

# ENFORCEABILITY OF ECONOMIC AND SOCIAL RIGHTS IN THE WAKE OF *GOSSELIN*: ROOM FOR CAUTIOUS OPTIMISM

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*This article focuses on the extent to which economic and social rights can be “read into” section 7 of the Canadian Charter of Rights and Freedoms. It canvasses the Supreme Court of Canada’s treatment in Gosselin of the barriers traditionally said to preclude such an approach – protection of economic rights, application outside an adjudicative context, imposition of positive obligations, and justiciability – and concludes with a comparative examination of cases from South Africa, the United Kingdom and Europe.*

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*Jusqu’à quel point les droits économiques et sociaux peuvent-ils être affirmés par l’article 7 de la Charte des droits et libertés ? Cet article met en lumière la façon dont l’arrêt Gosselin de la Cour suprême du Canada aborde les obstacles traditionnels à une telle approche – protection des droits économiques, application extrajudiciaire, imposition d’exigences, et justiciabilité – et conclut par un examen comparatif de causes de l’Afrique du Sud, du Royaume-Uni et de l’Europe.*

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### *I. Introduction*

In 1960, Frank Scott wrote:

I find it interesting to observe how in the field of constitutional law – and I think the same is true of other branches of law – certain parts of the total structure seem to become floodlighted and to stand out from the rest at particular periods of time. The law surrounds and clothes the body politic and economic, and as that body stirs restlessly so does the surface of the law disclose where the tensions and the pressures are being most felt.<sup>1</sup>

The fraying, if not the unravelling, of the social safety net in Canada over the last two decades is causing the body politic and economic to rest uneasily, and this is disclosed in the increased attention being paid to the question of the enforcement of economic and social rights. Section 7 of the *Canadian Charter of Rights and Freedoms*,<sup>2</sup> in particular, is now in the floodlights.

Government indebtedness increased rapidly in Canada, as elsewhere, during the 1980s and early 1990s,<sup>3</sup> and the response has been to cut deeply into social programmes. This has meant restrictions on unemployment insurance, “clawback” of benefits paid to children and seniors, elimination of national standards for provincial welfare programmes and services, and cuts in the level of social assistance. The cumulative effect of these changes on the social safety net as a whole compounds the effect of the cuts to the individual strands.

For example, throughout the 1990s the tightening of the eligibility criteria for unemployment/employment (“UI/EI”) insurance has resulted in fewer people qualifying for UI/EI benefits, and those who do qualify are receiving lower benefits and are exhausting their benefits more quickly. This in turn has led to an increase in the number of people applying for and receiving provincial social assistance. The financial burden of this increasing social assistance caseload was compounded by the reduction in the federal government’s contribution to the cost of social assistance, first through the “cap” on the Canada Assistance Plan, and subsequently through the reduced Canada Health and Social Transfer monies.<sup>4</sup>

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<sup>1</sup> F.R. Scott, “Expanding Concepts of Human Rights” (1960) 3 Can. Bar J. 199 at 199.

<sup>2</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>3</sup> During the 1980s Canada’s debt-to-GDP ratio rose from 12.5% to a conservatively estimated 40%, and by 1993 it had risen to 60%; this ratio was one of the highest of the industrialized countries: T. Macklem *et al*, *Government Debt and Deficit in Canada: A Macro Simulation Analysis*, Bank of Canada Working Paper 95-4, May 1995, 1.

<sup>4</sup> J. Keene, “Claiming the Protection of the Court: Charter Litigation Arising from Government ‘Restraint’” (1998) 9 N.J.C.L. 97 at 102.

The effect of these cuts on the poorest members of Canadian society has been strongly criticised. Some of this criticism has come from poverty advocates and academics,<sup>5</sup> but it has also come from the United Nations Committee on Economic, Social and Cultural Rights in its periodic reviews of Canada's compliance with its obligations under the *International Covenant on Economic, Social and Cultural Rights*.<sup>6</sup> The Committee was particularly critical of Canada in its detailed 1998 review of Canada's third periodic report. It noted, for example, that "since 1994 in addressing the budget deficits by slashing social expenditure, the State Party has not paid sufficient attention to the adverse consequences for the enjoyment of economic, social and cultural rights by the Canadian population as a whole, and by vulnerable groups in particular".<sup>7</sup> The Committee also expressed concern that "the State Party did not take into account the Committee's 1993 major concerns and recommendations when it adopted policies at federal, provincial and territorial levels which exacerbated poverty and homelessness among vulnerable groups during a time of strong economic growth and increasing affluence".<sup>8</sup> This is strong language, and indicates that the Committee considers Canada to be in continuing breach of its obligations under the *Covenant* on a number of fronts.<sup>9</sup>

In both its 1993 and 1998 *Concluding Observations*, the Committee stressed the importance of the *Charter* in providing effective domestic remedies for the rights protected under the *Covenant*. Sections 7 and 15 were singled out particularly in this regard. This position, which is also

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<sup>5</sup> See e.g. *ibid.*; L. Sossin, "Salvaging the Welfare State?: The Prospects for Judicial Review of the Canada Health & Social Transfer" (1998) 21 Dal. L.J. 141; M. Jackman, "From National Standards to Justiciable Rights: Enforcing International Social and Economic Guarantees through *Charter of Rights* Review" (1999) 14 J.L. & Soc. Pol'y 69.

<sup>6</sup> 16 December 1966, 993 U.N.T.S. 3, Can T.S. 1976 No. 46 (entered into force 3 January 1976, accession by Canada 19 August 1976). See particularly B. Porter, "Judging Poverty: International Human Rights Law to Refine the Scope of Charter Rights" (2000) 15 J.L. & Soc. Pol'y 117 at 130-137.

<sup>7</sup> UN ESC, Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada* (4 December 1998), Doc. E/C.12/1/Add.31, para. 11.

<sup>8</sup> *Ibid.* para. 34. The concerns and recommendations in question are found in the Committee's 1993 *Concluding Observations* to Canada's second periodic report: Doc. E/C.12/1993/5.

<sup>9</sup> Canada's fourth periodic report was due on 30 June 2000, and had not been submitted as of 2 January 2003: UN ESC, Committee on Economic, Social and Cultural Rights, *States Parties to the International Covenant on Economic, Social and Cultural Rights and Status of Submission of Reports in Accordance with the Programme Established by the Economic and Social Council in Resolution 1988/4 and Rule 58 of the Rules of Procedure of the Committee*, 2 January 2003, Doc. E/C.12/2003/2, Annex I, Part B.

advocated by a number of authors<sup>10</sup> and accepted by the federal government,<sup>11</sup> has been put to the test in the decision of the Supreme Court of Canada in *Gosselin v. Québec (Attorney General)*.<sup>12</sup>

## II. The Decisions in *Gosselin*

*Gosselin* involved a social assistance programme in force in Québec between 1984 and 1989, adopted in response to “a deep and long-lasting crisis in the North American economy”<sup>13</sup> which saw unemployment in Québec skyrocket, particularly among young people. Under this programme, the level of base benefits payable to recipients under the age of 30 was approximately one-third of the base amount payable to those 30 years and over, although young recipients could increase their benefits to a roughly comparable amount by participating in designated work activities or education programmes.<sup>14</sup> McLachlin C.J.C. described the programme succinctly as follows:

The new scheme was based on the philosophy that the most effective way to encourage and enable young people to join the work force was to make increased benefits conditional on participation in one of three programs: On-the-job Training, Community Work, or Remedial Education. Participating in either On-the-job Training or Community Work boosted the welfare payment to a person under 30 up to the base amount for those 30 and over; participating in Remedial Education brought an under-30 within \$100 of the 30-and-over base amount.<sup>15</sup>

Neither amount was particularly generous, as the Chief Justice admitted:

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<sup>10</sup> See e.g. the authors mentioned in notes 4-6; W.A. Schabas, “Freedom from Want: How Can We Make Indivisibility More Than a Mere Slogan?” (2000) 11 N.J.C.L. 189 at 205-207; G. McGregor, “The International Covenant on Social, Economic, and Cultural Rights: Will It Get Its Day in Court?” (2002) 28 Man. L.J. 321. Earlier examples include A.W. MacKay & M. Holgate, “Fairness in the Allocation of Housing: Legal and Economic Perspectives” (1983) 7 Dal. L.J. 383 at 403; I. Morrison, “Security of the Person and the Person in Need: Section 7 of the Charter and the Right to Welfare” (1988) 4 J.L. & Soc. Pol’y 1; and M. Jackman, “Poor Rights: Using the *Charter* to Support Social Welfare Claims” (1993) 19 Queen’s L.J. 65.

<sup>11</sup> *Concluding Observations*, 1998, *supra* note 7 at paras. 5 and 15.

<sup>12</sup> [2002] S.C.R.429, 298 N.R. 1, 221 D.L.R. 4<sup>th</sup> 257 [*Gosselin* S.C.C.], aff’g [1999] R.J.Q. 1033 (Qc. C.A.) [*Gosselin* C.A.] and [1992] R.J.Q. 1647 (Qc. Sup. Ct.) [*Gosselin* trial].

<sup>13</sup> *Gosselin* S.C.C., *ibid.* at para. 158 (*per* Bastarache J.).

