

Gosselin v. Quebec (Attorney General): Autonomy with a Vengeance*

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In Gosselin v. Quebec (Attorney General), the first poverty case under the Canadian Charter of Rights and Freedoms to reach the Supreme Court of Canada, the Court ruled against the applicant, Louise Gosselin and the class of social assistance recipients she represented. The decision is deeply divided, and the majority decision turns on a finding that the evidence was insufficient. Therefore, as precedent, the outcome of the Gosselin case may not be particularly significant. However, the majority's assessment of the evidence is unpersuasive. The challenged social assistance regulation embodied a negative stereotype of young men and women who are reliant on social assistance, which, sadly, the majority of the Court embraced.

The majority decision contrasts sharply with powerful dissents of other judges who found that reducing social assistance for young adults in need to a below subsistence level violated ss. 7 and 15 of the Canadian Charter as well as s. 45 of the Quebec Charter of Rights and Freedoms.

Introduction

Reading the decision of the Supreme Court of Canada in *Gosselin v. Quebec (Attorney General)*¹ gives one a feeling of *deja vu*. Since the early 1980s, there has been a problem of courts rejecting equality rights claims on the basis that it is reasonable for a government to treat a group differently if that group is perceived by the government to be differently situated.² Since the pre-*Canadian Charter of Rights and Freedoms*³ era of *Bliss v. Canada (Attorney General)*,⁴ feminist equality rights advocates and legal scholars have sought to shift equality rights analysis away from abstract questions of sameness and difference, to ground it firmly in the section 15 goal of ameliorating group disadvantage. The *Gosselin* decision, in which the Court relegates poor young adults to the “not similarly situated”⁵ category and condones their exclusion from social assistance because the government asserts that it was trying to promote their autonomy, replicates a familiar and disturbing pattern.

Constitutional Challenge

The question before the Supreme Court of Canada in *Gosselin* was the constitutionality of the *Regulation Respecting Social Aid*,⁶ which set the base amount of welfare for adults between the ages of eighteen and thirty at roughly one-third of the base amount payable to

those thirty years of age and over. In dollar terms, the difference was \$170 per month compared to \$466 per month, which the legislature had “deemed to be the bare minimum for the sustenance of life.”⁷ Although some people in the under-thirty age group were able to access employability programs through which they could get themselves back to the regular rate, for the vast majority, the regular rate was out of reach.⁸

The appellant Louise Gosselin brought a class action on behalf of herself and approximately 75,000 other young people who were affected by the regulation between 1985 and 1989. The constitutional issue before the Supreme Court of Canada was whether the challenged regulation violated sections 7 or 15 of the *Charter*. The Court was also asked to decide whether the regulation violated section 45 of the *Quebec Charter of Rights and Freedoms*,⁹ which is an explicit social rights guarantee.

Decision on Appeal

The Court below, namely the Québec Court of Appeal, was deeply divided. One judge, Justice of Appeal Michel Robert, found that the regulation discriminated based on the ground of age in violation of section 15¹⁰ of the *Charter* and that the violation was not justified under section 1.¹¹ Michel Robert J.A. also found that the regulation violated section 45 of the *Quebec Charter*. However, the other two judges of the Court of Appeal disagreed. Justice of Appeal Gérard A. Baudouin held that although the regulation violated section 15, the violation was justified under section 1. Justice of Appeal Louise Mailhot found no section 15 violation. None of the Court of Appeal judges found that the regulation violated the right to security of the person under section 7¹² of the Canadian *Charter*.

Summary of the Supreme Court of Canada Decision

Section 15 of the *Charter*

The Supreme Court of Canada was also starkly divided. In an opinion written by Chief Justice Beverley McLachlin, five of the judges found no violation of section 15. In the majority, in addition to the Chief Justice were Justices Charles Gonthier, Frank Iacobucci, John C. Major, and Ian Binnie. In dissent, with respect to section 15 were Justices Michel Bastarache, Louise Arbour, Louis LeBel, and Claire L'Heureux-Dubé. The main dissenting opinion on section 15, with which Arbour, LeBel, and L'Heureux-Dubé JJ. expressed their agreement, was authored by Bastarache J.. LeBel and L'Heureux-Dubé JJ. also wrote separate section 15 opinions.

Section 7 of the *Charter*

A majority of the Court found no section 7 violation. The main section 7 opinion with which Iacobucci, Gonthier, Major, and Binnie JJ. agreed in the result, was written by McLachlin C.J.. Bastarache and LeBel JJ. each wrote separate concurring opinions,

elaborating on their views with respect to the interpretive scope of section 7—Bastarache J.'s approach was a restrictive one, while LeBel J.'s was more generous.

Arbour and L'Heureux Dubé JJ. would have found the regulation to be in violation of section 7 of the *Charter*. Arbour J. wrote the main dissenting opinion on section 7. L'Heureux-Dubé J. expressed her agreement with Arbour J.'s reasoning and wrote supplementary reasons.

Section 45 of the Quebec Charter

With respect to section 45 of the *Quebec Charter*, there was a six-to-three split in the Court. A majority of the Court found no violation. The main opinion was written by McLachlin C.J. for herself, Gonthier, Major, Iacobucci, and Binnie JJ..

LeBel J. wrote a concurring opinion.

Bastarache and Arbour JJ. for whom Bastarache J. wrote one opinion were of the view that it was not necessary to enter into a lengthy examination of the s. 45 claim, since that provision of the Quebec Charter, they believed, is not enforceable.

In dissent, L'Heureux Dubé J., found that the challenged regulation violated s. 45. She expressly endorsed the opinion of Robert J.A. in the Court of Appeal, who had relied extensively on international human rights law as an aid to the interpretation of the *Quebec Charter*.

