

Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty

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Des études empiriques qui démontrent l'étendue et l'intensité de la pauvreté des femmes ainsi que des maux qu'elle provoque, viennent appuyer l'argument en vertu duquel une approche substantive de l'égalité réelle exige l'existence de droits positifs que l'on peut invoquer contre les gouvernements pour assurer que chaque personne obtienne nourriture, vêtements et logements adéquats. Malheureusement, certains tribunaux ont accepté que la classification d'une revendication sous la rubrique « droit social et économique » serve d'excuse pour retirer le litige du domaine judiciaire. En droit international des droits de la personne, la division des droits en droit civils et politiques, d'une part, par opposition aux droits économiques, sociaux et culturels, d'autre part, renforce le traitement des droits économiques et sociaux comme n'étant pas de « vrais droits ». Pourtant le droit international des droits de la personne n'autorise pas, de fait, la hiérarchisation de ces droits. L'idée d'une hiérarchie entre les deux catégories de droits provient d'un paradigme constitutionnel traditionnel qui s'accroche à un modèle de droits dits négatifs, les envisageant seulement comme des limites au pouvoir néfaste de l'État. Une conception formelle de l'égalité concorde bien avec ce paradigme dépassé des droits négatifs. Une conception substantive de l'égalité exige, au contraire, que les gouvernements prennent des mesures positives en vue de remédier au désavantage collectif, y compris la pauvreté des femmes.

The empirical evidence that reveals the extent and depth of women's poverty, and the harms that it causes, supports the claim that a substantive approach to equality requires that there be positive rights against governments to ensure that everyone has adequate food, clothing, and housing. Unfortunately, some courts have accepted the classification of a claim as 'social and economic' as an excuse to treat it as non-justiciable. Support for the treatment of social and economic rights as not 'real rights' is said to be provided by the division of rights in international human rights law into two categories: civil and political rights and economic, social, and cultural rights. However, international human rights law does not, in fact, support treating these rights in a hierarchical manner. The idea of a hierarchy between the two sorts of rights comes from an old-fashioned constitutional paradigm, which clings to a negative rights model of human rights, envisioning them only as restraints on harmful state action. A formal conception

of equality rights fits well within this outmoded negative rights paradigm, but a substantive conception of equality rights does not. Rather, substantive equality, by definition, requires governments to take positive steps towards remedying group disadvantage, including the poverty of women.

Introduction

An emerging issue in *Canadian Charter of Rights and Freedoms*¹ jurisprudence is the defeat of poverty-related challenges based on their characterization as 'social and economic' rights claims. In a variety of cases, governments have argued, with some success in lower courts, that the *Charter* is a negative rights instrument—a document of civil and political rights rather than of social and economic rights—which does not impose positive obligations on governments to assume a redistributive role. Tension about this issue is increasing as governments in Canada pursue cost-cutting agendas that diminish protections from poverty, and people are turning to the courts because they have no place else to go.

In recent years, governments in Canada have been withdrawing social and economic benefits and protections, leaving gaps in the programs and services that people need, and reducing benefits to inadequate levels. In 1995, the federal government repealed the *Canada Assistance Plan Act (CAP)*,² which set standards for social assistance and social services. The repeal of *CAP*, combined with other changes that were introduced in the 1995 federal budget, including substantial reductions in transfer payments to the provinces, has profoundly altered the social policy framework for the country. In the changed environment, provincial governments have made drastic cuts to key programs and services.³ These are programs upon which women are significantly reliant.

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1. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].
2. *Canada Assistance Plan Act*, R.S.C. 1985, c.C-1.
3. For example, the government of British Columbia cut welfare benefits for single parent families by \$51 a month as of April 2002. Almost all of the single parents on welfare are single mothers. In addition, the government has eliminated the Family Maintenance Exemption, so that all child support paid to single mothers will be deducted dollar for dollar from income-assistance benefits. Before this planned amendment, a single parent on social assistance was entitled to keep up to \$100 per month of these payments. Further, the Earnings Exemption has been eliminated for "employable" recipients. This exemption allowed people on welfare to work and keep \$100 if they were single or \$200 if they had children or a partner. In total, these measures mean that some single mothers in British Columbia will see a drop of as much as \$351 per month in their incomes. The Social Planning and Research Council of British Columbia [hereinafter SPARC] reported in *Falling Behind: A Comparison of Living Costs and Income Assistance Rates in B.C.* (Vancouver: SPARC, 2001) that, before the cuts, social assistance was providing only 65 per cent of the amount necessary to support a single parent with one child. Other recent cuts to welfare rates and limits on welfare eligibility, including flat time limits on the period during which any

Courtroom debates about the limits on how far governments can go with such cuts have been intensified by the fact that the Supreme Court of Canada has accorded an increasingly strong role to international treaties and norms as aids to the interpretation of the *Charter*.⁴ In particular, the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*⁵ has assumed a place in anti-poverty litigation because it explicitly recognizes the right of everyone to an adequate standard of living, including adequate food, clothing, and shelter.⁶

The main obstacle to recognizing that poverty-related claims can be fully justiciable is a dominant paradigm of domestic and international human rights thinking, which regards civil and political rights as rigidly distinct from social and economic rights and grants primacy to the former. Those who argue that economic and social rights claims are not justiciable rely for support on the bifurcation of civil and political rights and economic and social rights at the international level and on their placement in separate treaties, with different statements of obligation attached. Support for the treatment of economic and social rights claims as non-justiciable is also drawn from classical constitutionalism, which conceives of constitutional rights as merely negative constraints on government. This version of constitutional rights renders suspect positive governmental obligations to provide benefits and protections that are necessary to ensure that everyone has access to food, clothing, and shelter.

individual can receive welfare (two years out of five), and requirements that recipients live for two years outside of the family home before being eligible, will harm other groups of women, including young women, and single "employable" women. These changes have been combined with drastic cuts to legal aid services for family law and poverty law. More detailed descriptions of the cuts and changes to BC's welfare law and to legal aid can be found online at the BC government website at <<http://www.gov.bc.ca/>> (date accessed: 8 July 2002) and at the PovNet website at <<http://www.povnet.org/>> (date accessed: 8 July 2002).

With respect to cuts to social assistance in Ontario, see J.E. Mosher, "Managing the Disentitlement of Women: Glorified Market, the Idealized Family, and the Undeserving Other," in Sheila M. Neysmith, ed., *Restructuring Caring Labour: Discourse, State Practice and Everyday Life* (Toronto: Oxford University Press, 2000). It is important to note that welfare rates in every jurisdiction in Canada fall below the poverty line. Katherine Scott notes that "[i]f social assistance recipients received assistance for the entire year and no other income, their poverty would be virtually guaranteed." Katherine Scott, *Women and the CHST: A Profile of Women Receiving Social Assistance in 1994* (Ottawa: Status of Women Canada, 1998) at 50.