<sup>14</sup> *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, ss. 23, 29 and 35.0.2 ff, adopted under the *Social Aid Act*, R.S.Q., c. A-16 (as am. by S.Q. 1984, c. 5).

<sup>15</sup> *Gosselin* S.C.C., *supra* note 12 at para. 7.

The 30-and-over base amount still represented only 55 percent of the poverty level for a single person. For example, non-participating under-30s were entitled to \$170 per month, compared to \$466 per month for welfare recipients 30 and over. According to Statistics Canada, the poverty level for a single person living in a large metropolitan area was \$914 per month in 1987.<sup>16</sup>

Louise Gosselin was 25 years old when the programme came into force in 1984 and turned 30 just before it ended. For most of the programme, she was a 'non-participating under-30' and received only the reduced base amount, although she did have stints (about two years overall) in each of the three programmes. Gosselin brought a class action on behalf of all young welfare recipients subject to the differential regime from 1985 to 1989, in which she argued that the programme violated sections 7 and 15(1) of the *Canadian Charter* and section 45 of the *Québec Charter of Human Rights and Freedoms*.<sup>17</sup> She sought an order that the Québec government reimburse all those who had not received the higher base amount during the relevant period (for an estimated total of \$389 M plus interest).

The progress of the case through the courts was slow and Gosselin was unsuccessful at all three levels. The reasons for judgment varied considerably. The trial judge, Reeves J., found that none of the three rights claimed by the appellant had been breached.<sup>18</sup> All three Court of Appeal judges<sup>19</sup> agreed that section 7 of the *Canadian Charter* had not been breached, but each came to a different conclusion concerning section 15. Both Mailhot and Baudouin J.J.A. rejected the appellant's claim, the former holding that section 15 had not been infringed and the latter that its infringement was justifiable under section 1; only Robert J.A. held that section 15 had been infringed in unjustifiable manner. As for the *Québec Charter*, Baudouin J.A. held, with Mailhot J.A. concurring, that the differential social assistance regime did not violate section 45, whereas Robert J.A., in a wide ranging and detailed judgment, held that it did.

In the Supreme Court of Canada, the majority (Chief Justice McLachlin, with Gontier, Iacobucci, Major and Binnie J.J. concurring) held, like the trial judge, that the differential social assistance regime did not breach any of the three rights claimed by the appellant. The other four judges were of the view that at least one of the rights had been violated: Justices L'Heureux-Dubé and Arbour both found an unjustifiable infringement of section 7 of the *Canadian Charter*, whereas Justices Bastarache and LeBel agreed with the majority that section 7 had not been

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<sup>16</sup> *Ibid.*

<sup>17</sup> R.S.Q., c. C-25.

<sup>18</sup> *Gosselin* trial, *supra* note 12.

<sup>19</sup> *Gosselin* C.A., *ibid.*

infringed; all four held that the differential regime infringed section 15 and that this infringement was not justifiable under section 1; and only L'Heureux-Dubé J. came down clearly on the side of a violation of section 45 of the *Québec Charter*, although Bastarache J., with Arbour J. concurring, expressed some support for this view.

Nonetheless, a closer examination of the decisions in the Supreme Court of Canada suggests that there is room for cautious optimism about the enforceability of economic and social rights in the wake of *Gosselin*. This optimism flows more from the Court's analysis of section 7 of the *Canadian Charter* than it does from its treatment of section 45 of the *Québec* legislation and section 15 of the *Canadian Charter*.

### A. Section 45 of the *Québec Charter*

The argument based on section 45 of the *Québec Charter* appears at first blush to be the most promising, as this statute expressly protects economic and social rights. These are found in Chapter IV of the *Charter*, and include the guarantee relating to social assistance set out in section 45:

Every person in need has a right, for himself and his family, to measures of financial assistance and to social measures provided by law susceptible of ensuring such person an acceptable standard of living.

However, both the Chief Justice (speaking for the majority) and LeBel J. interpreted this right as one depending on the enactment of legislation: it is merely a right to “measures provided for by law”, with the adequacy of the measures being beyond the reach of judicial review. LeBel J. pointed out that similar terminology is found in regard to other economic and social rights in Chapter IV and has almost uniformly been held to curtail the extent of the obligation imposed.<sup>20</sup> There was no reason to decide differently in the present context.

L'Heureux-Dubé J., on the other hand, interpreted the section as entitling a court to review the adequacy of the legislative measures, and expressly adopted Robert J.A.'s dissenting opinion in the Court of Appeal to this effect.<sup>21</sup> Robert J.A. saw section 45 as guaranteeing a substantive right having a minimum core content<sup>22</sup> which is reviewable by the courts. He did not regard the phrase “provided for by law” as limiting the scope

<sup>20</sup> See e.g. *Lévesque v. Québec (Procureur général)*, [1988] R.J.Q. 223 (Qc. C.A.) and *Lecours v. Québec (Ministère de la Main d'œuvre et de la sécurité du revenu)*, J.E. 90-636, cited by LeBel J. in *Gosselin* S.C.C., *supra* note 12 at paras. 425-426.

<sup>21</sup> Saying that she “subscribe[d] entirely to [his] exhaustive analysis”: *Gosselin* S.C.C., *ibid.* at para. 146.

<sup>22</sup> “[U]n noyau de droits intangibles, un seuil objectif minimum que l'Etat ne saurait franchir” : *Gosselin* C.A., *ibid.* at 1109; see also at 1097.

of the right, and distinguished section 45 in this respect from the other sections of Chapter IV not only on linguistic grounds<sup>23</sup> but also because of the effect of *International Covenant on Economic, Social and Cultural Rights*. In a carefully constructed and well-documented analysis, Robert J.A. argued that there is a “parenté irréfutable”<sup>24</sup> between section 45 of the Québec *Charter* and article 11 of the *Covenant* (which recognises the right to an adequate standard of living); governments are under a positive obligation to implement, albeit progressively, the rights under the *Covenant*;<sup>25</sup> and any reduction in or withdrawal of existing measures is *prima facie* a violation of the *Covenant*<sup>26</sup> unless it can be shown that the restriction is neither discriminatory, arbitrary nor unreasonable, does not jeopardise a person’s survival or integrity and does not threaten the substance of the rights guaranteed.<sup>27</sup> In reducing the level of social assistance in the way that it did in 1984, Robert J.A. concluded that Québec was in breach of its obligations under the *Covenant* and thus, by extension, under section 45 of the Québec *Charter*.

Bastarache and Arbour JJ., in the Supreme Court, also agreed that “on its face, s. 45 does create some form of positive right to a minimal standard of living”.<sup>28</sup> However, they did not explore this in detail because they held the right to be unenforceable in the circumstances of the case.

This raises the issue of remedies under the Québec *Charter*. All judges agreed that even if the differential social assistance regime were held to violate section 45, a court has no power to declare it illegal under section 52. This is because, in providing that “[n]o provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38, except as provided by those sections, unless such Act expressly states that it applies despite the Charter”,<sup>29</sup> section 52 entrenches the civil and political rights

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<sup>23</sup> Robert J.A. felt that phrases such as “to the extent and according to the standards provided for by law” (s. 40, right to free public education) or “to the extent provided for by law” (s. 44, right to information) “semblent à première vue contenir une restriction intrinsèque des droits énoncés que l’on ne retrouve pas, ou moins clairement, dans le cas de l’article 45”: *ibid.* at 1100.

<sup>24</sup> *Ibid.* at 1092.

<sup>25</sup> *Ibid.* at 1092-1094, relying especially on UN ESC, Committee on Economic, Social and Cultural Rights, *General Comment No. 3*, UN Doc. E/1991/23 (1990) (interpreting art. 2 of the *Covenant*).

<sup>26</sup> *Ibid.* at 1094, citing “The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights” (1998) (reprinted in (1998) 20 Hum. Rts. Q. 691).

<sup>27</sup> *Ibid.*, citing “The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights”, UN Doc. E/CN.4/1987/17/Annex (1987) (reprinted in (1987) 9 Hum. Rts. Q. 122) (relating to art. 4 of the *Covenant*). See also at 1109.

<sup>28</sup> *Gosselin S.C.C.*, *supra* note 12 at paras. 302 (*per* Bastarache J.) and 397 (Arbour J., agreeing).