Majority's Explanation for the Five-to-Four Split on Section 15

The five-judge majority identified the disagreement with respect to section 15 as not being about the "fundamental approach" but rather about whether the claimant had met her burden of proof.¹³ The majority, purporting to apply the framework enunciated in *Law v. Canada*,¹⁴ found that the appellant Louise Gosselin had "not demonstrated that the government treated her as less worthy than older welfare recipients simply because it conditioned increased welfare payments on her participation in programs designed specifically to integrate her into the workforce and to promote her long-term self-sufficiency."¹⁵

In the majority's view, the evidence established that the government's purpose was to help young adults achieve long-term autonomy.¹⁶ The majority broke this purpose into a short-term and a long-term one, both of which boil down to the same thing: creating an incentive to compel young adults to participate in training programs that ostensibly would increase their employability.¹⁷ According to the majority, this purpose was not based on stereotype because it "corresponded to the actual needs and circumstances of individuals under 30"¹⁸ and was "an affirmation of their potential."¹⁹ In the view of the majority, young adults do not suffer from pre-existing social disadvantage or susceptibility to negative preconceptions such that legislative distinctions affecting them should be carefully scrutinized.²⁰ In

addition, the majority found no evidence of harmful effects, other than the fact that some under-thirty individuals may have fallen “through the cracks of the system and suffered poverty.”²¹ This fact was not, in the majority’s view, sufficient to establish adverse effects.²²

The majority also found no evidence that any welfare recipient under thirty, who wanted to participate in the employability programs, was refused enrollment.²³ The majority relied on the finding of the trial judge, Paul Reeves J., that Louise Gosselin’s claim with respect to the adverse effects of the rate reduction on the class she represented was not supported by the evidence. Similarly, in regard to section 7 of the *Charter*, the majority found that the evidence in this case was not sufficient to establish actual hardship, given the existence of the “compensatory ‘workfare’ provisions.”²⁴ Apparently, it was this lack of evidence that was fatal to the claimant’s *Charter* challenge.

Analysis

The primary focus of the analysis that follows is the Supreme Court of Canada’s decision with respect to section 15 of the *Charter*, although aspects of the decision on section 7 are also touched upon. One response to *Gosselin* is that, as precedent, the decision may simply not be as significant as anticipated because the Court was so deeply divided and because in the majority decision so much turns on the view that there was insufficient evidence of either a discriminatory government purpose or of harmful effects. For the purposes of future litigation, one could conclude that the lessons of *Gosselin* are purely of an evidentiary nature. *Gosselin* could be remembered as the case that established, at most, that a government is entitled to attach reasonable conditions to the receipt of welfare, and that what is reasonable will necessitate a highly fact-specific inquiry.

Is it reasonable to establish rules that impose a three-week waiting period on access to welfare; make eligibility conditional on proof that the applicant has lived independently for two years; place a two-year time limit on welfare benefits;²⁵ restrict disability coverage to certain approved disabilities but exclude other equally serious disabilities;²⁶ restrict legal aid to criminal matters only; and deny legal aid coverage for poverty law and most family law matters?²⁷ These questions have not been decided by the *Gosselin* decision, and *Gosselin* does not say that legal challenges should not be brought to such extreme assaults on the social safety net and the justice system. Rather, it says, make sure your evidence is solid and do not rest a class claim to financial reimbursement on the shoulders of one individual plaintiff.

There is much to be said for this assessment of *Gosselin*. As mentioned earlier, the majority was at pains to confine its section 15 ruling to an assessment of the sufficiency of the evidence in this particular case.²⁸ Subsequent jurisprudence of the Court supports attributing the loss in *Gosselin* to a lack of evidence that the social assistance scheme, viewed as a whole, caused actual hardship. In *Nova Scotia (Workers’ Compensation Board) v. Martin and Laseur*,²⁹ a case in which the plaintiffs successfully challenged under-inclusiveness in a

social benefit scheme, the Court distinguished *Gosselin* saying that it had not been shown that the allegedly affected group had been “effectively excluded” from the protection of the scheme.³⁰ More particularly, in the view of the Court, Louise Gosselin did not discharge her burden of proof by establishing that she and other members of the class had been excluded from the compensatory programs.³¹

Similarly, although the majority in *Gosselin* did not find the evidence sufficient to establish that the challenged regulation violated section 7, the door was explicitly left open for future section 7 challenges based on government inaction. Citing the “living tree” doctrine of *Charter* interpretation, the majority endorsed the view that “it would be a mistake to regard section 7 as frozen, or its content as having been exhaustively defined in previous cases,”³² and it stated that “[o]ne day section 7 may be interpreted to include positive obligations.”³³ McLachlin C.J. emphasized that, as with section 15, the dispute on the Court was not based on theoretical approach but rather, on the assessment of the evidence. She said:

The question therefore is not whether section 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 section 7 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 section 7. 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. The impugned program contained compensatory “workfare” provisions, and the evidence of actual hardship is wanting. The frail platform provided by the facts of this case cannot support the weight of a positive state obligation of citizen support.³⁴

Similarly, LeBel J., although he was among the seven judges who did not find that a section 7 violation had been made out in this case, refused to shut the door on future section 7 claims.³⁵ In the final tally, eight out of the nine judges indicated receptiveness to future section 7 claims. This fact is significant. Only one judge, Bastarache J., took a restrictive approach to section 7, which would limit its application to the judicial or administrative context in which the state is acting against the individual.³⁶ Furthermore, his section 7 opinion is at odds with his earlier opinion in *Dunmore v. Ontario (Attorney General)*,³⁷ suggesting that he may need to revisit his position on section 7 in a future case.

The very powerful dissenting opinion of Arbour J. on section 7, which was concurred in by LHeureux-Dubé J., combined with the section 7 door having been left open by the majority, should point to a brighter future for anti-poverty litigation in the Supreme Court of Canada. Arbour J. did an extremely effective job of deconstructing “the various firewalls” that have been said to exist around section 7.³⁸ She found that section 7 does impose positive

obligations on governments to offer basic protection for the life, liberty, and security of its citizens.³⁹ She found further that excluding the applicants from the full benefits of the Québec social assistance scheme, which effectively excluded them from any real possibility of having their basic needs met, violated their section 7 right to security of the person and perhaps even their right to life.⁴⁰

In the end, we have a divided Court; a majority decision that turns on evidence; some bright spots; and doors left open—this is one legitimate version of the story.

Deeper Analysis

Questioning the Insufficient Evidence Rationale

However, it is essential to ask why the majority did not find sufficient evidence that the challenged regulation caused actual hardship, whereas four dissenting judges did, as did two judges in the Quebec Court of Appeal. Does the outcome of the *Gosselin* appeal raise some questions about the majority's attitudes towards young adults reliant on social assistance and about its theoretical approach to poverty and *Charter* rights. I believe it does. The majority's finding that the evidence of adverse effect was insufficient is not persuasive. In dissent, L'Heureux-Dubé J. put it well. She said:

These are the facts that are before this Court ... As a result of section 29(a) [of the challenged Regulation], 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. Of those eligible to participate in the programs, 88.8 percent were unable to increase their benefits to the level payable to those over 30 and over. M. Gosselin was exposed to the risk of severe poverty as a sole consequence of being under 30 years of age. Ms. Gosselin's psychological and physical integrity were breached. There is little question that living with the constant threat of poverty is psychologically harmful. There is no dispute that M. 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 M. Gosselin's physical integrity was not breached.