4. *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038 [hereinafter *Slaight*]; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at 860-2 [hereinafter *Baker*]; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, per L'Heureux-Dubé J. at 365 [hereinafter *Ewanchuk*]; *United States v. Burns*, [2001] 1 S.C.R. 283.
5. *International Covenant on Economic, Social and Cultural Rights*, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc., A/6316 (1966), 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 [hereinafter *ICESCR*].
6. *ICESCR*, *supra* note 5 at art. 11. Article 11(1) states:
The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

However, the concept of indivisibility—the treatment of political and civil rights as inseparable from social and economic rights—together with the express rulings of the United Nations Committee on Economic, Social and Cultural Rights (CESCR) on the *ICESCR* obligations, provide a way of moving past the marginalization of social and economic rights. They point to the conclusion that social and economic rights, agreed to in human rights treaties, must be made the subject of justiciable domestic rights, along with civil and political rights. Canada's treaty commitments include an obligation on governments to establish monitoring mechanisms and institutions for the protection of all human rights. Sections 15 and 7 of the *Charter* are both obvious provisions through which domestic effect can be given to the obligation to ensure that everyone has an adequate standard of living.⁷

Further, the idea that *Charter* rights can be rigidly categorized as civil and political rather than social and economic, negative rather than positive, or legal rather than economic, is false. This categorical approach to constitutional rights cannot be determinative of today's interpretations of Canadian *Charter* rights. It is simply incompatible with the values and principles that underlie the *Charter*—respect for human dignity and personal autonomy, commitment to social justice and equality, and faith in social and political institutions—and it threatens to undermine the *Charter's* ability to deliver on its promise of equal respect and concern for every member of Canadian society. It is profoundly inconsistent with a substantive conception of equality.

Largely missing from debates about the justiciability of poverty-related claims, however, is an appreciation that poverty is a sex equality issue. The *ICESCR's* right to an adequate standard of living provides one basis for arguing that the *Charter* encompasses subsistence rights. However, a feminist substantive equality lens reveals another basis for finding that government cuts to basic social programs, such as welfare, are inconsistent with the *Charter* guarantees—they exacerbate women's pre-existing economic and social inequality and cause gender-specific harms. Failing to acknowledge this additional footing for poverty-related claims is a serious omission. The separation of poverty from the inequality of women and other disadvantaged groups mirrors and, therefore, tends to reinforce the traditional division between social and economic rights and civil and political rights. It bolsters the view that poverty-related claims are non-justiciable and permits equality rights guarantees to be understood as having nothing to say about material conditions.

In addition, addressing poverty as though it were a strictly individual, gender-, race-, and disability-neutral issue of human security results in an underestimation of the gravity and extent of the harms caused by removing protections and benefits from people living in poverty. Such an approach overlooks the fact that poverty is socially and legislatively created and that, for the groups predominantly affected by it, it is a result of systemic discrimination. It also overlooks the fact that poverty intensifies the effects of sexist, racist, and other discriminatory social

7. See *Baker and Ewanchuk*, both at *supra* note 4.

practices. Although it is theoretically possible to interpret *Charter* rights to include subsistence rights without talking about how particular groups are affected by poverty, conceptually ‘delinking’ poverty from its discriminatory roots, and from the reality of its particular and disproportionate effects on women and other systemically disadvantaged groups, narrows our understanding of poverty and deprives both section 7 and 15 of important interpretive content.⁸

Poverty is a sex equality issue because women’s poverty is a manifestation of persistent discrimination against women. It affects women, and particular groups of women, disproportionately, and it exacerbates every form of social and sexual subordination that women experience. Our claim is that women’s right to substantive equality must be understood to include a right to basic income security⁹ because, without that security, profound deprivations of personal autonomy, and of physical and psychological integrity—which are incompatible with women’s equality—result. We conclude that because women’s right to substantive equality encompasses a right to basic income security, those who argue that the question of adequate social assistance is not the business of the courts must establish not only that *ICESCR* rights are not justiciable as a part of domestic Canadian constitutional rights but also that women’s equality rights are not fully justiciable. This is a burden they cannot discharge.

Beginning with a consideration of the empirical picture of women’s poverty and economic inequality, and an analysis of the case of *Gosselin v. Procureur général du Québec*,¹⁰ we describe how the ‘social and economic’ category has been manipulated to defeat anti-poverty claims. We then discuss the implications of international human rights law for *Charter* interpretation and conclude that it does not mandate a fractured domestic jurisprudence—one that sharply distinguishes between civil and political rights and social and economic rights. Against this backdrop, we turn to an analysis of the purported distinction between fully justiciable civil and political rights rights as opposed to aspirational social and economic policy statements and argue that it rests on an unduly limited and outdated conception of the role and content of Canadian constitutional rights, a conception that is incompatible with the Supreme Court of Canada’s jurisprudence

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8. While this article focuses on the strong links between poverty and women’s inequality, it is our view that similar arguments can be made that the right to equality must be able to address the economic inequality of Aboriginal people, people of colour, and people with disabilities. Government acts and omissions that increase the economic vulnerability of these groups and make them more vulnerable to violations of every other right must be understood to compel the protection of section 15.
 9. We wish to clarify that adequate social assistance is not all that women need, or all that they are entitled to, in the name of basic income security. They are also entitled to income security to protect them when they are ill, disabled, unemployed, pregnant or recovering from childbirth, and old. However, adequate social assistance is, in our view, an indispensable element of basic income security, and, in this article, we focus on adequate social assistance and social services because they have been the target of drastic cuts in recent years, with obvious harmful effects on women.
 10. *Gosselin v. Procureur général du Québec*, [1999] R.J.Q. 1033 (C.A.) [hereinafter *Gosselin* (C.A.)], affirming [1992] R.J.Q. 1647 (C.S.) [hereinafter *Gosselin* (C.S.)], leave to appeal to S.C.C. granted 1 June 2000 (S.C.C. File no. 27418). *Gosselin* was heard by the Supreme Court of Canada on 29 October 2001. Judgement was reserved [hereinafter *Gosselin*].

on substantive equality. We finish by arguing that substantive equality requires that women's poverty be remedied by governments.