<sup>29</sup> Emphasis added.



found in the indicated section, but not economic and social rights – such as the right to social assistance – which are protected elsewhere than in sections 1 to 38. Nor would the appellant be entitled to damages under section 49, which provides that “[a]ny unlawful interference with any right or freedom recognized by this Charter entitles the victim to...compensation for the moral or material prejudice resulting therefrom”, as all judges agreed that this would require proof of civil fault.<sup>30</sup>

However, several Supreme Court justices emphasised that despite this lack of remedies, the social and economic rights protected under the Québec *Charter* are more than mere statements of policy. LeBel J. suggested that, in appropriate cases, such rights could be enforced indirectly by using them to ground a claim under section 10 of the *Charter* which, in providing that “[e]very person has a right to full and equal recognition and exercise of *his human rights and freedoms*...,” does not create an independent right to equality but rather one linked to other rights. A breach of section 10 would then support a declaration of invalidity under section 52.<sup>31</sup> McLachlin C.J.C.’s point was more general:

The *Québec Charter* is a legal document, purporting to create social and economic rights. These may be symbolic, in that they cannot ground the invalidation of other laws or an action in damages. But there *is* a remedy for breaches of the social and economic rights set out in Chapter IV of the *Québec Charter*: where these rights are violated, a court of competent jurisdiction can declare that this is so.<sup>32</sup>

Arbour J. stressed the symbolic and political force of such a declaration.<sup>33</sup>

### *B. Section 15 of the Canadian Charter*

The argument based on section 15 of the *Canadian Charter* attracted the most support, with only the slimmest of majorities holding that the

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<sup>30</sup> See particularly Bastarache J. in *Gosselin* S.C.C., *supra* note 12 at paras. 304-305, citing L’Heureux-Dubé J. in *Québec (Public Curator) v. Syndicat national des employés de l’hôpital St-Ferdinand*, [1996] 3 S.C.R. 211 at 260 (“...it must be shown that a right protected by the *Charter* was infringed and that this infringement resulted from wrongful conduct”), and Gonthier J. in *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, [1996] 2 S.C.R. 345 at 404-406. Even Robert J.A. felt that the Court of Appeal was bound by this interpretation: *Gosselin* C.A., *ibid.* at 1119.

<sup>31</sup> *Gosselin* S.C.C., *ibid.* at paras. 430-431. See also P. Bosset, “Les droits économiques et sociaux : Parents pauvres de la Charte québécoise” (1996) 75 Can. Bar. Rev. 583 at 592-593. However, this argument could not be applied in *Gosselin* as s. 10 protects against discrimination based on age “*except as provided by law*” [emphasis added]; the other possible ground of discrimination, “social condition”, had not been argued: see *Gosselin* C.A., *ibid.* at 1102-1103 (Robert J.A.).

<sup>32</sup> *Gosselin* S.C.C., *ibid.* at para. 96 [emphasis in original].

<sup>33</sup> *Ibid.* at para. 397.



differential social assistance regime did not constitute an unjustifiable infringement of section 15(1) of the Charter. The argument focused on discrimination based on age. Briefly put, both the majority and the four minority judges followed the approach suggested by Iacobucci J., speaking for the Court, in *Law v. Canada (Minister of Employment and Immigration)*<sup>34</sup> to determine whether or not social assistance recipients under the age of 30 were treated in a way that was respectful of their essential human dignity. This involved looking at three of the four contextual factors set out in *Law*: pre-existing disadvantage, stereotyping, prejudice or vulnerability; correspondence between the distinction drawn and the actual needs and circumstances of the affected group; and the nature and scope of the interests affected.<sup>35</sup> McLachlin C.J.C., speaking for the majority, held that the appellant had failed to prove that any of the contextual factors applied. The dissenting judges disagreed. Bastarache and Arbour JJ. found that all three factors applied; LeBel J. stressed the second factor; and L'Heureux-Dubé J. emphasised the last. Throughout, the majority focused on the government's purpose in adopting the differential regime whereas the minority judges looked more to its effect.

Of particular interest is the somewhat sharp exchange between McLachlin C.J.C. and Bastarache J. concerning the relevance of the fact that the applicant was a welfare recipient. This was irrelevant to the Chief Justice, as she saw the issue solely in terms of discrimination on the basis of age: had the regulation setting up the differential regime "treated welfare recipients under 30 as less worthy of respect than those 30 and over, marginalizing them on the basis of their youth"?<sup>36</sup> Bastarache J., on the other hand, felt that the overarching concern for human dignity required that the comparison be cast more widely:

The fact that people on social assistance are in a precarious, vulnerable position adds weight to the argument that differentiation that affects them negatively may pose a greater threat to their human dignity. The fact that their status as beneficiaries of social assistance was not argued as constituting a new analogous ground should not be a matter of concern at this stage of the analysis, since it has already been determined ... that the differentiation has been made on the basis of an enumerated ground. The issue, at this stage, is to determine whether, in the context of this case, a differentiation based on an enumerated ground is threatening to the appellant's human dignity. *If the vulnerability of the appellant's group as welfare recipients cannot be recognized at this stage, can we*

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<sup>34</sup> [1999] 1 S.C.R. 497 at 534-541.

<sup>35</sup> See *Gosselin* S.C.C., *supra* note 12 at paras. 25 (McLachlin C.J.C.) and 232 (Bastarache J.). The remaining factor in *Law* (the ameliorative purpose or effect of the impugned measure on a more disadvantaged group) did not apply in the circumstances of the case.

<sup>36</sup> *Ibid.* at para. 28. She seemed to treat an attempt "to shift the focus from age to welfare" (para. 35) with some impatience.

*really be said to be undertaking a contextual analysis?*<sup>37</sup>

### *C. Section 7 of the Canadian Charter*

The arguments based on section 7 are the most interesting for present purposes, as they pose squarely the question of the extent to which economic and social rights can be enforced under the *Charter*. Section 7 reads as follows:

Everyone has the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Does a right such as the right to social assistance come within the scope of section 7?

Opinions on this question varied. At one end of the spectrum, Bastarache J. took the position that a right to social assistance is, by its very nature, outside the scope of the section. At the other end, Arbour J., with L'Heureux-Dubé J. agreeing, held that such a right does come within the scope of section 7, that the differential programme in question constituted an infringement of section 7 and that this infringement was not justifiable under section 1. Somewhere in the middle, McLachlin C.J.C, speaking for Gonthier, Iacobucci, Major and Binnie JJ., declined to decide whether a right to adequate living standards might ever come with the section's scope, as "the frail platform provided by the facts"<sup>38</sup> in *Gosselin* did not support such a decision in the case. LeBel J. agreed with the Chief Justice.

At the heart of the difference of opinion between the judges is their interpretation of section 7 as guaranteeing one right, or two. Arbour J. saw the section as protecting two rights: a right to life, liberty and security of the person, on the one hand, and a right not to be deprived of it except in accordance with the principles of fundamental justice, on the other. This interpretation had been impliedly recognised in early cases on section 7<sup>39</sup> and was for her the only plausible construction. To construe section 7 as guaranteeing only one right – the right not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice – would be to read out the conjunction "and", and with

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<sup>37</sup> *Ibid.* at para. 239 [emphasis added].

<sup>38</sup> *Ibid.* at para. 83.

<sup>39</sup> See particularly *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 500: "On the facts of this case it is not necessary to decide whether the section gives any greater protection [than the right not to be deprived], such as deciding whether, absent a breach of the principles of fundamental justice there still can be, *given the way the sentence is structured*, a violation of one's rights to life, liberty and security of the person under s. 7." (per Lamer J. [emphasis added by Arbour J. in *Gosselin*, *supra* note 12 at para. 338]); see also Wilson J. in *Re B.C. Motor Vehicle Act* at 523.

it, the entire first clause.<sup>40</sup> Moreover, a two-rights interpretation, still according to Arbour J., restores a more active role to section 1.<sup>41</sup> Bastarache J., on the other hand, clearly saw the section as containing a single right: “S. 7 does not grant a right to security of the person, full stop. Rather, the right is protected only insofar as the claimant is deprived of the right ... by the state, in a manner that is contrary to the principles of fundamental justice.”<sup>42</sup> He therefore insisted throughout his analysis on the need for a “determinative state action” to found a claim under section 7. McLachlin C.J.C., finally, also appears to have adopted the single-right approach in emphasising the need to show a deprivation,<sup>43</sup> but she is much less explicit in this regard than Bastarache J.

Despite this divergence, however, there was in fact some general agreement among the judges about the scope of section 7, with all essentially agreeing with Arbour J. that “the barriers that are traditionally said to preclude *a priori* a positive claim against the state under s. 7”<sup>44</sup> do not exist. These barriers relate to the extent to which section 7 might protect economic rights, apply outside an adjudicative context, impose positive state action and be justiciable.

### 1. *Protection of economic rights*

All of the judges seemed to accept that section 7 could, in appropriate circumstances, be construed as encompassing economic rights. Arbour J. was most explicit in this regard, and based her analysis on Dickson C.J.C.’s suggestion in *Irwin Toy Ltd. v. Québec (Attorney General)*<sup>45</sup> that “economic rights fundamental to human life or survival”, unlike corporate-

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<sup>40</sup> *Gosselin S.C.C.*, *ibid.* at paras. 338 and 341. Arbour J. pointed out that the French version of s. 7, with its two separate clauses, is even more supportive of the two-rights analysis: “Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu’en conformité avec les principes de justice fondamentale”.

<sup>41</sup> *Ibid.* at para. 342.

<sup>42</sup> *Ibid.* at para. 210; see also para. 205: “In order to establish a s. 7 breach, the claimant must *first* show that she was deprived of her right to life, liberty or security of the person, and *then* must establish that the state caused such deprivation in a manner that was not in accordance with the principles of fundamental justice” [emphasis added].

<sup>43</sup> *Ibid.* at para. 81.

<sup>44</sup> *Ibid.* at para. 311.