The sole remaining question is whether a reasonable person in M. Gosselin's position, apprised of all the circumstances, would perceive that her dignity had been threatened. The reasonable claimant would have been informed of the legislature's intention to help young people enter the marketplace. She would have been informed that those 30 and over have more difficulty changing careers, and that those under 30 run serious social and personal risks if they do not enter the job market in a timely manner. She would have been told that the long-term goal of the legislative scheme was to affirm her dignity.

The reasonable claimant would also likely have been a member of the 88.8 percent who were eligible for the programs and whose income did not rise to the levels available to all adults 30 years of age and over. Even if she wished to participate in training programs, she would have found that there were intervals between the completion of one program and the starting of another, during which the amount of her social assistance benefit would have plunged. The reasonable claimant would have made daily life choices in the face of an imminent and severe threat of poverty. The reasonable claimant would likely have suffered malnourishment. She might have turned to prostitution and crime to make ends meet. The reasonable claimant would have perceived that as a result of her deep poverty, she had been excluded from full participation in Canadian society. She would have perceived that her right to dignity was infringed as a sole consequence of being under 30 years of age, a factor over which, at any given moment, she had no control. While individuals may be able to strive to overcome the detriment imposed by merit-based distinctions, M. Gosselin was powerless to alter the single personal characteristic that the government's scheme made determinative for her level of benefits.

The reasonable claimant would have suffered, as M. Gosselin manifestly did suffer, from discrimination as a result of the impugned legislative distinction. I see no other conclusion but that M. Gosselin would have reasonably felt that she was being less valued as a member of society than people 30 and over and that she was being treated as less deserving of respect [contrary to s. 15 of the *Charter*].⁴¹

Bastarache J. also found ample evidence that the challenged regulation had adverse effects, as did LeBel J. in his concurring section 15 judgment,⁴² and Arbour J. in her section 7 judgment.⁴³ The government's employability programs were structurally incapable of compensating for the facially negative treatment of young adults.⁴⁴ This structural incapacity of the employability programs to compensate for the manifestly discriminatory impact of the rate reduction was thoroughly documented and persuasively analyzed by the four judges who dissented on section 15. As Bastarache J. explained, there were barriers to access to the programs in the form of various restrictive eligibility criteria. For example, there was evidence that illiteracy was a bar to accessing the remedial education program. One must have been out of school for more than nine months and financially independent of one's parents for at least six months. Participants would receive an increase that still totalled less than the base amount received by beneficiaries thirty years of age and over. In the community work program, priority for admission was given to those people who had been on social assistance for a longer period. While ostensibly designed for those under thirty years of age, at least one of the programs was open to some persons over thirty. Members of the over-thirty group received the top-up in addition to their base amount, ensuring that the person under thirty would always receive less than the members of the thirty-and-over group.

A further difficulty with the Québec government's reliance on its employability programs as a defence to the discriminatory impact of the rate cut is that the government had only established 30,000 spaces for 85,000 people. In the view of the four judges who dissented on section 15, this fact reinforced the conclusion that the employability programs were not truly accessible and raised questions about whether the regulation was really geared towards improving the long-term situation of those under the age of thirty as opposed to simply saving money.⁴⁵

Bastarache J. also found that Louise Gosselin herself had been unable to maintain continuous enrollment in the employability programs because of various problems that were beyond her control. He noted that in 1985 she had sought out and participated in a community work program but it had ended after one year, and she had fallen back on the reduced amount. No one had suggested another program to her.⁴⁶ At one point, Louise Gosselin was able to get a job cleaning homes, but she was unable to continue because she was overcome with the fear of being fired.⁴⁷ In 1986, she was granted a medical certificate due to her mental state. Later in the same year, a neighbour helped her find a placement in a pet store, where she had wanted to work because of her love of animals. However, she was forced to leave this job because of allergies.⁴⁸ While enrolled in the remedial education program in 1988, Louise Gosselin was able to raise her benefits but, due to the structure of the scheme, she still received \$100 less than the base amount. Bastarache J. put it this way:

While this raised her benefits to \$100 less than the base amount, she was terrified that she would not succeed and would be forced back onto the reduced rate. After paying her rent and phone, she was left with only \$150 per month, which she had to stretch scrupulously in order to buy food and bus tickets. Finally, in July of 1989, she turned 30 and was allocated the full social assistance benefit. When that benefit was added to the money she received for participating in the Remedial Education Program, her total monthly benefits rose to \$739 per month.⁴⁹

Supreme Court of Canada Decision Rests on Stereotype

Without doubt, section 29(a) perpetuates a discriminatory stereotype. Poor young people reliant on social assistance are a disadvantaged group that is frequently branded as lazy and insufficiently motivated to obtain employment.⁵⁰ The challenged regulation embodies this stereotype. Section 29(a) is manifestly based on the view that the under-thirty group of social assistance recipients needs to be coerced, through a highly punitive withdrawal of support, to make them seek employment opportunities. This point is captured by the section 15 judgment of LeBel J. who stated:

[T]he distinction made by the social aid scheme did not reflect the needs of young social assistance recipients under the age of 30. By trying to combat the pull of social assistance, for the “good” of the young people themselves who depended on it, the distinction perpetuated the stereotypical view that a majority of young social assistance recipients choose to freeload off society permanently and have no desire to

get out of that comfortable situation. There is no basis for that vision of young social assistance recipients as “parasites.” It has been disproved by numerous experts.⁵¹

In Québec in the 1980s, young adults were also disadvantaged and vulnerable in the sense that they suffered from high rates of unemployment. This fact was actually admitted even by the majority, which said, “the situation of young adults was particularly dire,”⁵² but the majority still did not conclude that young people affected by the social assistance rate reduction were a group that suffered from “pre-existing social disadvantage,” such that legislative distinctions affecting them should be carefully scrutinized.⁵³ This position is contradictory, as the dissenting judges observed.⁵⁴ The majority view—that young adults are simply not a disadvantaged group—is symptomatic of a failure to deal appropriately with the intersection of the ground of age and the situation of being a young woman or man reliant on social assistance. It is one thing to question whether young adults in general are a disadvantaged group. It is quite another thing to say that poor young women and men reliant on social assistance are not a disadvantaged group and that their dignity is not profoundly injured when they are denied subsistence income. The artificial separation of the fact of the claimants being young adults from the fact of their being poor results in an impoverished understanding of the impact of the cut to their social assistance.

