 7 Constitutional Forum 113 at 115, Justice Cory stated, at para. 60:

The relevant subsection, s. 32(1) (b), states that the *Charter* applies to “the legislature and government of each province in respect of all matters within the authority of the legislature of each province”. There is nothing in that wording to suggest that a positive act encroaching on rights is required; rather the subsection speaks only of matters within the authority of the legislature. Dianne Pothier has correctly observed that s. 32 is “worded broadly enough to cover positive obligations on a legislature such that the *Charter* will be engaged even if the legislature refuses to exercise its authority.” The application of the *Charter* is not restricted to situations where the government actively encroaches on rights.

See generally: Martha Jackman & Bruce Porter, “Rights-Based Strategies to Address Homelessness and Poverty in Canada: The *Charter* Framework” in Jackman & Porter, *Advancing Social Rights*, *supra* note 71 65 [Jackman & Porter, “Rights-Based Strategies”].

⁸⁹ Hogg, *Constitutional Law*, *supra* note 86 at 44.5.

this argument is that it accords to s. 7 an economic role that is incompatible with its setting in the legal rights portion of the *Charter*.⁹¹ In Hogg's opinion:

The suggested role also involves a massive expansion of judicial review, since it would bring under judicial scrutiny all the elements of the modern welfare state, including . . . of course, the level of public expenditures on social programmes. As Oliver Wendell Holmes would have pointed out, these are the issues upon which elections are won and lost; the judges need a clear mandate to enter that arena, and s. 7 does not provide that clear mandate.⁹²

In *Gosselin*, the Attorney General of Québec repeatedly cited Peter Hogg in arguing that s. 7 of the *Charter* applies only to government action that directly threatens an individual's physical and psychological integrity;⁹³ that it excludes socio-economic rights;⁹⁴ and that it imposes no positive obligations on governments.⁹⁵ Referencing Hogg's analysis, Québec insisted that the *Charter* does not permit judicial review of publicly funded social policies and that the principle of Parliamentary sovereignty continued to apply in this area.⁹⁶ It concluded: "L'État n'a donc aucune obligation constitutionnelle d'adopter des mesures pour promouvoir ou assurer la sécurité des personnes."⁹⁷

In its intervention before the Supreme Court in *Gosselin*, the Attorney General of Ontario likewise maintained that "section 7 exists to constrain government action rather than to impose an obligation on the government to provide a minimum guaranteed income"⁹⁸ and it invoked Hogg's warning about the wide array of social programs in the areas of housing, health care, utilities, food, and others, that would become subject to judicial review if s. 7 were read to include positive obligations.⁹⁹ Pointing out that "the courts have consistently ruled that . . . section 7 does not impose positive legal obligations on governments",¹⁰⁰ Ontario averred that "section 7 is restricted to the protection of individuals from direct state interference with physical and psychological integrity."¹⁰¹

⁹⁰ *Ibid.* at 44.8.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Gosselin* (SCC), *supra* note 5 (*Factum of the Respondent* at para. 198).

⁹⁴ *Ibid.* at para. 208.

⁹⁵ *Ibid.* at para. 202.

⁹⁶ *Ibid.* at para. 220.

⁹⁷ *Ibid.* at para. 211 [author's translation: "The State therefore has no constitutional obligation to adopt measures to promote or guarantee the security of persons."].

⁹⁸ *Gosselin* (SCC), *ibid.* (*Factum of the Intervenor, The Attorney General of Ontario* at para. 30).

⁹⁹ *Ibid.* at para. 46.

¹⁰⁰ *Ibid.* at para. 58.

¹⁰¹ *Ibid.*

(c) **The Supreme Court's Ruling on Positive Obligations in *Gosselin***

This narrow reading of s. 7 was rejected by eight of the nine Supreme Court justices in *Gosselin*. Only Justice Bastarache took the position that “a s. 7 claim must arise as a determinative state action that in and of itself deprives the claimant of the right to life, liberty and security of the person.”¹⁰² Justice Bastarache maintained that Louise Gosselin’s s. 7 claim could not succeed because the threat to her security of the person “was brought upon her by the vagaries of a weak economy not by the legislature’s decision not to accord her more financial assistance.”¹⁰³ He concluded that any harm caused by the under-inclusive nature of the welfare regime could be successfully challenged only under s. 15.¹⁰⁴

While agreeing with his finding that the impugned *Regulation* violated Louise Gosselin’s s. 15 rights,¹⁰⁵ Justice LeBel disagreed with Justice Bastarache’s “interpretation and application” of s. 7.¹⁰⁶ Chief Justice McLachlin, with the concurrence of Justices Gonthier, Iacobucci, Major and Binnie, also rejected Justice Bastarache’s argument that s. 7 could not apply absent state action.¹⁰⁷ The Chief Justice noted that s. 7 had so far been interpreted by the Supreme Court as a negative guarantee restricting the state from depriving people of life, liberty or security of the person.¹⁰⁸ However she affirmed that “One day section 7 may be interpreted to included positive obligations.” Referring to Lord Sankey’s “living tree” metaphor,¹⁰⁹ and to Justice LeBel’s caution in *Blencoe v.*

¹⁰² *Ibid.*, at para. 213. Justice Bastarache’s narrow reading of s. 7 in *Gosselin* was particularly disappointing in light of his Court of Appeal dissent, subsequently adopted by the Supreme Court of Canada, in *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, 1997 CarswellNB 145, 187 N.B.R. (2d) 81 (N.B. C.A.), reversed 1999 CarswellNB 305, 1999 CarswellNB 306, [1999] 3 S.C.R. 46 (S.C.C.). In that case, Justice Bastarache concluded that the New Brunswick government had a positive obligation to provide legal aid to a sole support mother on social assistance who was at risk of losing custody of her children, and who couldn’t afford a lawyer to represent her. Referencing John Whyte’s s. 7 analysis, *supra* note 83, Justice Bastarache observed, at p. 12:

In modern societies, rights cannot be fully protected by preventing government intrusions in the lives of citizens. Some rights in effect require governmental action . . . It is also important to look at individual international instruments . . . for instance, section 25 of the *Universal Declaration of Human Rights* . . . speaks of “the right to security in the event of unemployment, sickness, disability, widowhood, old age and other lack of livelihood in circumstances beyond [one’s] control” (my emphasis). The *Charter* must limit the intrusion of the state in the lives of its citizens; it must also mandate its function in those limited cases where individuals can make legitimate claims against it in the name of liberty and human dignity.

¹⁰³ *Gosselin* (SCC), *ibid.* at para. 217.

¹⁰⁴ *Ibid.* at para. 223.

¹⁰⁵ *Ibid.* at para. 401.

¹⁰⁶ *Ibid.* at para. 82.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.* at para. 81.

¹⁰⁹ *Edwards v. Canada (Attorney General)*, 1929 CarswellNat 2, [1930] A.C. 124 (Jud. Com. of Privy Coun.) at 136.

*British Columbia (Human Rights Commission)*¹¹⁰ “that it would be dangerous to freeze the development” of s. 7,¹¹¹ the Chief Justice concluded:

The question therefore is not whether s. 7 has ever been — or will ever be — recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards . . . 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. However, this is not such a case.¹¹²

Justices Arbour and L’Heureux-Dubé not only rejected the narrow reading of s. 7 put forward by the province and adopted by Justice Bastarache and the trial and Court of Appeal, they further held that Louise Gosselin’s s. 7 rights were violated by the gross inadequacy of the welfare benefits provided by the *Regulation*. In contrast to the Chief Justice’s focus on previous jurisprudence, Justice Arbour argued:

There is a suggestion that s. 7 contains only negative rights of non-interference and therefore cannot be implicated absent any positive state action. This is a view that is commonly expressed, but rarely examined . . . We must not sidestep a determination of this issue by 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.¹¹³

Justice Arbour underscored the need to “deconstruct the various firewalls that are said to exist around s. 7”,¹¹⁴ starting with the premise that the exclusion of property rights from s. 7 was determinative of Louise Gosselin’s claim.¹¹⁵ Referring to the distinction drawn by Chief Justice Dickson in *Irwin Toy*,¹¹⁶ between “corporate-commercial economic rights” and “economic rights fundamental to human life or survival”, Justice Arbour argued that: “the rights at issue here are so intimately intertwined with considerations related to one’s basic health (and hence ‘security of the person’) — and, at the limit, even of one’s survival (and hence ‘life’) — that . . . it is a gross mischaracterization to attach to them the label of ‘economic rights’.”¹¹⁷

Justice Arbour contested the proposition that s. 7 rights “cannot be implicated absent any positive state action”¹¹⁸ as contradicted by the language of

¹¹⁰ 2000 CarswellBC 1860, 2000 CarswellBC 1861, [2000] 2 S.C.R. 307 (S.C.C.) at para. 188.