Women's Disproportionate Poverty and Overall Economic Inequality

Our argument that women's poverty should be understood as a justiciable section 15 sex equality issue is grounded in an empirical picture that shows that women are economically unequal and disproportionately poor. In 1998, 17.6 per cent of all women in Canada were living below the poverty line,¹¹ compared with 13.5 per cent of men.¹² Single mothers and other "unattached women" are most likely to be poor, with poverty rates for these groups reaching as high as 54.2 per cent for single mothers under sixty-five, 41.9 per cent for unattached women under sixty-five, and 39.4 per cent for unattached women over sixty-five in 1998.¹³ Unattached men have significantly lower poverty rates.¹⁴

Poverty rates for single mothers are even higher when the figures are disaggregated by race and by the mothers' ages. In 1996, 73 per cent of Aboriginal single mothers were living below the poverty line.¹⁵ In 1998, 85.4 per cent of single mothers under twenty-five were living in poverty.¹⁶ Single mothers under sixty-five with children under eighteen are also living in the deepest poverty, with incomes \$9,230 below the poverty line in 1998.¹⁷ 83,000 single mothers had incomes of less than half the poverty line, and another 138,000 mothers had incomes that were 50 to 75 per cent of the poverty line.¹⁸

Aboriginal women, immigrant women, women of colour, and women with disabilities are also significantly more vulnerable to poverty than other women. In 1997, 43 per cent of Aboriginal women, 37 per cent of women of colour, and

11. Following the practice of the National Council of Welfare, we use "poverty" and "low income" interchangeably in this article, and references are to those living below Statistics Canada's low-income cut-offs (LICOs). The National Council of Welfare states: "The National Council of Welfare, like many other social policy groups, regards the low income cut-offs as poverty lines and uses the term poor and low-income interchangeably." Statistics Canada takes pains to avoid references to poverty. It says the cut-offs have no official status, and it does not promote their use as poverty lines. Regardless of the terminology, the cut-offs are a useful tool for defining and analyzing the significantly large portion of the Canadian population with low incomes. They are not the only measures of poverty used in Canada, but they are the most widely accepted and are roughly comparable to most alternative measures. National Council of Welfare, *Poverty Profile 1995* (Ottawa: Minister of Supply and Services, 1997) at 5-6.

12. Statistics Canada, *Women in Canada 2000* (Ottawa: Statistics Canada, 2000) [hereinafter *Women in Canada 2000*] at 13.

13. National Council of Welfare, *Poverty Profile 1998* (Ottawa: National Council of Welfare, 2000) at 71. *Poverty Profile 1998* states that "most of the differences between the sexes can be explained by the high poverty rates of three family types: unattached women under 65, unattached women 65 and older, and single-parent mothers under 65 with children under 18" (at 71).

14. *Ibid.* at 16.

15. *Ibid.*

16. *Ibid.* at 32.

17. *Ibid.* at 45.

18. *Ibid.* at 49.

48 per cent of women who are recent immigrants (those who arrived between 1991 and 1995) were living below the poverty line.¹⁹ Aboriginal women and women of colour also have higher rates of poverty and substantially lower incomes than their male counterparts.²⁰ Women with disabilities had a poverty rate of 25.1 per cent in 1991.²¹

Women have a higher incidence of poverty, and women experience greater depths of poverty than men. However, even when their incomes are above the poverty level, they are not economically equal to men. Though women have moved into the paid labour force in ever-increasing numbers over the last two decades,²² they do not enjoy equality there, not in earnings, in access to non-traditional jobs and managerial positions,²³ or in benefits.²⁴ The gap between men's and women's full-time, full-year wages is due in part to occupational segregation in the workforce, which remains entrenched, and to the lower pay that is accorded to traditionally female jobs. Though the wage gap has decreased in recent years, with women who are employed on a full-time, full-year basis now earning about 72 per cent of comparable men, part of this narrowing of the gap is due to a decline in men's earnings as a result of restructuring, and not to an increase in women's earnings.²⁵

19. *Women in Canada 2000*, *supra* note 12 at 205, 232, and 259.

20. *Ibid.* at 231, 233, 258, and 259. 43 per cent of Aboriginal women are living in poverty in 1996, compared to 35 per cent of Aboriginal men and 20 per cent of non-Aboriginal women. Wherever their place of residence, the incomes of Aboriginal women were less than those of Aboriginal men. 37 per cent of visible minority women were living in poverty in 1995, compared to 35 per cent of visible minority men, and 19 per cent of other women. In 1995, the average incomes of visible minority women were 70 per cent of their male counterparts.

21. Gail Fawcett, *Living with Disability in Canada* (Ottawa: Human Resources Canada, 1996) at 131.

22. *Women in Canada 2000*, *supra* note 12 at 12.

23. *Ibid.* at 12 and 107. *Women in Canada 2000* notes that "[t]he majority of employed women continue to work in occupations in which women have traditionally been concentrated. In 1999, 70 per cent of all employed women were working in teaching, nursing and related health occupations, clerical or other administrative positions and sales and service occupations." The report also notes that "women continue to account for large shares of total employment in each of these occupational groups. In 1999, 87 per cent of nurses and health-related therapists, 75 per cent of clerks, 62 per cent of teachers, 59 per cent of sales and service personnel were women." The report also notes that "women tend to be better represented among lower-level managers as opposed to those at more senior levels. In 1999 women made up only 27 per cent of senior managers, compared with 36 per cent at other levels" (at 107).

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

25. See Isabella Bakker, "Introduction: The Gendered Foundations of Restructuring in Canada," in Isabella Bakker, ed., *Rethinking Restructuring: Gender and Change in Canada* (Toronto: University of Toronto Press, 1996) at 13-14; Pat Armstrong, "The Feminization of the Labour

The average annual income of women from all sources is about 62 per cent of men's.²⁶ This significant difference in annual income is partly attributable to the wage gap, but it is also partly attributable to the fact that women work fewer hours than men in the paid labour force because they cannot obtain full-time work²⁷ and because they carry more responsibility for unpaid care-giving duties.²⁸ In 1999, 41 per cent of women, compared to 29 per cent of men, held non-standard jobs²⁹—that is, they were self-employed, had multiple jobs, or jobs that were temporary or part-time. These jobs are unlikely to be unionized and unlikely to provide pensions or benefits.³⁰

Aboriginal women are heavily concentrated in low-paying sales, service, and clerical jobs. They also have higher unemployment rates and lower earnings levels than other women.³¹ Women of colour have higher education levels than other women, but this fact does not result in better jobs and better earnings. Instead, they too have higher unemployment rates and lower earnings than other women and than their male counterparts.³² Immigrant women also generally earn less than other women and initially accept employment for which they are overqualified. They are more likely than other women to be employed in manual work.³³ Women with disabilities earn less than their male counterparts and less than other women in most age groups.³⁴ Even though women's earnings are substantially lower than men's, women play a significant role in keeping their families out of poverty through their earnings. Without women's earnings, poverty rates would rise

Force: Harmonizing Down in a Global Economy," in Bakker, *Rethinking Restructuring*, *supra* note 25 at 29-54; *Women in Canada: A Statistical Report*, 3d ed. (Ottawa: Industry 1995) at 86. See also Katherine Scott and Clarence Lochhead, *Are Women Catching Up in the Earnings Race?* (Ottawa: Canadian Council on Social Development, 1997) at 2. Scott and Lochhead state that "[p]reliminary analysis shows that the women who made wage gains over the last decade were the beneficiaries of a pool of good jobs in the health, education and social service sectors. However, as the structure of the economy continues to change, with the continuing polarization of job opportunities, there is a real danger that women's economic advances will be halted. And such a situation would herald greater economic insecurity for all Canadians."