The *Gosselin* decision itself perpetuates a negative stereotype of poor young adults. The claimants in *Gosselin* were viewed by the majority as resilient but lazy young adults with enormous, but untapped, human potential, who needed some tough love. It is on this stereotype that the trial judge’s evidentiary finding rests and upon which the majority opinion of the Supreme Court of Canada rests. It is ironic that the judges refer to no evidence in support of this stereotype. The majority also misses the point that is well understood by the dissenting judges—that the problem faced by young women and men in the 1980s was not a lack of job training or motivation but rather a lack of jobs.⁵⁵

Over-Emphasis on Legislative Purpose within the Section 15 Analysis

The outcome of the *Gosselin* decision is not just a reflection of a technical dispute about the sufficiency of the evidence. The decision reflects deeper problems that also run through some of the Court’s earlier section 15 jurisprudence about basic understandings that are being brought to the task of assessing evidence. One problem is the role of legislative purpose in the section 15 analysis. In the Court’s earlier jurisprudence, listed section 15 grounds such as age were treated as suspect classifications that were presumptively irrelevant to needs, capacities, or merits. Legislative distinctions based on such presumptively irrelevant classifications were said to be subject to rigorous section 1 justification.

That approach may not be the best since it seems to overlook the important role of section 15(2) and to imply that sex and race-based distinctions are presumptively illegal, even if they are targeted, equality-promoting initiatives for disadvantaged groups. Viewing the ground ‘sex’ as though there is no difference between an initiative that promotes equality for

women and one that subordinates women does not serve the section 15 purpose of reducing disparities between groups. However, inserting a “relevance” qualifier is also problematic, if the principle reference point is legislative purpose and a tight correspondence between purpose and means is not required. In the *Gosselin* decision, as in *Law*⁵⁶ and *Granovsky v. Canada (Minister of Employment and Immigration)*,⁵⁷ the majority took a listed section 15 ground—in this case the ground of age—and required, as part of the section 15 analysis, that the claimant demonstrate that a manifestly harmful distinction based on an enumerated ground was irrelevant to the legislative purpose.⁵⁸ By taking a very deferential approach to the government’s stated purpose and a highly sceptical approach to compelling evidence of adverse effects, including evidence that the stated purpose of promoting autonomy was undermined by the legislative means the majority found no discrimination. The respondent government was thereby relieved of its burden of justification under section 1.

In *Gosselin*, the role of legislative purpose, within the section 15 analysis, was especially muddled by the fact that the majority was completely preoccupied with the government’s stated goal of integrating young adults into the workforce. However, the goal of the Québec social assistance scheme, as a whole, as with all such schemes, was to provide aid of last resort to people in need. There is no correspondence between being under thirty years of age and the cost of meeting needs for food and shelter. Reducing a social assistance rate based on someone’s age is purely arbitrary—that is, it is irrelevant to the person’s actual circumstances.⁵⁹ Food and housing do not cost any less for adults under thirty than for adults over thirty. However, this point is overlooked by the majority, notwithstanding the definition of discrimination that is supposedly operating, namely: “[d]iscrimination occurs when people are marginalized or treated as less worthy on the basis of irrelevant personal characteristics, without regard to their actual circumstances.”⁶⁰

It is unfortunate that the approach of LHeureux-Dubé J. to the correspondence factor did not prevail. In dissent, she held that there should be a strong presumption that a legislative scheme that causes individuals to suffer threats to their physical and psychological integrity as a result of their possessing a characteristic such as age which cannot be changed, does not adequately take into account the needs, capacity or circumstances of the individual or group in question. And regarding a legislative scheme that exposes the members of an enumerated or analogous category, and only those members, to severe poverty *prima facie* does not take into consideration the needs of that categories members.⁶¹

The question of what role a government’s statement about its intentions should play in constitutional analysis, is not just a minor quibble about the relationship between sections 15 and 1 of the *Charter*. It can make a difference if the respondent government is expected to go beyond a mere assertion of laudable purpose and actually required to demonstrate rationality and proportionality. Applying a section 1 analysis, Arbour J. disputed that denying the means of subsistence is rationally connected to the values of long-term liberty and inherent dignity of young adults. She rightly observed that the lack of adequate food and shelter interferes with the capacity for both learning and job hunting.⁶²

Significantly, the analysis of the employability programs that Bastarache J. provided was also conducted within the framework of a section 1 analysis, with the understanding that the government bore the onus of demonstrating that the rights infringement occasioned by the reduced rate, which was discriminatory on its face,⁶³ was justified in a free and democratic society. I am not saying that legislative purpose should never enter into a section 15 inquiry. However, the section 15 net should not be woven so tightly that a claimant cannot pass through even when, as in this case, the negative effects of a facially discriminatory provision actually contradict the central legislative purpose of providing aid of last resort to people in need and do not even advance the government's stated purpose of promoting self-reliance through employment.

In this appeal, the government should have been, but was not put to the test of showing that it could not develop a scheme that was based on correct assumptions rather than crude generalizations, which would ensure that vulnerable people do not fall through the cracks.⁶⁴ The government should also have been required to show why it could not create an incentive for young adults to participate in employment programs by providing a top-up from the base amount, as it did for the thirty-and-over group.⁶⁵ These are among the questions that would normally and legitimately be asked under section 1, but, in *Gosselin*, the majority did not require the government to discharge its section 1 burden of proof. Instead, based on a much lower standard of justification, denying young adults the means of subsistence was held not to constitute discrimination within the meaning of section 15. In short, the section 1 stage of analysis was pre-empted.

By imposing such a heavy burden on the plaintiff and a very minimal burden of justification on the respondent, *Gosselin* takes section 15 jurisprudence back to the analytical approach that was put forward by McLachlin J.A., as she then was, in *Andrews v. Law Society of British Columbia* at the British Columbia Court of Appeal level.⁶⁶ On appeal to the Supreme Court of Canada, this analytical approach was rejected. In the 1989 Supreme Court of Canada judgment in *Andrews*,⁶⁷ Justice William McIntyre explained:

“The ... approach put forward by McLachlin J.A. in the Court of Appeal involved a consideration of the reasonableness and fairness of the impugned legislation under section 15(1). She stated, as has been noted above, at p. 610:

The ultimate question is whether a fair-minded person, weighing the purposes of legislation against its effects on the individuals adversely affected, and giving due weight to the right of the Legislature to pass laws for the good of all, would conclude that the legislative means adopted are unreasonable or unfair.

She assigned a very minor role to section 1 which would, it appears, be limited to allowing in times of emergency, war, or other crises the passage of discriminatory legislation which would normally be impermissible.