¹¹¹ *Gosselin* (SCC), *supra* note 5 at para. 82.

¹¹² *Ibid.* at paras. 82-83.

¹¹³ *Ibid.* at para. 319.

¹¹⁴ *Ibid.* at para. 309.

¹¹⁵ *Ibid.* at para. 311.

¹¹⁶ *Supra* note 1.

¹¹⁷ *Gosselin* (SCC), *supra* note 5 at para. 312.

s. 7 itself, as well as by Supreme Court jurisprudence,¹¹⁹ including the court's decision in *New Brunswick (Minister of Health & Community Services) v. G. (J.)* in which Chief Justice Lamer imposed a positive obligation on the provincial government to provide state funded legal counsel to a mother in receipt of social assistance in a child protection proceeding.¹²⁰ Justice Arbour further questioned "the general assertion that positive claims against the state for the provision of certain needs are not justiciable" because deciding them would, in Peter Hogg's words, "bring under judicial scrutiny all of the elements of the modern welfare state", something the courts are not competent to do.¹²¹ Justice Arbour countered that: "While it may be true that courts are ill-equipped to decide policy matters concerning resource allocation — questions of how much the state should spend, and in what manner — this does not support the conclusion that justiciability is a threshold issue barring the consideration of the substantive claim in this case."¹²² Justice Arbour concluded that "any acceptable approach to *Charter* interpretation — be it textual, contextual or purposive — quickly makes apparent that interpreting the rights contained in s. 7 as including a positive component is not only possible, but necessary."¹²³

In summary, eight of nine Supreme Court justices in the *Gosselin* case rejected the argument that s. 7 could not be invoked absent direct state action and could not be applied to impose positive obligations on governments to protect, life, liberty and security of the person. While a majority of the court upheld Justice Reeves' finding that the evidentiary record was insufficient to support Louise Gosselin's challenge, the court explicitly left open the possibility that s. 7 could be read to include socio-economic rights. Justices Arbour and L'Heureux-Dubé held not only that s. 7 provided a sound doctrinal basis for Louise Gosselin's claim, but that the reduced benefits for those under-30 violated their *Charter* rights to security of the person. Chief Justice McLachlin ruled that the circumstances in which s. 7 would be applied as the basis for an affirmative government obligation to guarantee adequate living standards remained to be decided in a future case. This aspect of the *Gosselin* decision represented a step forward for the *Charter* rights of people living in poverty.

4. TWO STEPS BACK: THE COURT'S APPROACH TO LOUISE GOSSELIN'S SECTION 7 CLAIM

The Supreme Court's rejection of the narrow reading of s. 7 that prevailed in Peter Hogg's and other scholarly commentary,¹²⁴ in government submissions,

¹¹⁸ *Ibid.* at para. 319.

¹¹⁹ *Ibid.* at paras. 321-325.

¹²⁰ *Supra* note 102.

¹²¹ *Gosselin* (SCC), *supra* note 5 at paras. 330-331 citing Hogg, *Constitutional Law of Canada*, *supra* note 86.

¹²² *Gosselin* (SCC), *ibid.* at para. 332.

¹²³ *Ibid.* at para. 335.

and in Canadian lower court jurisprudence up to that point, was a positive development for the advancement of poor people's *Charter* rights. As outlined below, however, the majority's uncritical and stereotype-infused approach to the evidence, and the way in which the majority of the court reframed and then dismissed Louise Gosselin's s. 7 claim, were equally significant set-backs for the constitutional inclusion of people living in poverty.

(a) The Court's Approach to the Evidence

At trial Justice Reeves concluded there was insufficient evidence to support Louise Gosselin's *Charter* challenge. He characterized the expert evidence she adduced as hearsay and he found that her personal testimony was insufficient to support her claim on behalf of all other young welfare recipients adversely affected by the *Regulation*. In his view:

On ne peut considérer comme vrais les faits sur lesquels les experts ont fondé leurs conclusions et formulé leurs généralisations. Il est donc fort douteux que la demanderesse représentante, agissant pour le compte de quelque 75 000 individus, ait déchargé le fardeau de la preuve quant à savoir si l'application de la loi a produit à leur égard des effets défavorables.¹²⁵

At the same time, Justice Reeves' appraisal of Louise Gosselin's evidence and substantive argument was rife with prejudicial stereotypes about the nature and causes of poverty and about people living in poverty as individuals and as a group.

In particular, Justice Reeves maintained that while poverty could in some cases be attributed to external factors beyond individual control, most poverty was the result of "intrinsic" characteristics of the poor.¹²⁶ Justice Reeves explained: "Les études démontrent que la majorité des pauvres le sont pour des raisons intrinsèques. Il s'agit de personnes sous-scolarisées ou psychologiquement vulnérables, ou chez qui l'éthique du travail n'est guère favorisée."¹²⁷ He argued further: "En effet, il est constant que l'être humain qui a développé les qualités de force, courage, persévérance et discipline surmonte et

¹²⁴ In *Gosselin (SC)*, *supra* note 5, Justice Reeves and the Attorney General of Québec also relied on Patrice Garant, "Fundamental Rights and Fundamental Justice" in Gérald-A. Beaudoin & Ed Ratushny, eds, *The Canadian Charter of Rights and Freedoms*, 2nd ed. (Toronto: Carswells, 1989) 331.

¹²⁵ *Gosselin (SC)*, *ibid.* [author's translation: "We cannot assume the facts upon which the experts based their conclusions and formulated their generalizations to be true. It is thus highly doubtful that the representative plaintiff, acting on behalf of some 75,000 individuals, has discharged the burden of proof as to the negative effects the application of the law had upon them."].

¹²⁶ *Ibid.* at 1670.

¹²⁷ *Ibid.* at 1676 [author's translation: "Studies show that the majority of the poor are poor for intrinsic reasons. They are persons who are under-educated or psychologically vulnerable, or who have a weak work ethic."].

maîtrise généralement les obstacles éducatifs, psychiques et même physiques qui pourraient l'entraîner dans la pauvreté matérielle."¹²⁸ As an illustration, Justice Reeves pointed to the high incidence of respiratory illnesses among people living in poverty, coupled with the fact that the most economically disadvantaged were twice as likely to smoke, notwithstanding the high cost of cigarettes.¹²⁹ This, he asserted, demonstrated that any financial assistance provided to the poor, including to young welfare recipients, had to be conditional:

Pourquoi le pauvre affecte-t-il une part importante de son maigre budget au tabac (et à l'alcool)? Il s'agit évidemment d'usage de drogues bénignes qui soulagent sa détresse psychologique. La conclusion s'impose : l'assistance pécuniaire doit s'accompagner d'éducation et d'encouragement à délaisser les habitudes coûteuses et nocives. C'est la philosophie qui inspire les programmes offerts aux 18 à 30 ans qui désirent obtenir la parité.¹³⁰

Instead of censuring Justice Reeves' reliance on these discriminatory stereotypes, Chief Justice McLachlin expressed full agreement with his ruling on the insufficiency of Louise Gosselin's evidence. In her words: "the trial judge, after a lengthy trial and careful scrutiny of the record, found that Ms. Gosselin had failed to establish actual adverse effect . . . I can find no basis upon which this Court can set aside this finding"¹³¹ With regard to Louise Gosselin's s. 7 claim in particular, the Chief Justice was unequivocal. Making virtually no reference either to the expert evidence, or to Louise Gosselin's own testimony about the multiple harms to the lives and security of young welfare recipients caused by the *Regulation*, she concluded: "The frail platform provided by the facts of this case cannot support the weight of a positive state obligation of citizen support."¹³²

Conversely, even in the absence of any supporting evidence, Chief Justice McLachlin was unqualified in her acceptance of the government's claims in defence of the impugned *Regulation* — claims that reflected and perpetuated equally prejudicial stereotypes about poverty and young welfare recipients. In particular, although the government failed to provide any concrete evidence of

¹²⁸ *Ibid.* at 1676 [author's translation: "In fact, it is a given that a human being who has developed the qualities of strength, courage, perseverance and discipline generally overcomes and masters the educational, psychological and even physical obstacles that could lead them into material poverty"].