<sup>45</sup> [1989] 1 S.C.R. 927 at 1003-4: “Lower courts have found that the rubric of ‘economic rights’ embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property-contract rights. To exclude all of these at this early moment in the history of *Charter* interpretation seems to us precipitous. We do not, at this moment, choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights.”

commercial rights, might fall within “security of the person”. In Arbour J.’s view, the rights at issue “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 they can readily be accommodated under section 7 “without the need to constitutionalize ‘property’ rights or interests.”<sup>46</sup> In fact, she felt that it was a “gross mischaracterization” to label the rights claimed as “economic rights” just because they, like most rights, involved some economic value: “It is in the very nature of rights that they crystallize certain benefits, which can often be quantified in economic terms”. She continued:

What is truly significant, from the standpoint of inclusion under the rubric of s. 7 rights, is not therefore whether a right can be expressed in terms of its economic value, but as Dickson C.J. suggests, whether it “fall[s] within ‘security of the person’” or one of the other enumerated rights in that section. It is principally because corporate-commercial “property” rights fail to do so, and not because they contain an economic component *per se*, that they are excluded from s. 7. Conversely, it is because the right to a minimum level of social assistance is clearly connected to “security of the person” and “life” that it distinguishes itself from corporate-commercial rights in being a candidate for s. 7 inclusion.<sup>47</sup>

McLachlin C.J.C. and Bastarache J. were less explicit than Arbour J. about the protection of economic rights because they linked it to other hurdles facing the application of section 7. The Chief Justice recognised that the issue had been left open in *Irwin Toy*, and was content to follow suit because she related it to the questions of the application of the section to rights unconnected to the administration of justice<sup>48</sup> or in the absence of a deprivation by the state.<sup>49</sup> Bastarache J. linked the issue to the distinction between negative and positive rights,<sup>50</sup> but did not consider it in detail because of the stress he placed on the need, flowing from his “single right” analysis,<sup>51</sup> for a deprivation by the state.

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<sup>46</sup> *Gosselin S.C.C.*, *supra* note 12 at para. 312.

<sup>47</sup> *Ibid.*, at para. 313.

<sup>48</sup> *Ibid.* at para. 80.

<sup>49</sup> *Ibid.* at para. 81 (“*Even if s.7 could be read to encompass economic rights*” [emphasis added]).

<sup>50</sup> *Ibid.* at para. 219: “The appellant and several of the interveners made forceful arguments regarding the distinction that is sometimes drawn between negative and positive rights, as well as that which is made between economic and civil rights, arguing that security of the person often requires the positive involvement of government for it to be realised. This is true.”

<sup>51</sup> See text accompanying note 42.

## 2. Application outside an adjudicative context

All of the Supreme Court judges agreed that the context in which section 7 operates is evolving and can no longer be seen as restricted to proceedings akin to criminal or penal proceedings, as Lamer J. had suggested in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Manitoba)*<sup>52</sup> and as its inclusion under the heading “Legal Rights” (“*Garanties juridiques*”) might support. The judges in *Gosselin* pointed to a number of recent Supreme Court decisions as examples of this evolution: in *B.(R.) v. Children’s Aid Society of Metropolitan Toronto*,<sup>53</sup> section 7 had been applied in regard to parental rights over an infant’s medical treatment; in *New Brunswick (Minister of Health & Community Services) v. G.(J.)*,<sup>54</sup> the section had been applied in the context of a child custody hearing; in *Blencoe v. British Columbia (Human Rights Commission)*,<sup>55</sup> it was a human rights investigation; in *Winnipeg Child and Family Services v. K.L.W.*,<sup>56</sup> the administrative seizure of a newborn; and in *Suresh v. Canada (Minister of Citizenship and Immigration)*,<sup>57</sup> a ministerial deportation order.

The judges were divided, however, on how far outside the adjudicative context the protection of section 7 could be extended. Bastarache J. was the most restrictive in this regard, stating that “at the very least, in order for one to be deprived of a s. 7 right, some determinative state action, *analogous to a judicial or administrative action*, must be shown to exist.”<sup>58</sup> He thus found *Gosselin*’s claim wanting in two respects: there had been no engagement with the judicial system or its administration; and the threat to her right to security had not emanated from the state – it had simply been “brought upon her by the vagaries of a weak economy”.<sup>59</sup>

The other judges were more open to the possibility that section 7 might protect rights or interests wholly unconnected to the administration of justice. Arbour and L’Heureux-Dubé JJ. felt that continued insistence upon section 7’s placement in the “legal rights” portion of the *Charter* “would be to freeze constitutional interpretation in a manner that is inconsistent with the vision of the Constitution as a ‘living tree’”.<sup>60</sup> LeBel J. found that Bastarache J.’s interpretation “unduly circumscribes” the scope of section 7, and preferred the “cautious, but open, approach” of the

<sup>52</sup> [1990] 1 S.C.R. 1123 at 1172-1177.

<sup>53</sup> [1995] 1 S.C.R. 315 [*B.(R.)*].

<sup>54</sup> [1999] 3 S.C.R. 46 [*G.(J.)*].

<sup>55</sup> [2000] 2 S.C.R. 307 [*Blencoe*].

<sup>56</sup> [2000] 2 S.C.R. 519 [*K.L.W.*].

<sup>57</sup> [2002] 1 S.C.R. 3 [*Suresh*].

<sup>58</sup> *Gosselin* S.C.C., *supra* note 12 at para. 217 [emphasis added].

<sup>59</sup> *Ibid.* at para. 218.

<sup>60</sup> *Ibid.* at para. 318.

majority.<sup>61</sup> McLachlin C.J., speaking for the majority, also disagreed with Bastarache J's conclusion that section 7 applies only in an adjudicative context: "With respect, I believe that this conclusion may be premature. An adjudicative context might be sufficient, but we have not yet determined that one is *necessary* in order for s. 7 to be implicated."<sup>62</sup> For McLachlin C.J., the question of whether section 7 can apply to protect rights or interests wholly unconnected to the administration of justice "remains unanswered".<sup>63</sup> She did not regard *Gosselin* as an appropriate case to attempt to answer it, as she linked this question to the issue of whether section 7 can be interpreted to include positive obligations.

### 3. *Imposition of positive state obligations*

The most difficult issue with which the Court had to wrestle in *Gosselin* was whether or not section 7 can be invoked to impose upon the state a duty to act where it has not done so. Can the section be used as a sword, or is it simply a shield providing protection against unjustifiable state interference? It is the Court's treatment of this issue, in particular, which gives room for cautious optimism about the enforceability of economic and social rights in the wake of *Gosselin*.

Somewhat surprisingly, all of the judges accepted that, as a matter of principle, section 7 could impose positive obligations upon governments. This means that they rejected the oft-cited distinction between rights of "non-interference" and rights of "performance", between "first generation" civil and political rights and "second generation" economic and social rights, between rights that are seen as cost-free and those that are seen as costly.<sup>64</sup> Arbour J., with L'Heureux-Dubé J. concurring, was the most emphatic in this regard. She stressed that the realisation of some of the most basic *Charter* rights requires the positive involvement of the state, and gave as examples the right to vote (section 3), the right to be tried within a reasonable time (section 11(b)), the right to be presumed innocent (section 11(d)), the right to a jury trial (section 11(f)), the right to an interpreter in penal proceedings (section 14) and minority language education rights (section 23).<sup>65</sup> She pointed to decisions of the Supreme Court holding that the *Charter* might impose a positive obligation upon the state to legislate in an inclusive way, both within the context of section 15 and outside it.<sup>66</sup> She highlighted decisions recognising that section 7 itself

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<sup>61</sup> *Ibid.* at para. 415.

<sup>62</sup> *Ibid.* at para. 78 [emphasis in original].

<sup>63</sup> *Ibid.* at para. 80.

<sup>64</sup> See generally P. Hunt, *Reclaiming Social Rights: International and Comparative Perspectives* (Aldershot: Dartmouth Publishing, 1996) 54-69 and Schabas, *supra* note 10; see also the authors cited in notes 4-6.

<sup>65</sup> *Gosselin*, *supra* note 12 at para. 321; see also paras. 314 and 360 ff.

<sup>66</sup> *Ibid.* at para. 321, citing *Schacter v. Canada*, [1992] 2 S.C.R. 697, and *Vriend v.*

can contain a positive obligation: an obligation to provide legal aid in a child custody hearing in *G.(J.)*<sup>67</sup> and a requirement to hold a human rights complaint in a timely fashion in *Blencoe*.<sup>68</sup> Finally, she applied the usual multi-pronged interpretative approach to section 7<sup>69</sup> and concluded that in her view, “the results are unequivocal: every suitable approach to *Charter* interpretation, including textual analysis, purposive analysis and contextual analysis, mandates the conclusion that the s. 7 rights of life, liberty and security of the person include a positive dimension.”<sup>70</sup>

McLachlin C.J.C., speaking for the majority, was more cautious. She too recognised that section 7 might one day be interpreted to include positive obligations, and evoked Lord Sankey’s “living tree” analogy;<sup>71</sup> but she did not feel that the facts in *Gosselin* were sufficient to warrant such a novel result:

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 as the basis for a positive state obligation to guarantee adequate living standards.