I would reject, as well, the approach adopted by McLachlin J.A. She seeks to define discrimination under section 15(1) as an unjustifiable or unreasonable distinction. In so doing, she not only avoids the distinction test but also makes a radical departure from the analytical approach to the *Charter* that has been approved by the Court. In the result, the determination would be made under section 15(1), and virtually no role would be left for section 1.⁶⁹

Discrimination Is Not Only about Stereotyping

Closely connected to the “relevance” issue in *Gosselin* is an understanding of discrimination as consisting only of wrongful stereotyping. Although the chief justice says that she “does not suggest that stereotypical thinking must always be present for a finding that section 15 is breached,”⁷⁰ the majority decision nonetheless turns on the view that the treatment of young adults was not based on stereotype but rather corresponded to the actual needs and circumstances of the under-thirty group. Insistence on proof of stereotyping as the essence of discrimination too easily slides into a requirement on the claimant to prove that the respondent government had a malicious intention. Requiring the claimant to prove discriminatory intention flies in the face of well established principles of human rights and *Charter* equality rights law. Proof of discriminatory intent is not an essential element of a discrimination claim. As early as 1985, in the landmark case of *Ontario (Human Rights Commission) v. Simpson-Sears Ltd. (O'Malley case)*,⁷¹ the Supreme Court of Canada, held that proof of adverse effects is sufficient to ground a claim of discrimination, and, further, that is not necessary for a claimant to establish that the respondent employer has done something analogous to posting a sign stating “[n]o Catholics or no women or no blacks employed here.”⁷²

To require proof of discriminatory intent sets the bar too high for the section 15 claimant and distorts the inquiry so that the impact of neutral-seeming barriers is not fully appreciated. A preoccupation with stereotyping is also problematic in and of itself if the prevention of stereotyping is understood to be the sole normative goal for section 15. It is not that discrimination never consists of wrongful stereotyping but that this definition of discrimination is not sufficient, given how submerged stereotypes can be.

There is another problem with a primary focus on stereotyping. Stereotyping consists of unfounded or mistaken generalizations about individual capacity or needs based on group membership. However, some differences between groups, such as some of those relating to pregnancy and certain disabilities, are real and not mistaken. Nonetheless, we do not accept these differences, which are “real” and not the product of mistaken generalizations, as a legitimate basis for subordination.

Section 15 should be understood to have other goals besides the prevention of stereotyping, including reducing disparities in actual conditions between groups and ensuring respect for individual physical and psychological integrity. Not all harms to dignity are attributable to

the operation of mistaken or demeaning stereotypes. Harms to human dignity can arise because of material deprivations, as in *Gosselin*. L'Heureux Dube J. is right when she says that stereotypes should not be necessary for a finding of discrimination and that the severe impairment of an extremely important interest should be sufficient to ground a claim of discrimination.⁷³ Access to a subsistence income should be regarded as such a interest. L'Heureux- Dubé J. makes an important and related point in *Gosselin* when she says that interpretations of s.15 can be informed by s. 7 rights.⁷⁴ This is a point to which judges should be recalled in future cases as the endeavour to give content to the concept of human dignity continues, as it must.

Conclusion

It is very difficult to accept the failure of the majority in *Gosselin* to recognize the fundamentality of every individual's interest in accessing the means of subsistence. It is also difficult to accept the majority's failure to credit the evidence that showed that this interest was severely impaired by reducing young people's social assistance to a below-subsistence level. When it comes to an interest as fundamental as a person's ability to meet basic needs, constitutional guarantees of equality should be understood to have an irreducible core that includes an obligation on governments to provide adequate social assistance to people in need. For an individual who is homeless or hungry, the fact that government has decided to turn a "blind eye"⁷⁵ because of what it thinks of as long-term emancipatory objectives, is cold comfort.

There is a tension in our constitutional jurisprudence between competing conceptions of rights.⁷⁶ Substantive equality rights theory understands that individuals can be constrained by circumstances, that not everyone can make it on their own, and that governments have a redistributive role to play to prevent the entrenchment of extreme disparities in material conditions. Another older, classical, nineteenth-century United States version of constitutional rights conceives of individuals as autonomous, freely choosing, unconstrained by circumstance, and always able to make it on their own. Government is conceived of as a threat to autonomy and not an enabler of it. In *Gosselin*, this older version of constitutional rights, which is not at all concerned with substantive equality or the right to security of the person and only concerned with an anti-statist version of liberty, won out.

The majority decision in *Gosselin* represents a convergence between the idealization of one version of individual autonomy—a version that is not in fact available to everyone—and plain old-fashioned stereotyping of young people who are dependent on government programs as lazy. This convergence expresses itself as hostility towards welfare for young adults—a conviction that reducing young people's welfare is a way of helping them and blindness to the actual adverse effects of the rate reduction.

Autonomy is an important value. Among the examples of autonomy that people prize are being able to pursue one's life goals; to participate in political and social affairs; to make

one's own choices about such personal matters as when and whether to bear children; to think and express one's own thoughts; and to join with others to pursue social, political, equality-promoting, or familial interests. The freedom held out by the majority in *Gosselin*—freedom from welfare dependency—might be highly valued by someone who was being offered a decent job, as an alternative to the stigmatization, poverty, loss of privacy, and over-regulation associated with being on social assistance. However, denying social assistance to people who lack access to decent employment, is neither autonomy-promoting nor humane. A civilized society does not purport to promote the autonomy of its most vulnerable members by excluding them from aid of last resort. In this circumstance, lack of access to adequate social assistance may be far more threatening to autonomy than welfare dependency, especially for women, for whom poverty is an enlarger of every dimension of sex inequality.

The autonomy of poor women is profoundly threatened by a lack of access to adequate social assistance.⁷⁷ Being forced to survive without the means to meet basic needs increases women's vulnerability to violence, sexual exploitation, and coercion because it makes them more reliant on relationships with men and simultaneously diminishes their equality in those relationships. Given the degree and extent to which poverty diminishes women's autonomy, s. 15 equality rights should be interpreted by courts to encompass a right to adequate social assistance.⁷⁸ The notion of autonomy, through escape from welfare dependency, which is held up by the majority of the Court in *Gosselin*,⁷⁹ obscures the social reality of young people struggling to survive in conditions of high structural unemployment and government cuts to social programs, and of women being forced into increased reliance on men because they do not have access to adequate social assistance. If this notion of autonomy becomes a substitute for meeting people's immediate subsistence needs, without which no autonomy is possible, the danger is that vulnerable groups will never benefit from the promise of equality, respect for human dignity, autonomy, or security of the person. Instead, they will get autonomy with a vengeance.

* I am honoured that this case comment will be included in the special issue of the *Canadian Journal of Women and the Law* on Justice Claire L'Heureux Dubé, whose contribution to *Canadian Charter of Rights and Freedoms* equality rights jurisprudence is a continuing source of inspiration. Thanks are owed to Kathleen Kinch for her assistance and to Shelagh Day and Melina Buckley for their comments. I also wish to acknowledge and thank the Law Foundation of British Columbia and the Community University Alliance program of the Social Sciences and Humanities Research Council, for their financial support.