¹²⁹ *Ibid.* at 1677.

¹³⁰ *Ibid.* [author's translation: "Why does a poor person devote a large portion of his meagre budget to tobacco (and to alcohol)? This is obviously the use of benign drugs to relieve psychological distress. The conclusion is unavoidable: financial assistance must be combined with education and encouragement to abandon costly and harmful habits. This is the philosophy that underlies the programs offered to those aged 18 to 30 who wish to achieve parity of benefits."].

¹³¹ *Gosselin* (SCC), *supra* note 5 at paras. 46-47.

¹³² *Ibid.* at paras. 82-83.

the *Regulation's* benefits or effectiveness in promoting the integration of young welfare recipients into the workforce or broader society, the Chief Justice accepted that: "notwithstanding its possible short-term negative impact on the economic circumstances of some welfare recipients under 30 . . . the thrust of the program was to improve the situation of people in this group, and to enhance their dignity and capacity for long-term self-reliance."¹³³ Chief Justice McLachlin likewise approved the province's unsubstantiated claim that, left to their own devices, young people would develop long term dependence on government assistance, and therefore had to be forced off welfare for their own good. In her view: "Simply handing over a bigger welfare cheque would have done nothing to help welfare recipients under 30 escape from unemployment."¹³⁴ She stressed that "reliance on welfare can contribute to a vicious circle"¹³⁵ and charged that: "opposition to the incentive program entirely overlooks the cost to young people of being on welfare during the formative years of their working lives."¹³⁶

Chief Justice McLachlin also accepted the Québec government's argument that difficulties facing young welfare recipients were owing not to the government's actions, but to personal circumstances and individual choice. Although, as Justice Bastarache detailed in his s. 15 dissent,¹³⁷ there were numerous barriers to accessing the remedial education and job training programs,¹³⁸ the Chief Justice affirmed: "there is no evidence in the record that any welfare recipient under 30 wanting to participate in one of the programs was refused enrollment."¹³⁹ As for Louise Gosselin herself, the Chief Justice concluded that she "ended up dropping out of virtually every program she started, apparently because of her own personal problems and personality traits" rather than because of any flaws in the programs themselves."¹⁴⁰ The Chief Justice's inattention to, if not callous disregard for, the actual experience of the claimants, exhaustively documented in the expert and Louise Gosselin's own evidence, produced a decision completely out of touch with the reality of the impugned regime and young welfare recipients' lives.¹⁴¹

¹³³ *Ibid.* at para. 66.

¹³⁴ *Ibid.* at para. 43.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Ibid.* at paras. 158-163; 276-285.

¹³⁸ *Ibid.* (*Factum of the Appellant* at paras. 114-128).

¹³⁹ *Ibid.* at para. 47.

¹⁴⁰ *Ibid.* at paras. 8, 48.

¹⁴¹ For a critique of this aspect of the *Gosselin* decision see: Martha Jackman, "Reality Checks: Presuming Innocence and Proving Guilt in *Charter* Welfare Cases" in Young et al, *Poverty: Rights, supra* note 54 23; Natasha Kim & Tina Piper, "*Gosselin v. Québec: Back to the Poorhouse*" (2003), 48 McGill LJ 749.

Unfiltered by stereotypes or preconceptions about the respective motivations of governments and those seeking financial assistance, the dissenting justices' more critical appraisal of the evidence led them to very different conclusions. Having earlier referred to the multiple ways in which the inadequate benefits threatened the physical and mental health and security of young welfare recipients,¹⁴² Justice Arbour underlined the challenge of job hunting for those who could not afford a telephone, suitable clothes or transportation and the reality that "inadequate food and shelter interfere with the capacity both for learning as well as for work itself."¹⁴³ As she observed: "the long-term importance of continuing education and integration into the workforce is undermined when those at whom such 'help' is directed cannot meet their basic short-term subsistence requirements."¹⁴⁴ In terms of the efficacy of the remedial education and job training programs, Justice Arbour was succinct: "The 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."¹⁴⁵

For his part, pointing to the weight of expert evidence relating to youth unemployment in Québec in the mid-eighties, Justice LeBel asserted: "Young social assistance recipients in the 1980s certainly did not latch onto social assistance out of laziness; they were stuck receiving welfare because there were no jobs available."¹⁴⁶ Justice LeBel observed that the province had offered no evidence that young welfare recipients would not have participated in the education and job training programs without the financial incentive created by the differential regime. In his view: "the Québec government could have achieved its objective of developing employability just as well without abandoning recipients under the age of 30 to these paltry benefits."¹⁴⁷

(b) The Framing of Louise Gosselin's S. 7 Claim

Like the Chief Justice's approach to the evidence in *Gosselin*, the manner in which her majority judgment framed Louise Gosselin's s. 7 claim proved highly problematic not only for the success Ms. Gosselin's argument, but in subsequent poverty-related *Charter* cases. What Ms. Gosselin asked the court to decide was whether, by reducing the under-30 welfare rate to a level that made recipients sick, homeless, hungry and even suicidal, the Québec government had violated their s. 7 rights to security of the person. What the majority did, however, was to

¹⁴² *Gosselin* (SCC), *supra* note 5 at paras. 373-377.

¹⁴³ *Ibid.* at para. 392.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.* at para. 371.

¹⁴⁶ *Ibid.* at para. 409.

¹⁴⁷ *Ibid.* at para. 410.

transform her challenge to the *Regulation* into a far more abstract and sweeping claim. As the Chief Justice put it, Ms. Gosselin was seeking “a novel application of s.7 as the basis for a positive state obligation to guarantee adequate living standards” — one that, in her view, the evidence failed to support.¹⁴⁸ Instead of examining the actual impact of the impugned *Regulation* on the physical and psychological security and integrity of those affected — the issue that was the primary focus of Louise Gosselin’s exhaustive personal and expert evidence — the Chief Justice failed even to acknowledge those egregious harms. Instead, the starting point for her analysis became a different question: whether, in the absence of any state action, s. 7 guaranteed a right to adequate welfare.¹⁴⁹ Framed in this way, Louise Gosselin faced what became an insurmountable doctrinal and evidentiary burden.

Again, the difference between the majority and dissenting justices’ analyses of Louise Gosselin’s claim is striking. From Justice Arbour’s perspective, there was no doubt that the reduction in the basic needs benefit imposed by the *Regulation* seriously infringed the physical integrity and security of those affected: “First, there are the health risks that flow directly from the dismal living conditions that \$170/month afford . . . Second, the malnourishment and undernourishment of young welfare recipients also result in a plethora of health problems.”¹⁵⁰ The deprivation of psychological security of the person caused by the *Regulation* was, in Justice Arbour’s view, equally devastating: “isolation, depression, humiliation, low self-esteem, stress and drug addiction.”¹⁵¹ As Justice Arbour summarized it: “this evidence overwhelmingly demonstrates that the exclusion of young adults from the full benefits of the social assistance regime substantially interfered with their fundamental right to security of the person and, at the margins, perhaps with their right to life as well.”¹⁵²

Justice l’Heureux-Dubé concurred with Justice Arbour’s analysis.¹⁵³ In her view:

There is little question that living with the constant threat of poverty is psychologically harmful. There is no dispute that Ms. Gosselin lived at times below the government’s own standard of bare subsistence. In 1987, the monthly cost of proper nourishment was \$152. The guaranteed monthly payment to young adults was \$170. I cannot imagine how it can be maintained that Ms. Gosselin’s physical integrity was not breached.¹⁵⁴

¹⁴⁸ *Ibid.* at paras. 82-83.

¹⁴⁹ *Ibid.* at para. 76.

¹⁵⁰ *Ibid.* at paras. 373-375.

¹⁵¹ *Ibid.* at para. 376.

¹⁵² *Ibid.* at para. 377.

¹⁵³ *Ibid.*, at para. 141.

¹⁵⁴ *Ibid.* at para. 130.

Instead of ruling on Louise Gosselin's s. 7 claim in the abstract, Justices Arbour and L'Heureux-Dubé looked to the actual evidence of the impact of the *Regulation* on young welfare recipients' physical and psychological health and security. Assessed in light of the real-life consequences of the *Regulation*, rather than against a preconceived doctrinal backdrop, Justices Arbour and L'Heureux-Dubé found it impossible to see the government's decision to provide a grossly inadequate level of benefits to those under the age of 30 as anything but unconstitutional.