26. *Women in Canada 2000*, *supra* note 12 at 13.

27. In 1999, 25 per cent of part-time workers indicated that they wanted full-time work but could not find it. See *ibid.* at 104.

28. Women's care of children affects their participation in employment and, consequently, their incomes. Women with pre-school-aged children are less likely than those with school-aged children to be employed. In 1999, 63 per cent of women with children under age six were employed, compared to 74 per cent of women with children aged six to fifteen. Single mothers are considerably less likely than women in two-parent families to be employed. 37.6 per cent of single mothers with children under three were employed, compared to 63.1 per cent of women in two-parent families with children the same age. See *ibid.* at 98 and 101.

29. *Ibid.* at 103.

30. Monica Townson, "Non-Standard Work: The Implications For Pension Policy and Retirement Readiness," report from the Women's Bureau, Human Resources Development Canada, 1996, at 1 and 3 [unpublished].

31. *Women in Canada 2000*, *supra* note 12 at 257-8.

32. *Ibid.* at 224-30.

33. *Ibid.* at 197-203.

34. *Ibid.* at 166.

dramatically and the number of poor families would more than double.³⁵ In addition to diminished rewards for their labour, women do not enjoy an equal share of wealth, including property, savings, and other resources.³⁶

It is clear that female sex, motherhood, and single status are significant determinants of poverty. Being an Aboriginal woman, a woman of colour, or a woman with a disability further increases the risk of poverty. It is also clear that women generally are economically unequal to men and that race, disability, and other factors complicate and deepen that inequality. Though there are variations from year to year, the pattern of women's poverty is persistent. More women than men are poor, and women tend to be the poorest of the poor.³⁷

Women are also poor for different reasons than men. As we said in our earlier book *Women and the Equality Deficit*,

[w]omen's persistent economic inequality is caused by a number of interlocking factors: the social assignment to women of the unpaid role of caregiver and nurturer for children, men, and old people; the fact that in the paid labour force women perform the majority of the work in the "caring" occupations and that this "women's work" is lower paid than "men's work"; the lack of affordable, safe child care; the lack of adequate recognition and support for child care and parenting responsibilities that either constrains women's participation in the labour force or doubles the burden they carry; the fact that women are more likely than men to have non-standard jobs with no job security, union protection, or benefits; the entrenched devaluation of the labour of women of colour, Aboriginal women, and women with disabilities; and the economic penalties that women incur when they are unattached to men, or have children alone. In general, women as a group are economically unequal because they bear and raise children and have been assigned the role of caregiver. Secondary status and income go with these roles.³⁸

35. *Ibid.* at 146.

36. Bakker, "The Gendered Foundations of Restructuring in Canada," *supra* note 25 at 18-19; Lisa Philipps, "Tax Policy and the Gendered Distribution of Wealth," in Bakker, *Rethinking Restructuring*, *supra* note 25 at 141-62.

37. See also Monica Townson, *A Report Card on Women and Poverty* (Ottawa: Canadian Centre on Policy Alternatives, 2000). Townson notes that "women remain among the poorest of the poor in Canada. Over the past two decades, the percentage of women living in poverty has been climbing steadily. As Canada enters the 21st century, almost 19 per cent of adult women are poor—the highest rate in two decades. About 2.2 million adult women are now counted as low-income, with 1.8 million who had low incomes in 1980" (at 1).

38. Shelagh Day and Gwen Brodsky, *Women and the Equality Deficit: The Impact of Restructuring Canada's Social Programs* (Ottawa: Status of Women Canada, 1998) at 7. This characterization of the causes of women's poverty and economic inequality has been replicated with some variations in the submission of the National Association of Women and the Law [hereinafter NAWL], *Canadian Women and the Social Deficit: A Presentation to the International Committee on Economic, Social and Cultural Rights on the Occasion of the Consideration of Canada's Third Report on the Implementation of the International Covenant on Economic, Social and Cultural*

It is the prevalence of poverty amongst women and its gendered causes and effects that make poverty a sex equality issue.

The Jurisprudential Problem

It is our view that if section 15 is to fulfil its purpose it must be able to assist women to alter this picture and to pick apart the legislative, regulatory, and policy regimes that perpetuate women's economic inequality and their poverty. However, this requires dealing directly with the obstacles that claims confront when they are categorized as 'social and economic' rights claims. In lower court *Charter* jurisprudence, the effect of a claim being categorized as a 'social and economic' rights claim is almost certain dismissal. The social and economic category denotes legislative, not judicial responsibility; it is treated as not fully justiciable. This can be seen in the lower court decisions in *Gosselin*. At issue is the constitutionality of reducing the social assistance entitlement of a group of eligible recipients, such that its members are deprived of the means to meet basic needs for food, clothing, and shelter. Section 29(a) of the *Regulation Respecting Social Aid*³⁹ cut the entitlement of adults between the ages of 18 and 30 to \$170 per month, which was roughly one-third of the regular welfare rate established by the government of Québec as necessary to meet basic needs. The *Gosselin* case is not only about discrimination within the four corners of a legislative scheme. While *Gosselin* can be viewed as a case of age-based discrimination against vulnerable young people, it can also be viewed as a case about government failure to provide adequate social assistance to persons in need, with particular and disproportionate effects on poor young women.

On behalf of Louise Gosselin, and the class of approximately 70,000 welfare recipients that she represented, it was argued that the regulation violated the section 7 *Charter* right to security of the person, the section 15 right to be free of age-based discrimination as well as section 45 of the *Québec Charter of Human Rights and Freedoms*.⁴⁰ In dismissing Louise Gosselin's claim, Justice Paul Reeves of the Québec Superior Court, referring to section 7 of the *Charter*, said:

[t]he [Canadian] *Charter* is not an obstacle to parliamentary sovereignty
... [I]f positive obligations were to be inferred, they would be those of the

Rights (Geneva: Committee on Economic, Social and Cultural Rights, 16 November 1998) at para. 24, text is available online at <www.nawl.ca> (date accessed: 4 July 2002).