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Endnotes

1. *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R.J. 42985 [hereinafter *Gosselin*].
2. Gwen Brodsky and Shelagh Day, *Canadian Charter Rights for Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989).
3. *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11 [hereinafter *Charter*].
4. *Bliss v. Canada (Attorney General)*, [1979] 1 S.C.R. 183, (1978) 92 D.L.R. (3d) 417.
5. At *Gosselin*, *supra* note 1 at para. 61-2, the majority states that [t]hose 30 and over and under-30s were not “similarly situated” in ways relevant to determining the appropriate level of social assistance in the form of unconditional welfare payments. More generally, as discussed above, the regulation was aimed at ameliorating the situation of welfare recipients under 30.
6. *Regulation Respecting Social Aid*, R.R.Q., c. A-16, r. 1, s. 29(a).
7. *Gosselin*, *supra* note 1 at paras. 251, 285, per Bastarache J. Similarly, at para. 334 Arbour J. put it this way: “This is the amount that was deemed by the legislature itself to be sufficient to meet the ‘ordinary needs’ of a single adult.” At para. 372, Arbour J. stated:
On \$170/month, paying rent is impossible. Indeed, in 1987, the rent for a bachelor apartment in the Montreal Metropolitan Area was approximately \$237 to \$412/month, depending on the location. Two-bedroom apartments went for about \$368 to \$463/month. As a result, while some welfare recipients were able to live with parents, many became homeless. During the period at issue, it is estimated that over 5,000 young adults lived on the streets of the Montreal Metropolitan Area. Arthur Sandborn, a social worker, testified that young welfare recipients would often combine their funds and share a small apartment. After paying rent however, very little money was left to pay for the other basic necessities of life, including hot water, electricity and food. No telephone meant further marginalization and made job hunting very difficult, as did the inability to afford suitable clothes and transportation.
8. *Ibid.* at para. 130, per LHeureux-Dubé J. Similarly, at para. 371, Arbour J. stated that “[t]he various remedial programs put in place in 1984 simply did not work: a startling 88.8 percent of the young adults who were eligible to participate in the programs were unable to increase their benefits to the level payable to adults 30 and over. In these conditions, the physical and psychological security of young adults was severely compromised during the period at issue.” At para. 254, Bastarache J. stated that “any reading of the evidence indicates that it was highly improbable that a person under 30, with the best intentions, could at all times until he or she was 30 years old be registered in a program and therefore receive the full subsistence amount.”
9. *Quebec Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12, s. 45 [hereinafter *Quebec Charter*]. Section 45 provides that “[e]very person in need has a right, for himself and his family, to measures provided for by law, susceptible of ensuring such person an acceptable standard of living.”
10. *Charter*, *supra* note 4. Section 15 states: “Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”
11. *Ibid.* Section 1 states: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”
12. *Ibid.* Section 7 states: “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.”
13. *Gosselin*, *supra* note 1 at paras. 18-19, 56, per McLachlin C.J., and at paras. 248-9, per Bastarache J..
14. *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1 [hereinafter *Law*].

15. *Gosselin*, *supra* note 1 at para. 19.
16. *Ibid.* at paras. 27, 43-4, 65, per McLachlin C.J.
17. *Ibid.* at para. 41-2. The majority said:
 The government's short-term purpose in the scheme at issue was to get recipients under 30 into work and training programs that would make up for the lower base amount they received while teaching them valuable skills. The differential regime of welfare payments was tailored to help the burgeoning ranks of unemployed youths obtain the skills and basic education they needed to get permanent jobs. The mechanism was straightforward. In order to increase their welfare benefits, people under 30 would be required to participate in On-the-job Training, Community Work or Remedial Education programs. Participating in the training and community service programs would bring welfare benefits up to the basic level payable to the 30-and-over group, and in the education program to about \$100 less.
 The government's longer-term purpose was to provide young welfare recipients with precisely the kind of remedial education and skills training they lacked and needed in order eventually to integrate into the work force and become self-sufficient. This policy reflects the practical wisdom of the old Chinese proverb: "Give a man a fish and you feed him for a day. Teach him how to fish and you feed him for a lifetime."
 This was not a denial of young people's dignity; it was an affirmation of their potential.
18. *Ibid.* at para. 38, per McLachlin C.J.
19. *Ibid.* at para. 19, per McLachlin C.J.
20. *Ibid.* at paras. 30-2, 35, 68, per McLachlin C.J.
21. *Ibid.* at para. 54, per McLachlin C.J.
22. *Ibid.* at paras. 55-6, per McLachlin C.J.
23. *Ibid.* at paras. 46-7, per McLachlin C.J.
24. *Ibid.* at para. 83, per McLachlin C.J.
25. *Employment and Assistance Act*, S.B.C. 2002, c. 40, repealing R.S.B.C. 1996, Schedule A: a two-years work record requirement (section 8(1)); and *B.C. Employment and Assistance Act Regulations*, B.C. Reg. 263/2002: a twenty-four-month eligibility out of sixty months (sections 3, 18, and 27.) and a three-week wait/employment search before being eligible to (section 3).
26. *Employment and Assistance for Persons with Disabilities Act*, S.B.C. 2002, c. 41, replacing *Disability Benefits Program Act*, R.S.B.C. 1996, c. 97.
27. *Legal Services Society Act*, S.B.C. 2002, c. 30, replacing *Legal Services Society Act*, R.S.B.C. 1996, c. 256. See also "What Legal Problems Are Covered by Legal Aid?" accessible at <http://www.lss.bc.ca/legal_aid/problems.asp> (Accessed 30 March 2003.)
28. *Gosselin*, *supra* note 1 at paras. 18-19, 56, per McLachlin C.J. See also *Ibid.* at paras. 248-9, per Bastarache J.
29. *Nova Scotia (Workers' Compensation Board) v. Martin; and Nova Scotia (Workers' Compensation Board) v. Laseur* 2003 SCC 54 .
30. *Ibid.* at para 100.
31. *Ibid.*
32. *Ibid.* at para. 82, per McLachlin C.J. The majority endorsed the view expressed by LeBel J. in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, that it would be dangerous to freeze the development of this part of the *Charter*. But its importance is such for the definition of substantive and procedural guarantees in Canadian law that it would be dangerous to freeze the development of this part of the law. The full impact of s. 7 will remain difficult to foresee and assess for a long while yet. Our Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*.
33. *Ibid.*
34. *Ibid.* at paras. 82-4, per McLachlin C.J. [emphasis added].
35. *Ibid.* at para. 414, per LeBel J.
36. *Ibid.* at para. 205-23, per Bastarache J.