5. THE LEGACY OF *GOSELIN*

In principle, the Supreme Court's rejection of the narrow interpretation of s. 7 that prevailed prior to *Gosselin* was a significant step forward for the *Charter* rights of people living in poverty. In reality, in the 15 years since the decision in *Gosselin*, lower and appellate courts have invoked the majority's ruling to further buttress the argument that s. 7 does not protect socio-economic rights or require governments to take affirmative steps to protect life, liberty or security of the person. *Charter* claimants in poverty-related cases have continued to confront adverse stereotypes and more onerous evidentiary burdens than government defendants.¹⁵⁵ In many cases, the serious harms to life and security of the person they have painstakingly documented in their own testimony, and through expert evidence, have been discounted or even ignored.¹⁵⁶ And, like in *Gosselin*, the s. 7

¹⁵⁵ See for example *R. v. Banks*, 2001 CarswellOnt 2757, 55 O.R. (3d) 374 (Ont. C.J.), reversed in part 2005 CarswellOnt 115 (Ont. S.C.J.), affirmed 2007 CarswellOnt 111 (Ont. C.A.), leave to appeal refused 2007 CarswellOnt 5670, 2007 CarswellOnt 5671 (S.C.C.) [*Banks* (CJ)] where the Ontario Court of Justice dismissed a *Charter* challenge to the Ontario *Safe Streets Act* and convicted the claimants of panhandling. Babe J. commented at 404, in relation to the s. 15 evidence, that:

Much of the affidavit material filed by the defendants consists of complaints about the general thrust of current provincial social policy in Ontario; the affiants all have an obvious socio-economic and political perspective that is diametrically opposed to that of the government of the day. It is, however, frankly difficult to discern how the legislation in question in itself can be said to have a prejudicial effect on their 'essential human dignity' by placing restrictions on the place and manner of solicitation.

Babe J was even more emphatic in relation to the claimants' evidence in support of their s. 2 argument, stating at 409 that: "I find assertions by affiants and authors relied upon by the defence to the contrary unconvincing; it may be that they consider the presence of aggressive beggars in the streets conducive to the advancement of their own socio-political points of view, but there is no evidence at all that the defendants themselves or others like them are intending to make a political point by soliciting for funds."

¹⁵⁶ See for example *Toussaint v. Canada (Attorney General)*, 2011 FCA 213, 2011 CarswellNat 3685, 2011 CarswellNat 6061 (F.C.A.) at para. 113, leave to appeal refused 2012 CarswellNat 943, 2012 CarswellNat 944 (S.C.C.) [*Toussaint* (FCA)], where Justice Stratas ignored the expert evidence to the contrary and rejected a *Charter* challenge to the denial of federal health coverage to an undocumented migrant, on the grounds that: "If the appellant were to prevail in this case and receive medical coverage under the Order in Council without complying with Canada's immigration laws, others could be expected to come to Canada and do the same. Soon, as the Federal Court warned, Canada could

claims of people living in poverty continue to be reframed in a way that reflects and reinforces the discriminatory and outmoded positive *versus* negative rights paradigm that the *Charter* was expected to overcome. Instead of examining the actual impact of governments' actions and inaction on claimants' lives and physical and psychological health and security, lower courts are, like in *Gosselin*, characterizing the *Charter* claims of people living in poverty as broad and presumptively non-justiciable demands for free standing rights to welfare, housing or health care, and dismissing them on that basis.¹⁵⁷

(a) The Tanudjaja Case

The decision in *Tanudjaja v. Canada (Attorney General)*¹⁵⁸ provides the clearest illustration of *Gosselin's* legacy in this regard. The Applicants in *Tanudjaja* included the Centre for Equality Rights in Accommodation,¹⁵⁹

become a health care safe haven, its immigration laws undermined." See: *Nell Toussaint v. Canada*, UN Human Rights Committee, Communication No. 2348/2014. Petition filed on November 27, 2013 by Andrew Dekany and Bruce Porter on behalf of Nell Toussaint, paras. 43-46, 54-56. Online: < <http://www.socialrightscura.ca/documents/legal/toussaint%20IFBH/Toussaint%20v%20Canada%20HRC%20No%202348-2014.pdf> >; and see generally: David Wiseman, "Managing the Burden of Doubt: Social Science Evidence, the Institutional Competence of Courts, and the Prospects for Anti-poverty *Charter* Claims" (2014), 33 NJCL 1; Jennie Abell, "Poverty and Social Justice at the Supreme Court during the McLachlin Years: Slipsliding Away" 50 SCLR (2d) 257 [Abell, "Poverty and Social Justice"]; Faisal Bhabha, "Institutionalizing Access-to-Justice: Judicial, Legislative and Grassroots Dimensions" (2007), 33 Queen's LJ 139; Patricia Cochran, "Taking Notice: Judicial Notice and the 'Community Sense' in Anti-Poverty Litigation" (2007), 40 UBC L Rev 559; David Wiseman, "The *Charter* and Poverty: Beyond Injusticiability" (2001), 51 UTLJ 425.

¹⁵⁷ See generally: Bruce Porter, "Inclusive Interpretations: Social and Economic Rights and the Canadian *Charter*" in Helena Alviar Garcia, Karl Klare & Lucy A. Williams, eds, *Social and Economic Rights in Theory and Practice: Critical Enquiries* (New York: Routledge, 2014) 215 [Porter, "Inclusive Interpretations"]; Jessica Eisen, "On Shaky Grounds: Poverty and Analogous Grounds under the *Charter*" (2013), 2 CJ Poverty Law 1; Margot Young, "The Other Section 7" (2013), 62 SCLR (2d) 3; Cara Wilkie & Meryl Zisman Gary, "Positive and Negative Rights under the *Charter*: Closing the Divide to Advance Equality" (2011), 30 Windsor Rev Legal Soc Issues 37; Martha Jackman, "Constitutional Castaways: Poverty and the McLachlin Court", (2010), 50 Supreme Court Law Review (2d) 297 [Jackman, "Constitutional Castaways"]; Abell, "Poverty and Social Justice", *ibid.*; Bruce Porter, "Claiming Adjudicative Space: Social Rights, Equality and Citizenship" in Young et al, *Poverty: Rights*, *supra* note 54 77; Yavar Hameed & Nitti Simmonds, "The *Charter*, Poverty Rights and the Space Between: Exploring Social Movements as a Forum for Advancing Social and Economic Rights in Canada" (2007), 23 NJCL 181; Margot Young, "Section 7 and the Politics of Social Justice" (2005), 38 UBC L Rev 539.

¹⁵⁸ *Tanudjaja v. Canada (Attorney General)*, 2013 ONSC 5410, 2013 CarswellOnt 12551 (Ont. S.C.J.) [*Tanudjaja* (SC)], affirmed 2014 ONCA 852, 2014 CarswellOnt 16752 (Ont. C.A.) [*Tanudjaja* (CA)], leave to appeal refused 2015 CarswellOnt 9613, 2015 CarswellOnt 9614 (S.C.C.). The judgments, Notice of Application, *Facta* of the parties and interveners, Applicant and Expert Witness Affidavits, and other key documents in

Jennifer Tanudjaja, and three other individuals who were homeless or had experienced homelessness.¹⁶⁰ The Application relied on an extensive evidentiary record compiled over a two-year period showing that the cumulative effect of the Canadian and Ontario governments' affordable housing, income support and accessible housing policies was widespread homelessness, disproportionately affecting Indigenous and racialized people, people with disabilities, newcomers, seniors, social assistance recipients, and youth. The evidence in *Tanudjaja* also documented the severe physical, psychological and social consequences of homelessness and housing insecurity for those affected.¹⁶¹

Based on that evidence, in May 2010, the Applicants filed a Notice of Application in the Ontario Superior Court, arguing that the Ontario and Canadian governments' failure to implement strategies to reduce and eliminate homelessness violated ss. 7 and 15 of the *Charter* and could not be justified under s. 1. The Applicants requested a declaration to that effect, and they asked the court to order the federal and Ontario governments to design and implement national and provincial strategies to reduce and eliminate homelessness as an

the *Tanudjaja* case can be found at: <http://socialrightscura.ca/eng/legal-strategies-charter-challenge-homlessness-motion-to-strike.html>.