39. The enabling legislation is *Social Aid Act*, R.S.Q., c. A-16. By regulation, the government determined that an adult's ordinary needs corresponded to a monthly amount ranging from \$434 as of 1 April 1985 to \$507 as of 1 January 1989 (this is the "regular rate"). Section 29(a) of the *Regulation Respecting Social Aid*, R.R.Q., c. A-16, r. 1, nonetheless stipulated that the assistance of single adults less than thirty years of age and able to work could not exceed a monthly amount ranging from \$158 as of 1 April 1985 to \$185 as of 1 January 1989 (sections 23 and 29(a)).
40. 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." *Québec Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12, s. 45 [hereinafter *Québec Charter*].

courts which, with or without approval, would ultimately determine the choices of the political order ... [B]ut this role has not been given to the judiciary under the Charter. The courts cannot substitute their judgement in social and economic matters for that of legislative bodies for the purpose of judging such matters.⁴¹

The section 7 claim was also unanimously rejected in the Court of Appeal. Justice of Appeals Michel Robert, writing for the Court, pointed out that although the right to receive social assistance that is sufficient to cover basic necessities of life is not a *purely* economic right, like the right to enter contracts, it does belong under the rubric of economic rights rather than legal rights, as evidenced by the fact that it is characterized as such in section 45 of the *Québec Charter* and Article 11 of the *ICESCR*.⁴² Robert J.A. concluded that section 7 could not encompass a right to social assistance.

Notwithstanding this position on section 7 of the Canadian *Charter*, Robert J.A. was strongly of the view that a government failure to provide adequate social assistance violates section 45 of the *Québec Charter*. He found that section 45 creates a justiciable right to social and economic measures sufficient to ensure an adequate standard of living, and he would have found the challenged regulation to be in violation of the *Québec Charter*. He reasoned that in light of the *ICESCR* and international human rights jurisprudence, section 45 of the *Québec Charter* should be interpreted as a substantive right capable of providing a remedy for below subsistence welfare rates.

However, the majority of the Court of Appeal disagreed. The majority chose instead to interpret section 45 as conferring only a right of access to such financial assistance as the government decides to provide. Given the language of section 45, this interpretation indicates a remarkable degree of commitment to the view that rights to the necessities of life are not justiciable. For the majority, Justice of Appeals Gérard A. Baudouin said: “The question of the sufficiency or adequacy of social assistance measures resides with the legislative body, and is strictly political, not judicial.”⁴³

Not even the facial discrimination based on the ground of age was found to violate the *Charter*. At trial, Reeves J. found that discrimination was not proven, and one judge in the Court of Appeal agreed. A majority on appeal held that discrimination had been proven, but a differently constituted majority found that the discrimination was justified under section 1. Here too, the viability of the claim was undermined because it was seen by the Court to concern entitlement to an economic benefit. The age discrimination claim was classified by the majority as “essentially political” and as a challenge to a government decision that was

41. *Gosselin* (C.S.), *supra* note 10 at para. 217, translation by Martha Jackman in Martha Jackman and Bruce Porter, “Women’s Substantive Equality and the Protection of Social and Economic Rights under the Canadian Human Rights Act,” in *Women and the Canadian Human Rights Act: A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, 1999) 43 at 61.

42. *ICESCR*, *supra* note 5.

43. *Gosselin* (C.A.), *supra* note 10 at para. 39, NAWL translation by Rachel Cox.

based on the “distribution of scarce resources.”⁴⁴ This characterization formed part of a rationale for lessening the government’s burden of justification.

Technically, the defeat of a claim under section 1 is different from holding it to be non-justiciable. However, lowering the government’s burden of justification in a case such as *Gosselin* is another technique whereby *Charter* rights are drained of their substantive content. It is a technique grounded in the view that economic rights are lesser rights and are inappropriate for judicial action. From the perspective of a section 15 claimant, it matters little whether the social and economic category functions so as to prevent the judicial determination of an issue, to preclude a finding of discrimination under section 15, or to permit the success of a defence under section 1.⁴⁵ The result is the same. The claim is defeated.

The lack of substantive equality analysis of poverty, age, and gender in *Gosselin* is also notable. A gender-neutral and socially decontextualized approach to the age discrimination, which was manifest on the face of the regulation, effectively lightened the respondent’s burden of justification under section 1. When it comes to weighing the harms of a discriminatory measure against its alleged benefits, as required under a section 1 analysis, it is crucial to calibrate accurately the seriousness of the harms. In the Québec Court of Appeal, this was not done. More particularly, there was no acknowledgment of the various forms of negative stereotyping to which welfare recipients, especially young welfare recipients, are subject. Nor was there any specific analysis of the impact on poor young women of a denial of access to a subsistence income. On appeal to the Supreme Court of Canada, the intervenors, the National Association of Women and the Law and the Charter Committee on Poverty Issues, sought to address this analytical deficit. At the time of writing, the judgment of the Supreme Court of Canada is pending.⁴⁶

The lower court decisions in *Gosselin* are not isolated examples. Rather, they are among a group of claims that have been dismissed based on their categorization as ‘social and economic’ rights claims.⁴⁷ What these cases have in common is claimants who seek to enlist the assistance of a court to stop a government from denying social assistance and services to people in need. They necessarily call for a focus on the legality of an action undertaken by government in its redistributive role. Given the facial discrimination in the Québec regulation, the *Gosselin* challenge does not necessarily require the Supreme Court of Canada

44. *Ibid.* at para. 26.

45. David Wiseman’s critique of justiciability, in the context of *Charter* anti-poverty litigation, supports the view that is not particularly helpful to differentiate lack of justiciability from other techniques of dismissal. See David Wiseman, “The Charter and Poverty: Beyond Injusticiability” (2001) 51 *University of Toronto Law Journal* 399.

46. See *Gosselin*, *supra* note 10 in general.

47. See, for example, *Masse v. Ontario (Ministry of Community and Social Service)* (1996), 134 D.L.R. (4th) 20 (Ont. C.A.). See also *Fernandes v. Manitoba (Director of Social Services, Winnipeg Central)* (1992), 93 D.L.R. (4th) 402 (Man.C.A.); *Clark v. Peterborough Utilities Commission* (1995), 24 O.R. (3d) 7 (Ont. Div. Ct.). See, generally, Bruce Porter, “Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights” (2000) 15 *Journal of Law and Social Policy* 117.

to consider whether there is a *Charter* right to social assistance in an amount adequate to meet basic needs. However, this conceptual question is raised by the case, and undoubtedly its presence explains the vigorous opposition by the government of Québec and other governmental intervenors.