I conclude that they do not. With due respect for the views of my colleague Arbour J., I do not believe that there is sufficient evidence in this case to support the proposed interpretation of s. 7. *I leave open the possibility that a positive obligation to sustain life, liberty, or security of person may be made out in special circumstances.* However, this is not such a case.<sup>72</sup>

In her view, *Gosselin* was not such a case because the impugned programme contained “compensatory ‘workfare’ provisions” and “the evidence of actual hardship” was “wanting”. For this reason, she concluded, the “frail platform of the facts of this case cannot support the weight of a positive obligation of citizen support”.<sup>73</sup>

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*Alberta*, [1998] 1 S.C.R. 493 (s. 15), and *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016 (s. 2(d)). Another s. 15 example would be the requirement to provide sign language interpreters in hospitals, as recognised in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624. See also the examples given in D. Pothier, “The Sounds of Silence: *Charter* Applications when the Legislation Declines to Speak” (1996) 7:4 Constitutional Forum 113 at 113-114.

<sup>67</sup> *Supra* note 54.

<sup>68</sup> *Supra* note 55 (although the Court did not find a violation of s. 7 in the particular circumstances of the case).

<sup>69</sup> *Gosselin* S.C.C., *supra* note 12 at paras. 337-358; see also para. 361.

<sup>70</sup> *Ibid.* at para. 358.

<sup>71</sup> *Ibid.* at para. 82.

<sup>72</sup> *Ibid.* at paras. 82-83 [emphasis added].

<sup>73</sup> *Ibid.* at para. 83.



Even Bastarache J. agreed with Arbour and L'Heureux-Dubé JJ. on the possibility that section 7 might have a positive dimension, and looked particularly to *Dunmore v. Ontario (Attorney General)*<sup>74</sup> as the most recent case in which the Supreme Court had canvassed the question of “whether a fundamental freedom can be infringed through lack of government action”.<sup>75</sup> He recognised that he had held in *Dunmore* that a government might infringe a *Charter* right if it failed to legislate in a sufficiently inclusive manner, but stressed that there nevertheless had to be “some form of government action as prescribed by s. 32”.<sup>76</sup> This is the same form of government action as “the trigger” mentioned by Arbour J. in her analysis of the issue:

Of course, it may well be that in order for such positive obligations to arise the state must first do *something* that will bring it under a duty to perform. But even if this is so, it is important to recognize that the kind of state action required will not be action that is causally determinative of a right violation, but merely action that “triggers”, or gives rise to, a positive obligation on the part of the state.<sup>77</sup>

In other words, the role of the state action in this context is not to ground a violation of section 7, as this is grounded on the very failure to act, but rather to ensure that the violation properly falls within the public sphere, which is subject to *Charter* review, and not within the private sphere, which is outside its scope. This is made clearer in *Dunmore*, where Bastarache J. observed: “Once a state has chosen to regulate a private relationship such as that between employer and employee, I believe it is unduly formalistic to consign that relationship to a ‘private sphere’ that is impervious to *Charter* review.”<sup>78</sup>

Both Bastarache and Arbour JJ. in *Gosselin* applied the three criteria set out in *Dunmore* for determining whether underinclusive legislation constitutes an infringement of a *Charter* right outside the context of section 15: that the claim be grounded in a *Charter* right or freedom rather than in access to a particular statutory regime; that a proper evidentiary foundation be provided to demonstrate that exclusion from the statutory regime

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<sup>74</sup> *Supra* note 66 [*Dunmore*] (holding that a failure to include agricultural workers within the purview of a statutory labour relations regime constituted an infringement of their freedom of association).

<sup>75</sup> *Gosselin*, S.C.C., *supra* note 12 at para. 221.

<sup>76</sup> *Ibid.* S. 32(1) of the *Charter* provides that it applies “a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province”.

<sup>77</sup> *Ibid.* at para. 329 [emphasis in original]; see also para. 383.

<sup>78</sup> *Supra* note 66 at 1052 (Bastarache J. was speaking for the majority, which included McLachlin C.J. and Arbour J. as well as Gonthier, Iacobucci, Binnie and LeBel JJ.).

constitutes a substantial interference with the exercise and fulfilment of the protected right; and that the state can truly be held accountable for any inability to exercise the right or freedom in question.<sup>79</sup> Bastarache J. held that Gosselin had failed to meet the first criterion, as she had not shown that the underinclusive nature of the legislation deprived her of the right itself and not just of a statutory benefit being provided to another group: “The appellant has failed to show a substantial incapability of protecting her right to security. She has not demonstrated that the legislation, by excluding her, has reduced her security any more than it would have already been, given market conditions.”<sup>80</sup>

Arbour J., on the other hand, held that all three criteria had been met. In particular, she returned to the distinction between negative and positive rights in the context of her consideration of the third criterion. In implicit contradiction of the approach taken by Bastarache J., she stressed the inappropriateness of a search for “a causal nexus tying the state to the claimant’s inability to exercise their fundamental freedoms” in the case of positive rights, stating that “[w]hile this focus on state action is appropriate where one is considering the violation of a negative right, it imports a requirement that is inimical to the very idea of positive rights.”<sup>81</sup> This means, according to Arbour J., that claimants such as Gosselin do not have to establish that the state was “causally responsible for the socio-economic environment in which their s. 7 rights were threatened” or that the government’s inaction “worsened their plight” in order to satisfy the third criterion.<sup>82</sup> Underinclusive legislation “can violate a fundamental right by effectively turning a blind eye, or *sustaining*, independently existing threats to that right”.<sup>83</sup>

#### 4. Justiciability

Only Arbour and L’Heureux-Dubé JJ. explicitly addressed the issue of the justiciability of economic and social rights, which is intimately linked to the distinction between positive and negative rights. The other judges’ acceptance of justiciability is arguably implicit in their silence on the issue. Arbour J. was the more reticent of the two about the issue, as she accepted that the concern about justiciability is “a valid one”, as legislatures are generally better suited than courts to address questions of resource allocation.<sup>84</sup> Arbour J. nevertheless cautioned against treating this concern

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<sup>79</sup> *Gosselin S.C.C.*, *supra* note 12 at para. 366 (*per* Arbour J.); see also *Dunmore*, *supra* note 66 at 1047-1049.

<sup>80</sup> *Gosselin S.C.C.*, *ibid.* at para. 223.

<sup>81</sup> *Ibid.* at para. 380.

<sup>82</sup> *Ibid.* at para. 381.

<sup>83</sup> *Ibid.* at para. 382 [emphasis in original].

<sup>84</sup> *Ibid.* at para. 332.

as a threshold issue barring consideration of the substantive claim:

As indicated above, this case raises altogether a different issue: namely, whether the state is under a positive obligation to provide basic means of subsistence to those who cannot provide for themselves. In contrast to the sorts of policy matters expressed in the justiciability concern, this is a question about what kinds of claims individuals can assert against the state. The role of the courts as interpreters of the *Charter* and guardians of its fundamental freedoms against legislative or administrative infringements by the state requires them to adjudicate such rights-based claims. One can in principle answer the question of whether a *Charter* right exists – in this case, to a level of welfare sufficient to meet one’s basic needs – without addressing how much expenditure by the state is necessary in order to secure that right. It is only the latter question that is, properly speaking, non-justiciable.<sup>85</sup>

The conundrum of not knowing whether a right has been violated without determining how much expenditure is needed did not arise in the case, *Arbour J.* held, because “that determination has already been made by the legislature [in setting the base amount of welfare], which is itself the competent authority to make it”.<sup>86</sup>

*L’Heureux-Dubé J.* was much less reticent than *Arbour J.* She felt that the amount of judicial deference that should be shown to the legislature in this regard was limited, and that a claimant in the position of *Gosselin* should be free to adduce evidence to show that the even the “30-and-over” base amount provided in the regulation was insufficient to meet basic needs.<sup>87</sup>

### III. Observations

The Supreme Court’s treatment of section 7 in *Gosselin* is noteworthy in several respects. These relate to the role of international human rights instruments in interpreting the *Charter*, the indivisibility of rights and the scope of section 7.

#### A. Role of international human rights instruments

A first, but disappointing, aspect of the Supreme Court’s decision in *Gosselin* is the limited role it gave to international human rights instruments in interpreting the *Charter*. Only *L’Heureux-Dubé J.* included an analysis of the *International Covenant on Economic, Social and Cultural Rights* in her judgment, but even she did so only indirectly,

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<sup>85</sup> *Ibid.* at para. 333.

<sup>86</sup> *Ibid.* at para. 334.

<sup>87</sup> *Ibid.* at paras. 141-142. Note that the Chief Justice herself recognized that the 30-and-over base amount “still represented only 55 percent of the poverty level for a single person”: see text accompanying note 16.

through her adoption of Robert J.A.'s analysis of the issue in the Court of Appeal, and only in relation to the interpretation of section 45 of the *Québec Charter*, not of section 7 of the *Canadian Charter*.