¹⁵⁹ CERA is a non-profit organization providing services to low income tenants and the homeless in Ontario; see <<http://www.equalityrights.org/cera/>>. The Application was supported by a number of interveners working in coalition, including the Charter Committee on Poverty Issues, Pivot Legal Society, Justice for Girls, the Income Security Advocacy Centre, Amnesty International, the International Network for Economic, Social and Cultural Rights (ESCR-Net), the David Asper Centre for Constitutional Rights, and (at the Ontario Court of Appeal) the Ontario Human Rights Commission, the ODSP Action Coalition, the Steering Committee on Social Assistance, the Colour of Poverty/Colour of Change Network, the ARCH Disability Law Centre, the Dream Team, the Canadian HIV/AIDS Legal Network and HIV/AIDS Legal Clinic and the Women's Legal Education and Action Fund (LEAF). The author, with Jackie Esmonde at the Ontario Superior Court and Benjamin Ries at the Court of Appeal, represented the Charter Committee Coalition.

¹⁶⁰ *Tanudjaja* (SC), *supra* note 158 (*Amended Notice of Application* at paras. 1-5); *Tanudjaja* (SC), *ibid* (*Factum of the Applicants (Respondents on the Motion)* at para. 8); *Tanudjaja* (SC), *ibid* paras. 12-14. Jennifer Tanudjaja, a young single mother in receipt of social assistance, was living with her two sons in an apartment that cost more than her total monthly social assistance benefit, and had been on a waiting list for subsidized housing for over two years. Diagnosed with cancer, Brian DuBourdicu was unable to work or to pay his rent and lost his apartment, living on the streets and in shelters, and on a waiting list for subsidized housing for four years. Ansar Mahmood, severely disabled in an industrial accident, lived with his wife and four children including one son confined to a wheelchair, in a two-bedroom apartment that was not accessible. He and his family had been on a waiting list for subsidized accessible housing for four years. Following the sudden death of her spouse, Janice Arsenaault became homeless, living in shelters and on the streets for several years and forced to place her young two sons in her parents' care, until she was able to find rental housing that consumed two-thirds of her limited monthly income, putting her at constant risk of becoming homeless again.

¹⁶¹ *Tanudjaja* (SC) (*Amended Notice of Application* at paras. 27-32), *ibid.*; *Tanudjaja* (SC) (*Factum of the Applicants (Respondents on the Motion)* at paras. 15-18), *ibid.*

appropriate remedy under s. 24(1) of the *Charter*.¹⁶² With regards to s. 7 in particular, the *Tanudjaja* Application did not contend that the provision of housing or housing subsidies was constitutionally guaranteed. Nor did the Applicants demand the governments be ordered to provide a particular “economic” benefit. Rather they argued that Ontario and federal government policies and decisions had created and sustained conditions of homelessness and inadequate housing, and that both governments had consistently refused to implement a coherent strategy to address this situation. The Applicants alleged that the governments’ actions and inaction together resulted in serious harm to life and to security of the person of those directly affected, including physical and mental illness, shortened lives and even death — interests the courts had previously recognized as falling directly within the ambit of s. 7.¹⁶³

In May 2012, two years after the Notice of Application was filed and six months after the full record was served,¹⁶⁴ the Ontario and Canadian governments brought a motion to strike the *Tanudjaja* claim for disclosing no reasonable cause of action.¹⁶⁵ In support of that motion, the Attorney General of Ontario argued that the Application was “in effect an effort to constitutionalize a right to housing.”¹⁶⁶ Citing Peter Hogg as authority, Ontario affirmed that: “s. 7 protects against deprivations of rights; it does not establish positive rights or obligations on the state. Nor does it provide protection to purely economic rights, including the right to affordable housing or a minimum standard of living.”¹⁶⁷ In the Attorney General of Canada’s submission: “The Court’s decision in *Gosselin* did not overrule any previous jurisprudence. Rather the majority decision affirmed that section 7 has not been recognized to provide for positive rights or economic benefits.”¹⁶⁸

In his 2013 Ontario Superior Court ruling, Justice Lederer granted the governments’ motion to strike the *Tanudjaja* claim.¹⁶⁹ In response to the Applicants’ argument that the governments’ actions, both in contributing to and failing to address homelessness, had infringed the security of the person of the Applicants and others similarly affected, Justice Lederer opined that: “the programs and decisions noted and complained of are not the cause of the harm

¹⁶² *Tanudjaja* (SC) (*Amended Notice of Application*), *ibid.*

¹⁶³ *Tanudjaja* (SC), *supra* note 158 (*Factum of the Applicants (Respondents on the Motion)* at paras. 1, 46-47); *Tanudjaja* (CA), *supra* note 158 (*Factum of the Appellants* at para. 6).

¹⁶⁴ Justice Feldman noted that the Applicants’ record comprised 16 volumes totalling 10,000 pages containing 19 Affidavits, of which 13 were from experts; *Tanudjaja* (CA), *ibid.*, at para. 66.

¹⁶⁵ *Tanudjaja* (SC) (*Notice of Motion*).

¹⁶⁶ *Tanudjaja* (CA), *supra* note 158 (*Factum of the Respondent, the Attorney General of Ontario* at para. 2).

¹⁶⁷ *Ibid.* at para. 24.

¹⁶⁸ *Tanudjaja* (CA), *ibid.* (*Factum of the Respondent, the Attorney General of Canada* at para. 30).

¹⁶⁹ *Tanudjaja* (SC), *supra* note 158 at para. 152.

described by the applicants. They are, if anything, part of the cure.”¹⁷⁰ Justice Lederer was unpersuaded by the Applicants’ contention that the Supreme Court of Canada intended to, and did in *Gosselin*, leave open the possibility that s. 7 could impose positive obligations on governments to protect life, liberty and security of the person, affirming that: “Section 7 of the *Charter* does not provide a positive right to affordable, adequate, accessible housing.”¹⁷¹ He also discounted the Applicants’ submission that the important constitutional issues raised in *Tanudjaja* should not be disposed of without a full hearing, on an interlocutory motion to strike.¹⁷² Instead Justice Lederer concluded: “It is plain and obvious that the Application cannot succeed . . . Quite apart from the question of whether there is a viable claim for breaches of the *Charter*, what the Court is ultimately being asked to do is beyond its competence and not justiciable.”¹⁷³

In its 2014 judgment, a 2-1 majority of the Ontario Court of Appeal upheld Justice Lederer’s order.¹⁷⁴ In her dissenting opinion, Justice Feldman found that Justice Lederer erred in deciding that the issue of positive obligations under s. 7 was settled law notwithstanding the Supreme Court’s contrary ruling in *Gosselin*.¹⁷⁵ Even more problematic in her view, was his order to dismiss the Application at the pleadings stage¹⁷⁶ — a misuse of the motion to strike “to frustrate potential developments in the law.”¹⁷⁷ Justice Pardu, with the concurrence of Justice Strathy,¹⁷⁸ agreed with Justice Lederer that the Applicants were arguing “that s. 7 confers a general freestanding right to adequate housing.”¹⁷⁹ She held that the Application contained “no sufficient legal component to engage the decision-making capacity of the courts”¹⁸⁰ and that it was not therefore justiciable.¹⁸¹ As a result, Justice Pardu held it was unnecessary to consider “the extent to which positive obligations may be imposed on government to remedy violations of the *Charter*, a door left slightly ajar in *Gosselin*.”¹⁸² In 2015, the Supreme Court of Canada refused leave to appeal, and the *Tanudjaja* claim was struck.¹⁸³

¹⁷⁰ *Ibid.* at para. 113.

¹⁷¹ *Ibid.* at para. 81.

¹⁷² *Ibid.* at paras. 55-56.

¹⁷³ *Ibid.* at paras. 147-148.

¹⁷⁴ *Tanudjaja (CA)*, *supra* note 158 at para. 39.

¹⁷⁵ *Ibid.* at para. 62.

¹⁷⁶ *Ibid.* at para. 64.

¹⁷⁷ *Ibid.* at para. 49.

¹⁷⁸ *Ibid.* at para. 39.

¹⁷⁹ *Ibid.* at para. 30.

¹⁸⁰ *Ibid.* at para. 27.

¹⁸¹ *Ibid.* at para. 19.

¹⁸² *Ibid.* at para. 37.