Social and Economic Rights Debates

Running through the *Gosselin* litigation is a dispute about what the implications of the *ICESCR* are for *Charter* interpretation. For Louise Gosselin, it was argued that Article 11 of the *ICESCR* supports reading the right to security of the person in section 7 of the *Charter* as including the right of every individual in need to the financial support necessary to obtain the necessities of life.⁴⁸ This claim was countered by two main arguments: (1) the argument that social and economic rights are not justiciable; and (2) the argument that, if they are justiciable, governments are required to realize the rights only ‘progressively.’ Intervening attorneys-general contended that the international human rights regime supports the view that social and economic rights are not justiciable.⁴⁹ They point to the fact that, at the international level, social and economic rights and civil and political rights are embodied in separate and distinct treaties (the *ICESCR* and the *International Covenant on Civil and Political Rights (ICCPR)*).⁵⁰ This bifurcation is offered as evidence that social and economic rights are different in kind from civil and political rights and not intended to be justiciable.

The central obligations of the signatories to these covenants are presented somewhat differently in each covenant. Signatories to the *ICESCR* are required to “take steps, individually and through international assistance and co-operation ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights ... by all appropriate means, including ... the adoption of legislative measures.”⁵¹ By contrast, signatories to the *ICCPR* are obliged to “adopt such ... measures as may be necessary to give effect to the rights.”⁵² These different statements of obligation are held out as proof that economic and social rights are non-justiciable. For example, in *Gosselin*, on appeal to the Supreme Court of Canada, the attorney general of Ontario argued that:

48. Factum of the Appellant, Louise Gosselin, Supreme Court of Canada in *Gosselin*, *supra* note 10, S.C.C. File no. 27418 at paras. 65-9 [hereinafter Appellant’s Factum].

49. Factum of the Intervenor, the Attorney General of Ontario, Supreme Court of Canada in *Gosselin*, *supra* note 10, S.C.C. File no. 27418 [hereinafter Factum of the Attorney General of Ontario]. See also Factum of the Intervenor, the Attorney General of British Columbia, Supreme Court of Canada in *Gosselin*, *supra* note 10, S.C.C. File no. 27418 at paras. 26, 32, 33, 92, and 93.

50. *International Covenant on Civil and Political Rights*, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. no. 16) 52, UN Doc. A/6316 (1966), 99 U.N.T.S. 171, Can. T.S. 1976 No. 47 [hereinafter *ICCPR*]; *ICESCR*, *supra* note 5. For a brief history and discussion of the division of civil and political rights from social and economic rights, see William A. Schabas, *International Human Rights Law and the Canadian Charter*, 2nd ed. (Toronto: Carswell, 1996) at 62-7.

51. *ICESCR*, *supra* note 5 at art. 2(1).

52. *ICCPR*, *supra* note 50 at art. 2(2).

[t]he Appellant and some of the intervenors refer to international sources in support of the position that section 7 of the *Charter* includes a justiciable right to a minimum level of income. They submit that the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* provides a basis for interpreting the Canadian constitution to impose positive obligations on the government to provide income support programmes that provide a certain standard of living. However ... the structure of the *ICESCR* suggests that the rights it protects are non-justiciable. If the *ICESCR* is of use in the interpretation of section 7 of the *Charter*, it supports the view that justiciable social and economic rights should be excluded from the ambit of section 7.⁵³

The claim that economic and social rights are non-justiciable is an outdated and unsustainable one. The bifurcated treaty structure created at the international level during the Cold War era does not mandate a domestic constitutional jurisprudence that distinguishes sharply between civil and political rights and social and economic rights. On the contrary, international human rights jurisprudence emphasizes the importance of giving effect to all human rights obligations by means of domestic legislation and judicial enforcement. In recent years, the CESCR has expressly repudiated the use of the bifurcation argument to support the view that social and economic rights are not justiciable in domestic courts.⁵⁴ In *General Comment 9*, which highlights the central obligation of the signatories to the *ICESCR* to use all appropriate means to give effect to the rights, the Committee states:

In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary presumption is too often made in relation to economic, social and cultural rights. This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions. The Committee has already made clear that it considers many of the provisions in the Covenant to be capable of immediate implementation ... While the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions. It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the different branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable

53. Factum of the Attorney General of Ontario, *supra* note 49 at para.52.

54. See Porter, *supra* note 47, for a full discussion of the approach of the Committee on Economic, Social and Cultural Rights [hereinafter CESCR] to the issue of the justiciability of social and economic rights and to Canada's failures to provide adequate access to domestic remedies for violations of these rights.

range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.^{55 56}

In light of the Committee's interpretation of the obligation of signatories, it is not surprising that it has been pointedly critical of Canada's failures to ensure that Canadians can seek effective remedies for violations of their social and economic rights under domestic law and through domestic tribunals and courts.⁵⁷ Specifically, the Committee has expressed concern that "provincial governments have urged upon their courts ... an interpretation of the *Charter* which would deny any protection of Covenant rights and ... leave the complainants without the basic necessities of life and without any legal remedy",⁵⁸ that "provincial courts have

55. CESCR, *General Comment 9: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 19th Session, 1998, UN Doc. HRI/GEN/1/Rev.5, 26 April 2001, para. 10.

56. The criticism that the categorization of social and economic rights is arbitrary bears underscoring. Distinctions between economic and social rights and civil and political rights are frequently overstated. For example, the purported resource-based distinction between claims involving so-called 'social and economic issues' and so-called 'legal issues' cannot withstand close scrutiny. It relies on the characterization of civil and political rights as purely negative restraints on the conduct of government and an assumption that negative restraints are, by definition, cost-free. However, even the most traditional of legal rights claims, such as the right to a fair trial, involves the creation of effective judicial institutions and the expenditure of state resources, sometimes very significant ones. The resources for such expenditures are neither more nor less scarce than resources for social programs.

Similarly, the view, alluded to by the CESCR, that 'economic' claims require judges to allocate priorities between groups and that judges lack the competence to deal with issues involving competing priorities is not a convincing rationale for placing questions of social and economic entitlements outside the parameters of the *Charter*. See Craig Scott and Patrick Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" (1992) 141(1) *University of Pennsylvania Law Review* 1 at 48-53.

Judges have long been required to deal with issues that involve allocating priorities between groups. For instance, the criminal law, while often viewed as the archetypal example of a contest between the individual and the state, in reality, also involves the allocation of priorities between the victim and the accused, and, in the case of gendered crimes such as rape, this can entail an allocation of priorities between groups.