This omission is surprising. Canadian courts have been criticised in the past for their failure to take international law, particularly international human rights law, into account,<sup>88</sup> but this approach has been changing. This can be illustrated by looking no further than to the cases relied upon by the Court in *Gosselin* itself. The decision of the Supreme Court in *Suresh* is the most expansive in this regard, with the Court devoting some sixteen paragraphs to a consideration of "The International Perspective".<sup>89</sup> The Court commenced this consideration by stressing that "the principles of fundamental justice expressed in s. 7 of the *Charter* and the limits on rights that may be justified under s. 1 of the *Charter* cannot be considered in isolation from the international norms which they reflect. A complete understanding of the *Act* and the *Charter* requires consideration of the international perspective."<sup>90</sup> It went on to consider whether prohibition of torture is "a peremptory norm of customary international law, or *jus cogens*",<sup>91</sup> and to look to such international instruments as the *International Covenant on Civil and Political Rights*,<sup>92</sup> article 7 of which prohibits "cruel, inhuman or degrading treatment", the *Convention against Torture*<sup>93</sup> and so on. In doing so, it cautioned:

International treaty norms are not, strictly speaking, binding in Canada unless they have been incorporated into Canadian law by enactment. However, in seeking the meaning of the Canadian Constitution, the courts may be informed by international law. Our concern is not with Canada's international obligations *qua* obligations; rather, our concern is with the principles of fundamental justice. We look to international law as evidence of these principles and not as controlling in itself.<sup>94</sup>

Other Supreme Court cases relied on in *Gosselin* similarly referred with approval to a variety of international human rights instruments. In *B.(R.)*, Lamer J. cited the *International Covenant on Civil and Political Rights* and the *European Convention for the Protection of Human Rights and Fundamental Freedoms*;<sup>95</sup> in *Blencoe*, LeBel J. referred to the *European Convention*;<sup>96</sup> in *K.L.W.*, it was the *United Nations Convention*

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<sup>88</sup> See e.g. McGregor, *supra* note 10; compare Jackman, *supra* note 5 at 82.

<sup>89</sup> *Supra* note 57 at 37-45.

<sup>90</sup> *Ibid.* at 37.

<sup>91</sup> *Ibid.* at 38.

<sup>92</sup> 19 December 1966, 999 U.N.T.S. 171, 1976 Can. T.S. No. 47.

<sup>93</sup> 10 December 1984, 1465 U.N.T.S. 85, 1987 Can. T.S. No. 36.

<sup>94</sup> *Suresh*, *supra* note 57 at 389.

<sup>95</sup> 4 November 1950, 213 U.N.T.S. 221, Eur. T.S. 5. See *B.(R.)*, *supra* note 53 at paras. 349 and 350.

<sup>96</sup> *Supra* note 55 at 389.

on the Rights of the Child;<sup>97</sup> and in *Dunmore*, Bastarache J. cited a number of International Labour Organization documents to demonstrate that “[t]he notion that underinclusion can infringe freedom of association is not only implied by Canadian *Charter* jurisprudence, but is also consistent with international human rights law”.<sup>98</sup> These examples perhaps reflect a greater willingness of Canadian courts to refer to international human rights law in relation to civil and political rights than to economic and social rights.

However, although the Court in *Gosselin* did not refer to international human rights law, and particularly the *International Covenant on Economic, Social and Cultural Rights*, to help identify the scope of section 7, the decision does in fact respond in some measure to the U.N. Committee on Economic, Social and Cultural Rights’ suggestion that the *Charter* be used to provide a domestic remedy for the rights protected under the *Covenant*.<sup>99</sup>

### *B. Indivisibility of rights*

Recourse to an instrument protecting civil and political rights, such as the *Charter*, to enforce economic and social rights underscores the indivisibility of rights, and this is a second noteworthy aspect of *Gosselin*. Human rights activists and academics have long disputed the distinction made between the two sets of rights, which is symbolised by the existence of two separate *International Covenants*, and their position has been reaffirmed in the *Vienna Declaration on Human Rights and Programme of Action*,<sup>100</sup> paragraph 5 of which asserts: “All human rights are universal, indivisible and interdependent and interrelated. ...”.

*Gosselin* is not the only decision to use what is ostensibly a civil and political rights instrument to protect economic and social rights. The technique of “reading in”<sup>101</sup> in this way has also been used in a number of European decisions in regard to the *European Convention*. The provisions of the *Convention* have been incorporated into United Kingdom law by the *Human Rights Act 1998*,<sup>102</sup> and courts there accept that a failure to provide

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<sup>97</sup> 20 November 1989, 1577 U.N.T.S. 3, 1992 Can. T.S. 1992 No. 3. See *K.L.W.*, *supra* note 56 at 533-534 and 563.

<sup>98</sup> *Supra* note 66 at 1050. *G.(J.)*, *supra* note 54, was the only s. 7 case in which international law was not invoked; it was similarly not invoked in the s. 15 cases mentioned in note 66.

<sup>99</sup> See text following note 9.

<sup>100</sup> UN GAOR, World Conference on Human Rights, UN Doc. A/CONF.157/24 (1993).

<sup>101</sup> Schabas, *supra* note 10 at 205.

<sup>102</sup> 1998, c. 2. See generally C. Baker, D. Carter & C. Hunter, *Housing and Human Rights Law* (London: LAG Education and Service Trust Ltd., 2001).

financial support or adequate accommodation to destitute or homeless people, including asylum seekers, can constitute “inhuman or degrading treatment” in contravention of article 3 of the *European Convention*.<sup>103</sup> This has been clearly recognised by the Court of Appeal in the case of *R (on the application of ‘Q’ and others) v. Secretary of State for the Home Department*,<sup>104</sup> which was treated as a test case on the issue. The Court held that a failure to provide support to destitute asylum seekers, even those who failed to claim asylum in a timely manner, constituted inhuman or degrading treatment where it results in a condition which “humiliates or debases an individual showing lack of respect for, or diminishing, his or her human dignity”.<sup>105</sup> In a similar vein, English courts have also held that a failure to provide adequate accommodation to destitute homeless, including asylum seekers, can constitute a violation of the right to “respect for private and family life” guaranteed in article 8 of the *Convention*.<sup>106</sup> In *Anufrijeva v. London Borough of Southwark*,<sup>107</sup> a leading case, the Court of Appeal applied article 8 but held that it had not been breached in the circumstances of the case as the accommodation provided by the public authority was in fact adequate;<sup>108</sup> and in *London Borough of Harrow v.*

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<sup>103</sup> Art. 3 reads as follows: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

<sup>104</sup> [2003] 2 All E.R. 905 [‘Q’].

<sup>105</sup> At 937 (*per curiam*), citing *Pretty v. United Kingdom* (2002), 35 E.H.R.R. 1 at 33. See also *R (on the application of Gezer) v. Secretary of State for the Home Department*, [2003] EWHC 860 (Admin) (holding that art. 3 not violated on facts).

<sup>106</sup> Art. 8 provides: “Everyone has the right to respect for his private and family life, his home and his correspondence.” European human rights jurisprudence has interpreted this provision broadly, as is shown in the following observation of the European Court of Human Rights in *Pretty v. United Kingdom*, *ibid.* at 35 (cited with approval by the Court of Appeal in *Anufrijeva v. London Borough of Southwark*, [2003] EWCA Civ 1406 at para. 11): “As the Court has had previous occasion to remark, the concept of ‘private life’ is a broad term not susceptible of exhaustive definition. It covers the physical and psychological integrity of the person. It can sometimes embrace aspects of an individual’s physical and social identity. ... Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world. ... [T]he Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.”

<sup>107</sup> *Supra* note 106 [*Anufrijeva*]. A related case, *R. (on the application of Anufrijeva) v. Secretary of State for the Home Department*, [2003] 3 All E.R. 827 (H.L.), concerns another family member’s entitlement to income support as an asylum seeker. The Lord Chief Justice criticised the cost of providing legal assistance in *Anufrijeva*: R. Ford, “Asylum case costs taxpayer £100,000” *The Times* (24 June 2003) 2.

<sup>108</sup> The applicant had argued that the two-storey accommodation interfered with family life as the stairs were too steep for an elderly member of the family to climb without difficulty. See also *R (on the application of Bernard) v. Enfield London Borough Council*, [2002] EWHC 2282 (Admin) (holding that art. 8 violated), and *R (on the application of A) v. National Asylum Support Service & London Borough of Waltham Forest*, [2003] EWCA

*Qazi*,<sup>109</sup> the House of Lords applied article 8 in the context of an action for possession of a public housing unit against an overholding tenant, with the majority holding that the article, although “engaged” (i.e. applicable), had not been violated and the minority holding that the application for possession constituted a *prima facie* violation which would be justifiable under article 8(2).

“Reading in” economic and social rights in this way depends on an expansive definition of the scope of the right being invoked, and this is at the heart of the Supreme Court’s decision in *Gosselin*.

### *C. Scope of section 7*

The most noteworthy aspect of *Gosselin* is its expansive interpretation of section 7’s scope. As we have seen, an expanded scope flows principally from a recognition that the section protects two rights rather than one – a right to “life, liberty and security of the person” *simpliciter* as well as a right not to be deprived thereof except in accordance with the principles of fundamental justice – which was vigorously argued by Arbour J. and countered expressly only by Bastarache J. This affects the way in which the section is analysed. The usual “two-step” approach of determining, first, whether section 7 has been infringed and, second, whether the infringement is contrary to the principles of fundamental justice<sup>110</sup> is thus not always appropriate: where an infringement of the first right is in issue, any justification must be found in section 1 of the *Charter* and not in the principles of fundamental justice.