37. *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 S.C.C. 94. In *Dunmore*, a s. 2(d) case, Bastarache J. held that the *Charter* may require a government to take positive steps to protect vulnerable groups from a violation of their *Charter* rights. The arguments adopted in *Dunmore*, regarding s. 2(d) rights are no less relevant to the s. 7 rights at issue in *Gosselin*. Bastarache J.'s attempt (at paras 2221-223) to distinguish *Gosselin* from *Dunmore* is not convincing.
38. *Gosselin*, *supra* note 1 at para. 309, per Arbour J.
39. *Ibid.* at paras. 319-29, per Arbour J.
40. *Ibid.* at paras. 371-7, per Arbour J.
41. *Ibid.* at paras. 129-33, per L'Heureux-Dubé J.
42. *Ibid.* at paras. 402-13, per LeBel J.
43. *Ibid.* at para. 307-95, per Arbour J.
44. The discussion by Bastarache J. of the inadequacies of the employability programs is contained in paras. 245-8 of the judgment (*ibid.*). At para. 393, Arbour J. states:
[I] agree with Bastarache J.'s finding that those means were not minimally impairing in a number of ways: (1) not all of the programs provided participants with a full top-up to the basic level; (2) there were temporal gaps in the availability of the various programs to willing participants; (3) some of the most needy welfare recipients—the illiterate and severely undereducated—could not participate in certain programs; (4) only 30,000 program places were made available in spite of the fact that 85,000 single young adults were on social assistance at the time. As my colleague points out, this last factor in particular “brings into question the degree to which s. 29(a) was geared towards improving the [long-term] situation of those under 30, as opposed to simply saving money” (para. 283).
45. *Ibid.*
46. *Ibid.* at para. 165, per Bastarache J.
47. *Ibid.* at para. 167, per Bastarache J.
48. *Ibid.* at para. 168, per Bastarache J.
49. *Ibid.* at para. 170, per Bastarache J.
50. J. Swanson, *Poorbashing: The Politics of Exclusion* (Toronto: Between the Lines, 2001) at 1-8 and 90-105.
51. *Gosselin*, *supra* note 1 at paras 407, per LeBel J.
52. *Ibid.* at para. 39, per McLachlin J.
53. *Ibid.* at para. 30-2, 35, 68, per McLachlin J.
54. At *ibid.* at para. 137, L'Heureux-Dubé J. said:
If 23 percent of young adults were unemployed by comparison with 14 percent of the general active population, and if an unprecedented number of young people were entering the job market at a time when federal social assistance programs were faltering, I fail to see how young adults did not suffer from a pre-existing disadvantage.
To a similar effect, Bastarache J. said at para. 235-8:
The first contextual factor that was considered in *Law* [*supra* note 15] was that of pre-existing disadvantage or prejudice. In *Law*, Iacobucci J. took notice of the fact that young widows are generally better situated to prepare for retirement than are older widows; there is no pre-existing disadvantage in their case. The respondent argues the same thing here, noting that young people are generally not considered to be routinely subjected to the sort of discrimination faced by some of Canada's discrete and insular minorities, and that they are not disadvantaged. While, in general, such a rule of thumb may hold true, it is precisely because of the generality of this type of consideration that distinctions based on enumerated or analogous grounds are suspect. The purpose of undertaking a contextual discrimination analysis is to try to determine whether the dignity of the claimant was actually threatened. In this case, we are not dealing with a general age distinction but with one applicable within a particular social group, welfare recipients. Within that group, the record makes clear that it was not, in fact, easier for persons under 30 to get jobs as opposed to their elders. The unemployment rate in 1982 had risen to 14 percent, with the rate among young people reaching 24 percent. As a percentage of the total population of people on social assistance, those under 30 years of age rose from 3 percent in 1975 to 12 percent in 1983. Thus,

the stereotypical view upon which the distinction was based, that the young social welfare recipients suffer no special economic disadvantages, was not grounded in fact; it was based on old assumptions regarding the employability of young people. The creation of the assistance programs themselves demonstrates that the government itself was aware of this disadvantage.

The appellant argues that people on social assistance have always suffered disadvantage because they are victims of stereotypical assumptions regarding the reasons for being welfare recipients, and are therefore marginalised from society. In making such an argument, the appellant is not comparing social assistance recipients under 30 to those 30 and over, but instead, comparing the relative position of young social assistance recipients to members of society as a whole. This raises the question of determining what is the proper comparator.

In *Law*, no argument was made that widows, as a category, have been traditionally marginalised. It was recognized, however, that in determining whether a group has suffered previous disadvantage, the analysis need not necessarily adopt the comparator upon which the distinction is first made. The question to be examined here is not whether differential treatment has occurred, which has already been established, but whether the particular group affected has been traditionally marginalised, or has faced unfair stereotyping. In *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, Iacobucci J. noted that the claimant group (non-registered natives) had faced considerable discrimination, but refused to enter into a “race to the bottom” (para. 69) by deciding who is more disadvantaged. The same approach, should, in my view, be adopted here. There is no compelling evidence that younger welfare recipients, as compared to all welfare recipients, have been traditionally marginalised by reason of their age. But that does not end the inquiry.

The concern, when determining whether the differential treatment of a group is discriminatory, must, according to this Court in *Law*, be governed by an overarching concern for human dignity. 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.

55. *Gosselin*, *supra* note 1 at paras. 406-7, per LeBel J.
56. *Law*, *supra* note 14.
57. *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, 186 D.L.R. (4th) 1, 2000 S.C.C. 28.
58. *Gosselin*, *supra* note 1 at paras. 37-58. These paragraphs are entirely about the question of whether the claimant has demonstrated a lack of correlation in purpose or effect between the ground of age and the needs and circumstances of welfare recipients under thirty in Quebec.
59. The point was summed up well by Bastarache J., in *ibid.*, who said, at paragraph 246:
As the appellant has demonstrated, and the respondent conceded, the dietary and housing costs of people under 30 are no different from those 30 and over. The respondent argued that those under 30 were more likely to live with their parents than those 30 and over. While this appears to have been true, the government had no empirical data to support that view when it adopted the Regulation; it was also shown that those over 25 were much less likely to live with their parents than those under 25. Thus, the decision to draw a bright-line at the age of 30 appears to have little to do with the actual situation of the affected group.
and, at para 248:
I would therefore disagree with the Chief Justice’s views as expressed at para. 38 of her reasons. She writes there that far from being stereotypical or arbitrary, the program was calibrated to address the particular needs and circumstances of young adults requiring social assistance. In my view it is more appropriate to characterize the government’s action in this way: Based on the unverifiable presumption that people under 30 had better chances of employment and lower needs, the program delivered to those people two thirds less of what the government viewed as the basic survival amount, drawing its distinction on a characteristic over which those people had no control, their age.
60. *Ibid.* at para. 21, per McLachlin J.
61. *Ibid.* at para. 135.
62. *Ibid.* at para. 57.
63. *Ibid.* at paras. 242-4, per Bastarache J. (distinction between section 15 and section 1 analyses) and paras. 260-90 (application of section 1 analysis. LHeureux-Dubé J. also emphasized the importance of