Furthermore, even within the category of 'civil and political' rights is a large range of subject matters, including, for example, fair trial rights and voting rights. Just because judges are experienced in the adjudication of claims to fair trial rights does not mean that they are automatically competent to decide voting rights issues. And yet, treating all civil and political rights as justiciable means that we expect judges to adjudicate voting rights issues. The fact is that judging has always required judges to be able to learn new things.

57. CESCR, *Concluding Observations on Canada*, UN Doc. E/C.12/1993/5, 10 June 1993; CESCR, *Concluding Observations on Canada*, UN Doc. E/C.12/1/Add.31, 10 December 1998 [hereinafter 1998 *Concluding Observations*].

58. 1998 *Concluding Observations*, *supra* note 57 at para. 14.

routinely opted for an interpretation of the *Charter* which excludes protection of the right to an adequate standard of living and other Covenant rights⁵⁹; and that there are inadequate legal protections in Canada for women.⁶⁰ The CESCR has also recommended that Canada ensure that “legal aid for non-criminal matters [is] available at levels that ensure the right to an adequate standard of living⁶¹” urged federal, provincial, and territorial governments to “adopt positions in [*Charter*] litigation which are consistent with their obligation to uphold the rights recognized in the Covenant⁶²” and encouraged governments to “expand protection in human rights legislation to include social and economic rights and to protect poor people in all jurisdictions from discrimination because of social and economic status.”⁶³

For government lawyers to advance the position in court that *ICESCR* rights are not justiciable actually contradicts the assurances given by the government of Canada to the CESCR that violations of *ICESCR* rights can be remedied through sections 7 and 15 of the *Charter*. In 1993, the federal government, in response to Committee questions, indicated that section 7 of the *Charter* “ensured that persons were not deprived of the basic necessities of life.”⁶⁴ Canada reconfirmed this position in 1998, noting that the decisions in *Slaight Communications v. Davidson*⁶⁵ and *Irwin Toy v. A.-G. Quebec*⁶⁶ confirm that the *Charter* may be interpreted to protect covenant rights and that section 7 guarantees that people are not to be deprived of basic necessities.⁶⁷

Viewed in its proper historical context, the bifurcation of the two sets of treaty rights, and the treatment of *ICESCR* rights as lesser in the hierarchy of rights, is an artifact of the Cold War environment of the 1960s when the treaties were being drafted. William Schabas comments that this environment caused some Western states to argue that the proposal to include social and economic rights in one encompassing human rights treaty was a “communist ruse.”⁶⁸ What is more important today than the existence of two separate treaties is the fact that both covenants assert the indivisibility of civil and political and social and economic rights, as do subsequent United Nations treaties, declarations, and agreements.⁶⁹

59. *Ibid.* at para. 15.

60. *Ibid.* at para. 16.

61. *Ibid.* at para. 42.

62. *Ibid.* at para. 50.

63. *Ibid.* at para. 51.

64. CESCR, *Summary Record of the 5th Meeting: Canada*, UN Doc. E/C.12/1993/SR.5, 25 May 1993 at para. 21.

65. *Slaight*, *supra* note 4.

66. *Irwin Toy v. A.-G. Quebec*, [1989] 1 S.C.R. 927.

67. Government of Canada, *Responses to the Supplementary Questions to Canada's Third Report on the International Covenant on Economic, Social and Cultural Rights*, UN Doc. HR/CESCR/NONE/98/8/, October 1998 at 33.

68. See Schabas, *supra* note 50 at 65-6. See also Craig Scott, “The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights” (Winter 1989) 27 Osgoode Hall Law Journal 769 at 790-6.

69. Subsequently negotiated human rights instruments, such as the *Convention on the Elimination of All Forms of Racial Discrimination*, GA Res. A/RES/2106A (XX) (1969), 660 U.N.T.S. 195, the

The concept of indivisibility stands as an acknowledgment that, in lived experience, rights are interdependent. The basic recognition, which is well established in international human rights law, is that for people who are poor, civil and political rights can be meaningless. Poor people have much less access to justice and, indeed, are criminalized because of their poverty. They are less able to defend themselves against abuse and less able to participate in, or to influence, political decision-making. In practice, governments cannot effectively implement one set of rights without implementing the other.⁷⁰ Without implementing social and economic rights, governments can only realize civil and political rights for the economically privileged. This is antithetical to a foundational value of the human rights framework, namely that all persons are born free and equal in dignity and rights.⁷¹

In the *Gosselin* appeal to the Supreme Court of Canada, the attorney general of Québec, unlike the attorney general of Ontario, did not argue that social and economic rights are not justiciable. Rather, Québec contended that it had satisfied its obligation to progressively realize the right to an adequate standard of living simply by having established a welfare scheme, even though it provided below-subsistence rates for eighteen to thirty year olds. Therefore, Québec argued that, even if it is accepted that the *ICESCR* rights inform section 7, Louise Gosselin's claim must fail.⁷² This argument must be seen for what it is: a thinly-disguised variation on the theme that social and economic rights are not justiciable.

Québec's argument is unpersuasive. Particularly in the Canadian context, the language of "progressive realization" in the *ICESCR* should not be interpreted as a defence for a refusal to realize rights but rather as an injunction to take positive steps to ensure their fulfilment. The *ICESCR*'s language of "progressive realization" cannot credibly be used as a defence for government refusals to realize *ICESCR* rights because Canada possesses the resources necessary to give immediate and full effect to these rights. Martha Jackman explains it in this way:

Convention on the Elimination of All Forms of Discrimination against Women, GA Res. 34/180, UN GAOR, 34th Sess., (Supp. no. 46), UN Doc. A/34/46 (1981), 1249 U.N.T.S. 13 [hereinafter *CEDAW*], and the *Convention on the Rights of the Child*, GA Res. 44/25, UN GAOR, 44th Sess., (Supp. No. 49), UN Doc. A/44/49 (1989), when setting out the rights of vulnerable groups, include both civil and political, and economic, social, and cultural rights. The *Vienna Declaration and Programme of Action*, UN Doc. A/Conf. 157/24 (Part I), cap. III, 14 H.R.L.J. 352, which was adopted in 1993, recognized the indivisibility, interdependence, and interrelatedness of all human rights (at para. 5). Schabas, *supra* note 50, also notes that both the *ICCPR* and the *ICESCR* now have more than 130 signatories (at 68). He says: "Most States, with a few exceptions, ratify both *Covenants* at the same time, attesting to the 'indivisibility' of the two instruments." See also CESCR, *General Comment 9*, *supra* note 55, and text.