One element of an enlarged scope is the interpretation of section 7 to include rights with an economic component, as long as they “encompass fundamental life choices, not pure economic interests”.<sup>111</sup> The Supreme Court has continued its cautious acceptance of this since *Gosselin*. In *Siemens v. Manitoba (Attorney General)*,<sup>112</sup> the Court declined to hold that the right to operate video lottery terminals in one’s place of business came within the scope of section 7, but did so because it was a purely economic interest and not a fundamental life choice.<sup>113</sup> In a similar vein, the Supreme Court also recently refused leave to appeal a decision of the British Columbia Court of Appeal in

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Civ 1473 (holding that art. 8 had been violated but that the violation was justified under art. 8(2), which is similar in effect to s. 1 of the Canadian *Charter*).

<sup>109</sup> [2003] UKHL 43. See also *Donoghue v. Poplar Housing and Regeneration Community Association Limited*, [2002] Q.B. 48 (C.A.) [*Poplar*].

<sup>110</sup> See e.g. L’Heureux-Dubé J. in *K.L.W.*, *supra* note 56 at 562: “Section 7 ... requires the following two-step analysis ...” [emphasis added].

<sup>111</sup> See text following note 45.

<sup>112</sup> (2002), 221 D.L.R. (4th) 90 (S.C.C.).

<sup>113</sup> *Ibid.* at 111-112.



*B.C. Teachers' Federation v. School District No. 39 (Vancouver)*.<sup>114</sup> In that case, the Court of Appeal ruled that a provision for summary dismissal of a teacher for refusal to submit to a psychiatric examination was not subject to section 7 as the right to liberty did not include the right to practice a profession. Hall J.A. stated that the latter aspiration "does not, in my opinion, *rise to the level* of any interest concerning the life, liberty or security of the person that would invoke the application of s. 7 of the *Charter*".<sup>115</sup> Neither of these cases refers to *Gosselin* on this point. However, in *Kaulius v. Canada*,<sup>116</sup> the Federal Court of Appeal accepted that the Chief Justice in *Gosselin* had left open the question whether section 7 protects economic rights fundamental to human survival, although not economic rights generally.

A second element of an enlarged scope is the Court's suggestion that section 7 might apply outside the adjudicative context. This has generated the most judicial attention to date, with three decisions referring to *Gosselin* on this issue.<sup>117</sup> All three agreed with McLachlin C.J.C.'s cautious but open approach. In *B.C. Teachers' Federation* (an employment law case, as mentioned above), only the dissenting judge in the B.C. Court of Appeal mentioned *Gosselin* and she spoke of a "conscious decision" by the majority of the Court "not to tie the hands of the courts in dealing with novel s. 7 arguments, but to allow the boundaries of s. 7 to be determined, and adjusted, on a case-by-case basis";<sup>118</sup> in *Kaulius* (an income tax reassessment case), the Federal Court of Appeal recognised that the Chief Justice in *Gosselin* had "refused to decide" whether section 7 could apply in circumstances wholly outside the administration of justice;<sup>119</sup> and in *Hitzig v. Canada*<sup>120</sup> (a case dealing with access to marijuana for medical

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<sup>114</sup> 2003 BCCA 100 (Prowse J.A. dissenting) [*B.C. Teachers' Federation*].

<sup>115</sup> *Ibid.* at para. 209 [emphasis added, suggesting that the issue is one of degree, not of kind]. The dissenting judge, Prowse J.A., agreed (at para. 140) that the right to liberty in s. 7 encompasses only those matters that are "fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence". She characterised the case as being about privacy interests (stressing the requirement to submit to a psychiatric examination), not economic interests.

<sup>116</sup> 2003 FCA 371 [*Kaulius*].

<sup>117</sup> See also, concerning its analysis of s. 15: *Nova Scotia (Workers' Compensation Board v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54; and *St-Sauveur v. La Reine* (9 May 2003), 2003 CCI 325 (T.C.C.).

<sup>118</sup> *Supra* note 114 at para. 160 (*per* Prowse J.A.).

<sup>119</sup> *Supra* note 116 at para. 26 (*per* Rothstein J.A., speaking for the Court). In this case, the Court was concerned mainly with countering the appellant's argument, which would turn the Chief Justice's position on its head, that "as a result of *Gosselin*, every state action implicating the administration of justice gives rise to section 7 protection" (para. 28).

<sup>120</sup> (2003), 171 C.C.C. (3d) 18 (Ont. Sup. Ct.); *var'd* (2003), 231 D.L.R. (4th) 104 (Ont. C.A.).

purposes) the trial judge stressed McLachlin C.J.C.'s "incremental approach" in defining the scope of section 7.<sup>121</sup>

A third element of an expanded scope is the application of section 7 to impose positive obligations on a government.<sup>122</sup> As we have seen, this was the most difficult question facing the Court in *Gosselin* and all judges envisaged that this might be possible, at least in the case of underinclusive legislation. However, the presence of a legislative basis in *Gosselin* meant that none of the judges had to grapple with a still more difficult question: whether the *Charter* can be invoked in the case of "complete", rather than simply "selective", legislative silence.<sup>123</sup> In *Gosselin*, both Bastarache and Arbour JJ. accepted the need for some government action, or trigger, to place the issue in the public sphere as is required by section 32, but this interpretation of section 32 can be questioned. As L'Heureux-Dubé observed in *Dunmore*: "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."<sup>124</sup> That said, where the issue is a failure to provide financial support, as was the case in *Gosselin*, identification of which level of government is responsible in the case of a total failure to act would be difficult, as the exercise of the spending power transcends the legislative division of power provisions in the Constitution. In this case, some sort of trigger might still be necessary, not so much to take the matter out of the private sphere as to identify in which public sphere – federal or provincial – it should be placed. The issue of *Charter* responsibility in the face of complete legislative silence thus still remains open.

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<sup>121</sup> *Ibid.* at 51 (*per* Lederman J.); the C.A. identified *Gosselin* as affirming that s. 7 protects the individual against state impingements "not just through the process of the criminal law but more generally through state action taken in the course of enforcing and securing compliance with the law" (at 142).

<sup>122</sup> For a vigorous critique of this aspect of the case, see J. Cameron, "Positive Obligations under Sections 15 and 7 of the Charter: A Comment on *Gosselin v. Québec*" (2003) 20 Sup. Ct. L. Rev. (2<sup>nd</sup>) 65.

<sup>123</sup> See generally Pothier, *supra* note 66 (focusing on selective silences and therefore conceding, without argument, "the difference between complete and selective silence": at 116). See also Bastarache J. in *Dunmore*, *supra* note 66 at 1051: "Before concluding on this point, I reiterate that the above doctrine does not, on its own, oblige the state to act where it has not already legislated in respect of a certain area. One must always guard against reviewing legislative silence, particularly where no legislation has been enacted in the first place."

<sup>124</sup> *Ibid.* at 1092. Pothier, *supra* note 66, put it this way (at 115): "[S]ection 32 does not require a legislature 'to exercise' its authority; it applies to the legislature 'in respect of all matters within the authority of the legislature.' Section 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" [emphasis in original]. Her second sentence was cited with approval by L'Heureux-Dubé in *Dunmore* at 1092.

The Supreme Court's treatment of positive rights in *Gosselin* has not been directly considered in subsequent Canadian cases. However, the issue has arisen in other jurisdictions, in situations quite similar to *Gosselin*. Three recent cases illustrate this, one from South Africa and two from the United Kingdom. All were unanimous decisions of the court in question, and all held, without much difficulty, that a proper recognition of human rights could require the state to take positive action in appropriate circumstances. The main question was to identify the circumstances in which the state was required to act – to determine where to draw the line – in a context of finite government resources.

The South African example is the decision of the Constitutional Court in *Government of the Republic of South Africa v. Grootboom*.<sup>125</sup> In this case, the issue was whether the government's failure to include in their housing policy a component to meet the immediate or short-term requirements of those in most desperate need – “for people who have no access to land, no roof over their heads, for people who are living in intolerable conditions and for people who are in crisis because of natural disasters such as floods and fire or because their homes are under threat of demolition”<sup>126</sup> – constituted a breach of section 26 of the South African Constitution.<sup>127</sup> Section 26 provides that “[e]veryone has the right to access to adequate housing” and that the state must take “reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right”.<sup>128</sup> The Court concluded that this section “obliges the state to act positively to ameliorate” the deplorable living conditions of hundreds of thousands of people.<sup>129</sup> Although the state is not obliged to go beyond available resources or to realise the rights immediately, “despite all these qualifications, these are rights, and the Constitution obliges the state to give effect to them. This is an obligation that courts can, and in appropriate circumstance, must enforce.”<sup>130</sup> Appropriate circumstances are to be identified against the backdrop of “the fundamental constitutional value of human dignity”: “In short, ... human

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<sup>125</sup> [2000] ZACC 20 [*Grootboom*]. See P. de Vos, “*Grootboom*, the Right of Access to Housing and Substantive Equality as Contextual Fairness” (2001) 17 S.A.J.H.R. 258.

<sup>126</sup> *Grootboom*, *ibid.* at para. 52 (*per* Yacoob J., speaking for the Court).

<sup>127</sup> *Constitution of the Republic of South Africa*, Act 108 of 1996.