(b) *Gosselin* and the Failure of Constitutionalism

The Applicants in *Tanudjaja* exercised their rights under s. 24(1) of the *Charter* to seek a judicial hearing and to obtain a legal remedy for a constitutional rights violation grounded in the text of s. 7 and supported by a full evidentiary record. Although Canadian governments are, following Canada's ratification of the *ICESCR*,¹⁸⁴ under binding international obligation to respect these core socio-economic rights, the Applicants did not argue they had a *Charter* right to housing or to an adequate level of income. Rather they submitted that their s. 7 rights to life and security of the person were infringed by policies and programs that left them homeless, and by governments' refusal to take appropriate measures to address this situation, thereby threatening the integrity of families, physical and psychological health, personal inviolability and life itself. These types of harms had all been subject to s. 7 review in previous Supreme Court cases.¹⁸⁵ Nevertheless, the Applicants' *Charter* argument was characterized as a sweeping demand for a freestanding right to housing that fell beyond the ambit of s. 7. Justice Lederer summarized why the *Tanudjaja* claim could not, in his view, be allowed to continue:

[W]hat is being sought here is a determination that every citizen has a right, protected by the *Charter*, to a minimum standard of living . . . Any application built on the premise that the *Charter* imposes such a right cannot succeed and is misconceived. General questions that reference, among many other issues, assistance to those in poverty, the levels of housing supports and income supplements, the basis on which people may be evicted from where they live and the treatment of those with psycho-social and intellectual disabilities are important, but the courtroom is not the place for their review.¹⁸⁶

The Applicants in *Tanudjaja* were not merely required to meet a disproportionate evidentiary standard or to combat negative stereotypes and judicial preconceptions about the homeless and homelessness. They were denied the very opportunity to have their evidence and arguments fully heard. In spite of the implications of upholding Justice Lederer and the Ontario Court of Appeal's decision to strike the *Tanudjaja* Application at the pleadings stage, the Supreme Court refused leave to appeal, as it has done in virtually every poverty-related *Charter* case since *Gosselin*.¹⁸⁷ In 2007 for instance, the Supreme Court

¹⁸³ *Supra* note 158.

¹⁸⁴ *Supra* note 70.

¹⁸⁵ See for example *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, *supra* note 102; *PHS Community Services Society v. Canada (Attorney General)*, 2011 CarswellBC 2443, 2011 CarswellBC 2444, [2011] 3 S.C.R. 134 (S.C.C.); and see generally Jackman & Porter, "Rights-Based Strategies", *supra* note 88; Margot Young, "Section 7: The Right to Life, Liberty and Security of the Person" in Oliver, *Oxford Handbook*, *supra* note 75 at 777.

¹⁸⁶ *Tanudjaja* (SC), *supra* note 158 at para. 120.

refused leave to appeal the lower courts' ruling in *R. v. Banks*,¹⁸⁸ dismissing a constitutional challenge to the Ontario *Safe Streets Act*.¹⁸⁹ The *Charter* claim was rejected in that case because the lower courts found no evidence that prohibiting panhandling interfered with the homeless claimants' ability to survive¹⁹⁰ and because, in the trial judge's view, allowing such a claim would "bring all the elements of the welfare state under scrutiny just as surely as a claim to state largesse."¹⁹¹ In 2008, the Supreme Court denied leave in *Canadian Bar Assn. v. British Columbia*,¹⁹² which invoked s. 7 to challenge the civil legal aid system's failure to ensure that people living in poverty, and especially women, had meaningful access to justice in situations affecting their *Charter*-protected interests. The B.C. courts ruled that the claim should be struck because "the CBA does not challenge any legislation, nor indeed any government action . . . Rather it seeks a sweeping review of the entire program."¹⁹³

In 2009, the Supreme Court denied leave in *Boulter v. Nova Scotia Power Assn. Inc.*,¹⁹⁴ in which the claimants challenged the province's approach to electricity pricing on the grounds that it exacerbated the unaffordability of residential hydro services for people living in poverty.¹⁹⁵ In rejecting the Applicants' *Charter* claim in that case, the Nova Scotia Court of Appeal averred: "That poverty's plight appeals for relief does not mean the redress is

¹⁸⁷ See generally Sanda Rodgers "Getting Heard: Leave to Appeal, Interveners and Procedural Barriers to Social Justice in the Supreme Court of Canada" in Sanda Rodgers and Sheila McIntyre, eds, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham: LexisNexis Canada, 2011) 1; Gwen Brodsky, "The Subversion of Human Rights by Governments in Canada" in Jackman & Porter, *Advancing Social Rights*, *supra* note 71 35.

¹⁸⁸ *Banks* (CJ), *supra* note 155, affirmed *R. v. Banks*, 2005 CarswellOnt 115, [2005] O.J. No. 98 (Ont. S.C.J.) [*Banks* (SC)], affirmed 2007 CarswellOnt 111, [2007] O.J. No. 99 (Ont. C.A.) [*Banks* (CA)], leave to appeal refused 2007 CarswellOnt 5670, 2007 CarswellOnt 5671, [2007] S.C.C.A. No. 139 (S.C.C.).

¹⁸⁹ S.O. 1999, c. 8.

¹⁹⁰ *Banks* (CA), *supra* note 188 at para. 81; *Banks* (SC), *supra* note 188 at para. 50.

¹⁹¹ *Banks* (SC), *ibid.* at para. 51.

¹⁹² *Canadian Bar Assn. v. British Columbia*, 2006 CarswellBC 2193, [2006] B.C.J. No. 2015 (B.C. S.C.), additional reasons 2007 CarswellBC 361 (B.C. S.C. [In Chambers]), affirmed 2008 CarswellBC 379, [2008] B.C.J. No. 350 (B.C. C.A.) [*Canadian Bar Assn.* (CA)], leave to appeal refused 2008 CarswellBC 1610, 2008 CarswellBC 1611, [2008] S.C.C.A. No. 185 (S.C.C.). See Kerri Froc, "Is The Rule of Law the Golden Rule? Accessing "Justice" for Canada's Poor" (2008), 87 *Canadian Bar Review* 459; Jackman, "Constitutional Castaways", *supra* note 157.

¹⁹³ *Canadian Bar Assn.* (CA), *ibid.* at para. 35.

¹⁹⁴ *Boulter v. Nova Scotia Power Assn. Inc.*, 2009 CarswellNS 79, [2009] N.S.J. No. 65 (N.S. C.A.), leave to appeal refused 2009 CarswellNS 485, 2009 CarswellNS 486, [2009] S.C.C.A. No. 172 (S.C.C.).

¹⁹⁵ See generally Claire McNeil & Vincent Calderhead, "Access to Energy: How Form Overtook Substance and Disempowered the Poor in Nova Scotia" in Jackman & Porter, *Advancing Social Rights*, *supra* note 71 253.

constitutional.”¹⁹⁶ And, in 2012, the Supreme Court refused leave to appeal the decision in *Toussaint v. Canada (Minister of Citizenship & Immigration)*,¹⁹⁷ in which the Federal courts dismissed a s. 7 challenge to the federal government’s denial of health care benefits to an undocumented migrant in urgent need of medical care, on the grounds her own conduct was the “operative cause” of any injury to her s. 7 rights,¹⁹⁸ and because Canada might otherwise become a “health care safe haven.”¹⁹⁹

The Supreme Court’s refusal to grant leave to appeal in these or virtually any other poverty-related s. 7 case in the 15 years since *Gosselin* was decided stands in sharp contrast to its approach to the *Charter* claim in *Chaoulli c. Québec (Procureur général)*.²⁰⁰ The Appellants in *Chaoulli*, an elderly patient who had experienced delays obtaining two hip replacements and a physician engaged in a long-running battle with the province over restrictions on his ability to deliver private care,²⁰¹ invoked s. 7 not to defend but to undermine the one socio-

¹⁹⁶ *Boulter (CA)*, *supra* note 194 at para. 43.

¹⁹⁷ *Toussaint (FCA)*, *supra* note 156, affirming 2010 FC 810, 2010 CarswellNat 4413, 2010 CarswellNat 2695 (F.C.) [*Toussaint (FC)*]. In *Toussaint v. Canada (Minister of Citizenship & Immigration)*, 2011 FCA 146, 2011 CarswellNat 1943, 2011 CarswellNat 1446 (F.C.A.), leave to appeal refused 2011 CarswellNat 4397, 2011 CarswellNat 4398 (S.C.C.), reversing 2009 FC 873, 2009 CarswellNat 2595, 2009 CarswellNat 5173 (F.C.); the court had earlier rejected Ms. Toussaint’s *Charter* challenge to the failure of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 to allow for a waiver of the \$550 processing fee for applications for permanent residency based on humanitarian and compassionate considerations.