maintaining the analytical distinction between sections 15 and 1). She stated at paras. 112-13: The fact that a legislature intends to assist the group or individual adversely affected by the impugned distinction also does not preclude a court from finding discrimination. Nor is it determinative, where a distinction produces prejudicial effects, that a legislature intends to provide an incentive for the affected individuals to alter their conduct or to change themselves in ways that the legislature believes would ultimately be beneficial for them: *Lavoie v. Canada*, 2002 SCC 23, at paras. 5, per McLachlin C.J. and LHeureux-Dubé J., dissenting, and at para. 51, per Bastarache J.

Of course, benign legislative intent may aid in saving a discriminatory distinction at section 1, but that is a separate inquiry. In the earliest moments of its *Charter* jurisprudence, the Court insisted that the analysis of the right at issue should be kept separate from the inquiry into an impugned distinction's justification: *R. v. Oakes*, [1986] 1 S.C.R. 103; and *Andrews S.C.R.*, *infra* note 67 at p.182. As we enter the third decade of the *Charter's* existence, I see no reason to depart from this fundamental division. Moreover, I am unable to imagine how a departure could result in anything but a weakening of the equality guarantee.

64. What the majority says about this is worrisome. In *Gosselin*, *supra* note 1 at paras. 54-6, McLachlin C.J. says:

It may well be that some under-30s fell through the cracks of the system and suffered poverty. However, absent concrete evidence, it is difficult to infer from this that the program failed to correspond to the actual needs of under-30s. I find no basis to interfere with the trial judge's conclusion that the record here simply does not support the contention of adverse effect on younger welfare recipients. This makes it difficult to conclude that the effect of the program did not correspond to the actual situation of welfare recipients under 30.

I add two comments. Perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required to find that a challenged provision does not violate the *Charter*. The situation of those people who, for whatever reason, may have been incapable of participating in the programs attracts sympathy. Yet the inability of a given social program to meet the needs of each and every individual does not permit us to conclude that the program failed to correspond to the actual needs and circumstances of the affected group. As Iacobucci J. noted in *Law*, *supra* note 15 at para. 105, we should not demand "that legislation must always correspond perfectly with social reality in order to comply with s. 15(1) of the *Charter*." Crafting a social assistance plan to meet the needs of young adults is a complex problem, for which there is no perfect solution. No matter what measures the government adopts, there will always be some individuals for whom a different set of measures might have been preferable. The fact that some people may fall through a program's cracks does not show that the law fails to consider the overall needs and circumstances of the group of individuals affected or that distinctions contained in the law amount to discrimination in the substantive sense intended by section 15(1).

Second, we cannot infer disparity between the purpose and effect of the scheme and the situation of those affected, from the mere failure of the government to prove that the assumptions upon which it proceeded were correct. Bastarache J. argues that the distinction between people under 30 and older people lacks a "rational basis" because it is "[b]ased on the unverifiable presumption that people under 30 had better chances of employment and lower needs" (at para. 248). This seems to place on the legislator the duty to verify all its assumptions empirically, even where these assumptions are reasonably grounded in everyday experience and common sense. With respect, this standard is too high. Again, this is primarily a disagreement as to evidence, not as to fundamental approach. The legislator is entitled to proceed on informed general assumptions without running afoul of section 15, provided that these assumptions are not based on arbitrary and demeaning stereotypes. The idea that younger people may have an easier time finding employment than older people is not such a stereotype. Indeed, it was relied on in *Law*, *supra* note 15, to justify providing younger widows and widowers with a lesser survivor's benefit.

65. This point was made by Bastarache J. He also identified a number of other reasons that the criterion of minimal impairment was not satisfied. See *Gosselin*, *supra* note 1 at paras. 272, 276-84.
66. *Andrews v. Law Society of British Columbia* (1986), 2 B.C.L.R. (2d) 305, 27 D.L.R. (4th) 600.
67. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 [hereinafter *Andrews S.C.R.*].
68. *Ibid.* at 179.
69. *Ibid.* at 181-2.

70. *Gosselin*, *supra* note 1 at para 70.
71. *Ontario (Human Rights Commission) v. Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536, 7 C.H.R.R. D/3102.
72. *Ibid.* at para. 18.
73. *Gosselin*, *supra* note 1 at para. 128, L'Heureux-Dubé J. stated:
 [G]iven that the effects of an impugned distinction should be the focal point of a discrimination analysis, and that stereotypes are not necessary for a finding of discrimination, the severe impairment of an extremely important interest may be sufficient to ground a claim of discrimination. I foresaw this possibility in *Egan*, *supra*, when I wrote (at para. 65):
 The more fundamental the interest affected or the more serious the consequences of the distinction, the more likely that the impugned distinction will have a discriminatory impact even with respect to groups that occupy a position of advantage in society.
 It may be that particularly severe negative effects, as assessed under the fourth contextual factor in the third step of the *Law* test, *supra* note 15, may alone qualify a distinction as discriminatory. It is at least conceivable that negative effects severe enough would signal to a reasonable person possessing any personal characteristics, with membership in any classificatory group, that he or she is being less valued as a member of society. Therefore, even if we accept for the moment that youth are generally an advantaged group, if a distinction were to severely harm the fundamental interests of youth and only youth, that distinction would be found to be discriminatory.
74. *Ibid.* at para. 144-145.
75. *Gosselin*, *supra* note 1 at para. 301, per Arbour J.
76. I have written about this more extensively in Gwen Brodsky and Shelagh Day, "Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty" (2002) 14(1) *Canadian Journal of Women and the Law* 185, [hereinafter "Substantive Equality Speaks to Poverty"].
77. Factum of the Intervenor, National Association of Women and the Law, Supreme Court of Canada, S.C.C. File no. 27418, in *Gosselin*, *supra* note 1. See also Brodsky and Day, *supra* note 70.
78. Shelagh Day and I developed this argument in "Substantive Equality Speaks to Poverty," *supra* note 75.
79. See the decision of the majority in *Gosselin*, *supra* note 1 at paras. 27, 43-4, and 65. Bastarache J. critiques this general notion at para. 250.