<sup>128</sup> Ss. (1) and (2) of s. 26. A third subsection protects against arbitrary eviction. The Court recognised in *Grootboom* that the applicants might have had a valid claim under this subsection, as the evictions had been carried out “at the beginning of the cold, windy and rainy Cape winter”, in a manner “reminiscent of apartheid-style evictions” (*supra* note 125 at para.10): “The [applicants] were evicted a day early and to make matters worse, their possessions and building materials were not merely removed, but destroyed and burnt” (para. 88). However, the applicants had not complained of the eviction *per se* but rather of the failure to provide access to adequate housing for them both before and after the eviction.

<sup>129</sup> *Grootboom*, *supra* note 125 at para. 93.

<sup>130</sup> *Ibid.* at para. 94.

beings are required to be treated as human beings.”<sup>131</sup>

The United Kingdom examples are two decisions of the Court of Appeal, discussed above, dealing with the provision of support to asylum seekers. In ‘*Q*’,<sup>132</sup> as we have seen, the Court had to determine whether a failure to provide financial support to destitute asylum seekers who did not claim asylum in a timely manner constituted “inhuman or degrading treatment” in contravention of article 3 of the European *Convention*. This meant that the Court had to determine whether a failure to provide support could constitute “treatment.” It held that although treatment implies something more than passivity on the part of the state, “[t]he imposition by the legislature of a regime which prohibits asylum seekers from working and further prohibits the grant to them, when they are destitute, of support amounts to positive action directed against asylum seekers and not to mere inaction”.<sup>133</sup>

In *Anufrijeva*,<sup>134</sup> which dealt with the right to respect for private and family life under article 8 of the European *Convention*, the Court set out the essential question as being “whether the Convention requires this country to provide welfare support in order positively to ensure that those within our borders can enjoy some minimum standard of private and family life, and, if so, what standard has to be achieved”.<sup>135</sup> A review of European and United Kingdom authorities convinced the Court that article 8 “is capable of imposing on a State a positive obligation to provide support”.<sup>136</sup> Strasbourg jurisprudence has accepted that article 8 “may oblige a State to provide positive welfare support, such as housing, in special circumstances”, although it has also “made it plain” that neither article 3 nor article 8 “imposes such requirement as a matter of course”.<sup>137</sup> there must be “a direct and immediate link” between the measures sought and the applicant’s private life.<sup>138</sup> And domestic courts have

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<sup>131</sup> *Ibid.* at para. 83.

<sup>132</sup> *Supra* note 104.

<sup>133</sup> *Ibid.* at 923.

<sup>134</sup> *Supra* note 106. The case is actually one of three test cases tried together because they afforded the Court with its first opportunity to consider the power of the courts to award damages under the *Human Rights Act 1998*. The other two cases are *R (on the application of ‘N’) v. Secretary of State for the Home Department* and *R (on the application of ‘M’) v. Secretary of State for the Home Department*. All three cases alleged that the defendant was at fault for failing to take positive action.

<sup>135</sup> *Ibid.* at para. 24.

<sup>136</sup> *Ibid.* at para. 43.

<sup>137</sup> *Ibid.* at para. 33.

<sup>138</sup> *Ibid.* at para. 30, citing with approval the European Court of Human Rights in *Marzani v. Italy* (1999) 28 E.H.R.R. CD175 (application for wheelchair accessible housing) at 179: “[W]hile the essential object of article 8 is to protect the individual from arbitrary interference by public authorities, this provision does not merely compel the state to abstain

recognised, in ‘Q’,<sup>139</sup> that “there is a state at which the dictates of humanity”<sup>140</sup> require positive state action and, in *R (on the application of Bernard) v. Enfield London Borough Council*,<sup>141</sup> that taking the necessary state action would have restored the applicant’s “dignity as a human being”.<sup>142</sup>

Respect for human dignity thus runs like a thread through these judgments and provides the measure by which the courts determine whether the state is under a positive obligation to act to guarantee rights in the particular circumstances of a case. The notion of respect for human dignity is familiar to Canadian courts, and was invoked in the context of *Gosselin* not only in relation to section 15 (“disrespect for human dignity lies at the heart of discrimination”<sup>143</sup>) but also more generally. Bastarache J., in particular, described the protection afforded by section 7 to be “reflective of our country’s traditional and long-held concern that persons should, in general, ... be treated with dignity and respect”<sup>144</sup> and identified human dignity as “an important, if not foundational value of this or any society” which informs the interpretation of the *Charter*.<sup>145</sup> This benchmark is thus readily available to Canadian courts to assist them in determining both when the state is obliged to act and the amount of judicial deference that should be afforded to the state when it does act.<sup>146</sup>

Finally, the South African and English cases accepted without difficulty that decisions about the allocation of scarce resources are justiciable. They recognised that such decisions require that a balance be struck between competing claims, always a delicate matter, and accepted that the courts should show particular deference to the decisions of

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from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private life. A State has obligations of this type where there is a direct and immediate link between the measures sought by the applicant and the latter’s private life.”

<sup>139</sup> *Supra* note 104.

<sup>140</sup> As cited in *Anufrijeva*, *supra* note 106 at para. 35.

<sup>141</sup> [2002] EWHC 2282 Admin (wheelchair accessible housing).

<sup>142</sup> As cited in *Anufrijeva*, *supra* note 106 at para. 40.

<sup>143</sup> *Gosselin S.C.C.*, *supra* note 12 at para. 229 (*per* Bastarache J.). See particularly the decision of the Court in *Law*, *supra* note 34, on this point.

<sup>144</sup> *Gosselin S.C.C.*, *ibid.* at para. 206.

<sup>145</sup> *Ibid.* at para. 215.

<sup>146</sup> See generally D. Feldman, “Human Dignity as a Legal Value” [1999] P.L. 682 and [2000] P.L. 61. Leckie suggests as other possible benchmarks (“reasonably specific formulas ...[for] delineating violations of economic, social and cultural rights”) the carrying out by states of deliberately retrogressive measures, the development of a decency threshold, minimum core entitlements and the principles of permeability, equality and non-discrimination: S. Leckie, “Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights” (1998) 20 Hum. Rts. Q. 81 at 99 ff.

government. Judicial deference should be shown both in determining whether a right had been violated<sup>147</sup> and in deciding whether to award damages in the event of a breach.<sup>148</sup> However, for them, as for L'Heureux-Dubé J. in *Gosselin*, judicial deference did not mean non-justiciability.

#### IV. Conclusion

The Supreme Court of Canada in *Gosselin* held that the social assistance programme for young adults in force in Québec during the 1980s did not infringe the applicant's rights either under section 45 of the Québec *Charter of Human Rights and Freedoms* or under sections 7 or 15 of the *Canadian Charter of Rights and Freedoms*. While the arguments based on section 15 attracted the most judicial support, it is the Court's approach to section 7 that is the most interesting. Although only two judges, Arbour and L'Heureux-Dubé JJ., found that section 7 had been violated, all of the judges showed openness to the possibility that section 7 might be invoked to protect economic and social rights in the appropriate circumstances.

It is difficult to understand why the Court did not regard *Gosselin* as an appropriate case to do so, as it was accepted that the base amount available to young adults (\$170 per month) fell significantly below the poverty level (\$914 per month).<sup>149</sup> However, decisions about the allocation of scarce resources are particularly difficult, with courts showing judicial deference to the state when considering both whether a right has been violated and whether damages is the appropriate remedy.<sup>150</sup> *Gosselin* is a case of double deference - in regard both to right and to remedy - and it might be this, together with the fact that it was a class action, that tipped the balance in favour of a decision that the applicant's rights had not been violated.

In spite of the actual outcome in the case, however, the Supreme Court

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<sup>147</sup> In *Poplar*, *supra* note 109, Lord Woolf, C.J., speaking for the Court, observed (at 70-71): "However, in considering whether Poplar can rely on Article 8(2), the Court has to pay considerable attention to the fact that Parliament intended when enacting [the relevant legislation] to give preference to the needs of those dependent on social housing *as a whole* over those in the position of the defendant. The economic and other implications of any policy in this area are extremely complex and far-reaching. This is an area where, in our judgment, the courts must treat the decisions of Parliament as to what is in the public interest with particular deference." [Emphasis in original.]

<sup>148</sup> In *Anufrijeva*, *supra* note 106, Lord Woolf, C.J., again speaking for the Court, observed (at para. 56): "In considering whether to award compensation and, if so, how much, there is a balance to be drawn between the interests of the victim and those of the public as a whole."

<sup>149</sup> See text accompanying note 16. And even the enhanced amounts available (between \$366 and \$466) fell short.

<sup>150</sup> See text accompanying notes 147 and 148.

adopted an open approach to the possibility that section 7 of the *Charter* might be invoked positively to protect “liberty through government”, and not just negatively to protect “liberty against government” (to use Frank Scott’s terms<sup>151</sup>). This openness situates the Court’s decision in *Gosselin*, albeit cautiously, at what has been described as “the cutting edge of human rights jurisprudence”.<sup>152</sup>

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<sup>151</sup> *Supra* note 1 at 203.

<sup>152</sup> ‘*Q*’, *supra* note 104 at 922 (*per* Lord Phillips M.R., speaking for the Court).