¹⁹⁸ *Toussaint (FCA)*, *ibid.* at paras. 72-73; *Toussaint (FC)*, *ibid.* at paras. 91, 93. In its subsequent decision in *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2014 FC 651, 2014 CarswellNat 2430, 2014 CarswellNat 2431 (F.C.) at para. 571, the Federal Court ruled that revisions to the Interim Federal Health Benefit Program to exclude certain categories of refugee claimants did not violate s. 7 because “the *Charter*’s guarantees of life, liberty and security of the person do not include the positive right to state funding for health care.”

¹⁹⁹ *Toussaint (FCA)*, *ibid.* at para. 112; *Toussaint (FC)*, *ibid.* at para. 94. The UN Human Rights Committee recently ruled that Canada’s actions violated Ms. Toussaint’s right to life under article 6 and her right to equality under article 26 of the ICCPR and it ordered Canada to provide Ms. Toussaint “with adequate compensation for the harm she suffered” and “to take steps to prevent similar violations in the future, including reviewing its national legislation to ensure that irregular migrants have access to essential health care to prevent a reasonably foreseeable risk that can result in loss of life.”; UNHRC, Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2348/2014 (August 7, 2018) CCPR/C/123/D/2348/2014, online: <<http://www.socialrights.ca/2018/Toussaint%20v%20Canada%202018.pdf>>.

²⁰⁰ 2005 CarswellQue 3276, 2005 CarswellQue 3277, (*sub nom.* *Chaoulli v. Canada (Attorney General)*) [2005] 1 S.C.R. 791 (S.C.C.) [*Chaoulli (SCC)*], reversing 2002 CarswellQue 598, [2002] R.J.Q. 1205 (C.A. Que.) [*Chaoulli (CA)*], affirming 2000 CarswellQue 182, [2000] R.J.Q. 786 (C.S. Que.) [*Chaoulli (SC)*].

²⁰¹ *Chaoulli (SC)*, *ibid.* at paras. 19-43. After summarizing Dr. Chaoulli’s evidence at trial, Justice Piché observed, at para. 43: “Tout ceci amène le Tribunal à se poser des questions

economic right that is widely recognized in Canada: access to health care based on need rather than ability to pay.²⁰² Although the claim in *Chaoulli* was unanimously rejected at trial and by the Québec Court of Appeal, the Supreme Court granted the Appellants leave to appeal. The majority of the court then set aside the trial judge's evidentiary findings and reversed the lower courts' ruling that Québec's prohibition on private health insurance was constitutionally unobjectionable because it was designed to safeguard the publicly funded system upon which everyone, including those unable to pay for private care, relies.²⁰³

In doing so, unlike in *Gosselin*, the majority did not question whether the evidence of two individual claimants was sufficiently representative of the impact on all Québec patients of prohibiting private insurance.²⁰⁴ Nor did it doubt the sufficiency of the evidence of the single witness who, against the weight of expert opinion in the case,²⁰⁵ maintained that allowing parallel private care would provide a solution to wait times.²⁰⁶ The majority rejected Justice Delisle's conclusion at the Court of Appeal²⁰⁷ that the Appellants were asserting a right to buy private insurance — an economic right that was excluded from s. 7 of the *Charter*.²⁰⁸ The majority did not suggest the Appellants were asking the court to recognize a free-standing right to private health care. Rather it emphasized that

sur les véritables motivations du Dr Chaoulli dans le présent débat. On ne peut qu'être frappé par les contradictions dans le témoignage et l'impression que le Dr Chaoulli s'est embarqué dans une croisade dont les enjeux lui échappent aujourd'hui." [author's translation: "All of this brings the Court to question what is really motivating Dr. Chaoulli in the present debate. One cannot help being struck by the contradictions in his testimony and the impression that Dr. Chaoulli has embarked on a crusade in which he now fails to grasp the stakes."]

²⁰² See generally Marie-Claude Prémont, "L'affaire *Chaoulli* et le système de santé du Québec: cherchez l'erreur, cherchez la raison" (2006), 51 McGill LJ 167.

²⁰³ *Chaoulli* (SCC), *supra* note 200 at para. 159. As Justice Piché affirmed at trial: "Il ne faut pas jouer à l'autruche. L'établissement d'un système de santé parallèle privé aurait pour effet de menacer l'intégrité, le bon fonctionnement ainsi que la viabilité du système public." [author's translation: "We can't stick our heads in the sand. The establishment of a parallel, private health care system would threaten the integrity, the effective operation and the existence of the public system."]; *Chaoulli* (SC), *ibid.*, at para. 263.

²⁰⁴ *Chaoulli* (SCC), *ibid.* at para. 35; see Kent Roach, "The Courts and Medicare: Too Much or too Little Judicial Activism" in Colleen M. Flood, Kent Roach & Lorne Sossin, eds, *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005) [Flood et al, *Access to Care*] 184.

²⁰⁵ In the trial judge's words: "le Dr Coffey fait cavalier seul avec son expertise et les conclusions auxquelles il arrive [Author's translation: Dr. Coffey is a lone rider in his expertise and the conclusions he arrives at.];" *Chaoulli* (SC), *supra* note 200 at para. 120.

²⁰⁶ The evidence accepted by the trial judge proved the reverse: that eliminating the ban on private insurance would, by diverting resources away from the public and into the private system, result in increased wait times for publicly funded care; *ibid.* at paras. 106-107.

²⁰⁷ *Chaoulli* (CA), *supra* note 200 at 1211.

²⁰⁸ *Chaoulli* (SCC), *supra* note 200 at paras. 14, 34.

the Appellants were arguing only that their life, liberty and security of the person were threatened by Québec's prohibition on private health insurance.²⁰⁹

The majority in *Chaoulli* was unconcerned by issues of justiciability or institutional competence raised by the Appellants' challenge to the single-payer health care system. As Chief Justice McLachlin affirmed:

While the decision about the type of health care system Québec should adopt falls to the Legislature of that province, the resulting legislation, like all laws, is subject to constitutional limits, including those imposed by s. 7 of the *Charter*. The fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for *Charter* compliance when citizens challenge it.²¹⁰

The result was a Supreme Court decision highly prejudicial to the *Charter* rights and health interests of people living in poverty. Disregarding the evidence of the negative impact of striking down the ban on private insurance for those who depend on the publicly funded system,²¹¹ the majority granted a remedy available only to individuals who could afford to buy private insurance to jump the public queue.²¹² The majority's ruling in *Chaoulli* appeared to suggest that, while s. 7 does not guarantee access to health care based need, it does ensure a right to health care based on ability to pay.²¹³

In this context, the Supreme Court's failure to grant leave to appeal in *Tanudjaja*, and to finally revisit its decision in *Gosselin*, represents clear a failure of constitutionalism. As the Charter Committee Coalition argued in its intervention before the Ontario Court of Appeal in *Tanudjaja*, the issues raised in the s. 7 *Charter* claims of people living in poverty:

. . . bear directly on the relationship between members of the most marginalized groups in Canadian society and the constitutional rights and values that underpin Canada's constitutional democracy . . . The

²⁰⁹ *Ibid.* at paras. 103; 108, 110.

²¹⁰ *Ibid.* at para. 107.

²¹¹ *Ibid.* at para. 152.

²¹² See generally: Bruce Porter, "A Right to Health Care in Canada — Only if You Can Pay for it" (2005), 6 *ESR Review* 8; Martha Jackman, "'The Last Line of Defence for [Which?] Citizens': Accountability, Equality and the Right to Health in *Chaoulli*" (2006), 44 *Osgoode Hall LJ* 349; Lorne Sossin, "Towards a Two-Tier Constitution? The Poverty of Health Rights" in Flood et al, *Access to Care*, *supra* note 204 161.

²¹³ The *Chaoulli* decision has prompted a further s. 7 challenge to the single payer system, led by Dr. Brian Day in B.C. in *Cambie Surgeries v. British Columbia (Medical Services Commission)*, Doc. S090663 (Vancouver); see also BC Health Coalition, "Clinics Case Court Documents", online: < <http://www.bchealthcoalition.ca/what-you-can-do/save-medicare/court-documents> >; Martha Jackman, "From *Chaoulli* to *Cambie*: Charter Challenges to the Regulation of Private Health Funding and Care" in Colleen M Flood & Bryan Thomas, eds, *Is Two-Tier Health Care the Future?* (Ottawa: University of Ottawa Press, 2019) (forthcoming).

courts have a constitutional mandate to interpret and apply the *Charter* in a manner that secures every individual in Canada the full benefit of the *Charter's* protection. This, rather than any preconceived idea of what kinds of issues (and, by definition what types of claimants) belong in the courtroom should be the starting point of any *Charter* analysis.²¹⁴

6. CONCLUSION

In the *Tanudjaja* case, a single judge on a motion to strike essentially overruled the Supreme Court of Canada, declaring:

The law is established. As it presently stands there can be no positive obligation on Canada and Ontario to put in place programs that are directed to overcoming concerns for the “life, liberty and security of the person . . . The majority in *Gosselin* does not depart from this view. It confirms what has been understood since the early days of the *Charter*.

Notwithstanding the doctrinal significance and access to justice consequences of allowing Justice Lederer’s ruling to stand, the Supreme Court refused leave to appeal the *Tanudjaja* decision. The experience of *Charter* claimants in poverty-related cases before and since *Gosselin*, culminating in the motion to strike in *Tanudjaja*, is one of constitutional exclusion — the Supreme Court’s approach to s. 7 having effectively immunized an entire sphere of government action from *Charter* review. By imposing discriminatory evidentiary burdens on those challenging government action and inaction leading to hunger, poverty and homelessness, and in some cases ignoring their experience and evidence outright, and by characterizing their constitutional arguments as non-justiciable demands for free-standing rights not found in the *Charter*, the courts have erected a nearly impenetrable barrier to the life, liberty and security of the person claims of people living in poverty. In those too few *Charter* cases in which the poverty-related claims been accepted by the courts, it is precisely because they fit a negative rights paradigm and demand only that governments do nothing.

In the 2008 *Victoria (City) v. Adams*²¹⁵ case for instance, the homeless residents of a tent city in Victoria were successful in their s. 7 challenge to a municipal bylaw prohibiting them from erecting temporary structures in public parks at night.²¹⁶ At trial, Justice Ross found that the shortage of shelter spaces in Victoria meant that “hundreds of people are left to sleep in public places in the City”²¹⁷ and that the government’s interference with homeless people’s ability to

²¹⁴ *Tanudjaja* (CA), *supra* note 158 (*Factum of the Interveners: Charter Committee Coalition* at paras. 1, 6).

²¹⁵ 2009 BCCA 563, 2009 CarswellBC 3314 (B.C. C.A.) [*Adams* (CA)], reversing in part 2008 BCSC 1363, 2008 CarswellBC 2156 (B.C. S.C.) [*Adams* (SC)].

²¹⁶ *Adams* (SC), *ibid.* at para. 70.

²¹⁷ *Ibid.* at para. 58.

provide themselves with temporary shelter exposed them to a risk of serious harm, including death by hypothermia. In deciding that the bylaw violated s. 7, Justice Ross underscored the fact that the homeless claimants were not arguing the government was required to provide them with adequate shelter, but instead were challenging negative restrictions on their ability to shelter themselves, akin to the situation in *Chaoulli*.²¹⁸ In upholding Justice Ross's ruling striking down the Victoria bylaw, the B.C. Court of Appeal also emphasized that it was applying s. 7 as a negative "restraint" on government action, rather than as a source of positive obligations to address the problem of homelessness or the rights of the homeless.²¹⁹

Examining the role of judicial interpretation in the realization of socio-economic rights in Canada, Bruce Porter has observed:

Negative rights interpretations have been adopted not on the basis of coherent or reasonable principles of interpretation but rather in the service of preconceived ideas of a restricted role of courts. The consequences of such restrictive interpretations for the integrity of the meanings of rights are severe. By retreating from understandings that may require positive measures or transformative change, courts stultify interpretation around existing patterns of discrimination, marginalization and exclusion. They exclude from their interpretation of rights the circumstances of disadvantaged and marginalized groups — those whose rights are most frequently denied by existing patterns of exclusion and by governments' failures to take positive measures to address these systemic violations.²²⁰

In sharp contrast to the current judicial approach, in the period leading up to and following its enactment, disadvantaged groups advocated for an interpretation and application of the *Charter* that would reflect and reinforce Canada's international socio-economic rights commitments, moving beyond the discredited and outmoded dichotomy between positive and negative rights that was abandoned under the *UN Declaration* and the two *International*

²¹⁸ *Ibid.* at paras. 119-120.

²¹⁹ *Adams (CA)*, *supra* note 215 at para. 95. The B.C. Supreme Court relied on *Adams* in coming to a similar finding that an Abbotsford bylaw prohibiting the erection of temporary shelter or sleeping in parks overnight violated s. 7, again underlining that the claimants were "not seeking to impose any positive obligations on the City"; *Abbotsford (City) v. Shantz*, 2015 BCSC 1909, 2015 CarswellBC 3020 (B.C. S.C.) at para. 148, additional reasons 2016 CarswellBC 3671 (B.C. S.C.); see generally Margot Young, "Charter Eviction: Litigating out of House and Home" (2015), 24 *Journal of Law & Social Policy* 46; Martha Jackman, "Charter Remedies for Socio-economic Rights Violations: Sleeping under a Box?" in Robert J Sharpe and Kent Roach, eds, *Taking Remedies Seriously* (Ottawa: Canadian Institute for the Administration of Justice, 2010) 279 [Jackman, "Sleeping under a Box?"]; Margot Young, "Rights, the Homeless, and Social Change: Reflections on *Victoria (City) v. Adams* (BCSC)" (Winter 2009/10), 164 *BC Studies* 103.

²²⁰ Porter, "Inclusive Interpretations", *supra* note 157 at 216-17.

Covenants.²²¹ Disadvantaged groups insisted that governments' inattention to, or deliberate failure to address the consequences of unemployment, homelessness, poverty, inadequate health services, and lack of social supports, should receive the same level of *Charter* scrutiny as direct violations of security of the person and other fundamental rights. As Justice Arbour underscored in *Gosselin*:

Freedom from state interference with bodily or psychological integrity is of little consolation to those who, like the claimants in this case, are faced with a daily struggle to meet their most basic bodily and psychological needs. To them, such a purely negative right to security of the person is essentially meaningless: theirs is a world in which the primary threats to security of the person come not from others, but from their own dire circumstances. In such cases . . . positive state action is what is required in order to breathe purpose and meaning into their s. 7 guaranteed rights.²²²

Three decades on, people living in poverty would surely have anticipated that the s. 7 right to life, liberty and security of the person would, as Louise Gosselin believed, translate into a level of social assistance that didn't force those in need to choose between hunger and homelessness. They would take as a given Chief Justice McLachlin and Justice Lebel's insistence that "the *Charter*, as a living document, grows with society and speaks to the current situation and needs of Canadians. Thus Canada's current international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the *Charter*."²²³ People living in poverty would have predicted the *Charter* would, as Jennifer Tanudjaja affirmed, require Canadian governments to adopt strategies to combat and eventually put an end to poverty and widespread housing insecurity. They would have expected the courts to recognize the disproportionately adverse impact government inaction has on the most socially and economically disadvantaged members of Canadian society: Indigenous people, people with disabilities; new immigrants and refugees, and sole support mothers and their children.²²⁴ Instead of one tenuous step forward by the Supreme Court of Canada in *Gosselin*, they would have expected Canadian courts at every level to hold governments fully accountable for failing to take affirmative steps to remedy poverty and the serious human rights violations that result. People living in poverty could not have foreseen that, 35 years after the *Charter*'s enactment, s. 7's promise of life, liberty and security of the person would offer no more than a right to sleep in a park at night under a piece of plastic or a cardboard box.²²⁵ Most of all, people

²²¹ *Supra* notes 69-71.

²²² *Gosselin* (SCC), *supra* note 5 at para. 377.

²²³ *Health Services Assn*, *supra* note 74 at para. 78.

²²⁴ One in seven people in Canada live in poverty, including 25.3% of Indigenous people; 23% of people with disabilities; 34.2% of new immigrants and refugees; 32.4% of single parent families (80% of which are female-led) and 43.4% of children in those families; *Poverty Trends 2017*, *supra* note 10 at 1-4.

living in poverty could not have imagined their *Charter* claims would no longer even be heard. Yet that, to all appearances, is the legacy of *Gosselin*.

²²⁵ See Jackman, "Sleeping under a Box?", *supra* note 219.