70. See Organization of American States, *Annual Report of the Inter-American Commission on Human Rights 1993* (Washington, DC: General Secretariat, Organization of American States, 1994) at 521-3.

71. *Universal Declaration of Human Rights*, G.A. Res. 217 (III) UN GAOR, 3d Sess., Supp. No. 13, Doc. A/810 (1948) 71, Article 1.

72. Factum of the Attorney General for Quebec, Supreme Court of Canada in *Gosselin*, *supra* note 10, S.C.C. File no. 27418 at 222-9.

The flexibility allowed for by [the concept of progressive realization in] Article 2 was designed to accommodate those countries whose level of economic development presents a serious obstacle to the realization of the rights contained in the *Covenant* and was not, as it has sometimes been suggested, intended to derogate in any way from the binding character of its obligations, particularly for countries like Canada which enjoy a high level of economic development.⁷³

Canada is in a very different situation from a country such as South Africa, where the legacy of apartheid means that there are inadequate resources to fully realize *ICESCR* rights, such as the right to housing. Even in South Africa, however, the Constitutional Court has held that the obligation to progressively realize a right requires governments to move forward expeditiously and effectively with the planned implementation of the right as well as to provide relief for those in desperate need.⁷⁴

We could conclude our discussion of the implications of international human rights law for *Charter* interpretation at this point. However, from a women's equality perspective there is more to be said. Apart from the standard patterns of argument about the justiciability of *ICESCR* rights, as distinct from *ICCPR* rights, there are implications that flow from international human rights instruments that are specific to women's equality rights, such as the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*.⁷⁵ We believe that the indivisibility of rights must be taken seriously⁷⁶ and that the concept applies with particular force to the realities of women's lives. It is telling that the disproportionate poverty of women in Canada, and the particular and harsh impact of cuts to social programs on Canadian women as a group, have been commented on recently not only by the CESCR⁷⁷ but also by the Committee on the Elimination of Discrimination against Women⁷⁸ and the Human Rights Committee.⁷⁹ The poverty of women and the denial of adequate social supports to women have been treated as social and economic rights, women's rights, and civil and political rights issues. When it comes to women's equality, taking indivisibility

73. Martha Jackman, "The Protection of Welfare Rights under the Charter" (1988) 20 *Ottawa Law Review* 257 at 257 and 286-7. This is consistent with the position taken by Rights and Democracy in its intervention in *Gosselin*, *supra* note 10, in the Supreme Court of Canada. Rights and Democracy argued that while the concept of progressive realization "might excuse a poor country from realizing the obligations immediately, [i]t does not excuse a country like Canada, one of the wealthiest in the world." Factum of the Intervenor, Rights and Democracy, Supreme Court of Canada in *Gosselin*, *supra* note 10, S.C.C. File no. 27418, at para. 55, see also paras. 54-68.

74. *South Africa v. Grootboom*, [2000] S.A.J. No. 57, at paras. 26-46.

75. *CEDAW*, *supra* note 69.

76. See Shelagh Day, "The Indivisibility of Women's Human Rights" 15(3) *Canadian Woman Studies* 11. See, generally, Scott, *supra* note 68.

77. 1998 *Concluding Observations*, *supra* note 57 at paras 23, 28, and 54.

78. Committee on the Elimination of Discrimination against Women, *Concluding Observations: Canada*, UN Doc. A/52/38/Rev.1, 12 August 1997, at para. 331.

79. Human Rights Committee, *Concluding Observations: Canada*, UN Doc. CCPR/C/79/Add.105, 7 April 1999, at para. 20.

seriously means giving an intertwined reading, rather than an artificially compartmentalized reading, to the whole range of Canada's human rights treaty obligations⁸⁰—reading not just the *ICCPR* and the *ICESCR* as integrally connected rights documents but also reading them with the *CEDAW* and the *Beijing Platform for Action* which is a contemporary interpretive aid to the *CEDAW*.⁸¹

The *CEDAW* does not make a distinction between women's material conditions of inequality and other forms of inequality. Rather, the *CEDAW* exemplifies indivisibility, obliging governments in Canada to "take all appropriate measures in all fields, including the political, economic, social and cultural fields to ensure the full development and advancement of women."⁸² Similarly, the *Platform for Action*, which was agreed to in 1995, acknowledges that many concrete and diverse strategies are needed to address women's inequality. The *Platform for Action* includes an agreement by governments to pursue and implement policies designed to eradicate women's poverty and provide adequate social safety nets as an integral part of social policy.⁸³

Furthermore, there has never been any question that equality rights are intended to be fully justiciable. The *CEDAW* contains an express provision committing signatories to establish mechanisms for the enforcement of *CEDAW* rights.⁸⁴ It is also a settled principle of international human rights law that equality rights create obligations of immediacy, as distinct from social and economic rights, which may be progressively realized in poorer countries where resources are not available to realize them immediately. As an interpretive aid to section 15 equality rights, the *CEDAW* reinforces a view of section 15 as requiring all levels of government in Canada to take positive steps to ameliorate women's poverty. The integrated content of the *CEDAW* makes the continuing marginalization of social and economic security interests seem all the more inappropriate. It is surely contradictory to argue that social and economic rights claims are non-justiciable, when similar kinds of rights that logically flow out of the *CEDAW* are clearly intended to be justiciable.

An intertwined reading of the panoply of Canada's international human rights treaty obligations, including the *CEDAW*, as informed by the *Platform for Action*, points to the conclusions that: (1) *ICESCR* rights should be considered to be a part

80. See also Day and Brodsky, *supra* note 38 at 116.

81. *Beijing Declaration and Platform for Action*, Fourth World Conference on Women, UN Doc. A/CONF. 177/20 (17 October 1995) [hereinafter *Platform of Action*]. It is important to note that the *Platform of Action* is not just important as a new statement of international policy on women's human rights. It also should be regarded as an interpretive aid to the *CEDAW*'s current meaning. The *Platform for Action* provides a recent articulation, by governments, of some appropriate means to achieve the elimination of discrimination against women, in twelve critical areas of concern which are based on the rights set out in the *Convention*. The *CEDAW* committee is assigned monitoring authority in para. 322 of the *Platform for Action*, which states that the committee "should, within its mandate, take into account the *Platform for Action* when considering the reports submitted by States parties."

82. *CEDAW*, *supra* note 69 at art. 3.

83. See, for example, *Platform for Action*, *supra* note 81 at para. 58(c) and (g).

84. *CEDAW*, *supra* note 69 at art. 2(d).

of the content of justiciable constitutional rights and (2) that constitutional sex equality rights should be understood to have social and economic content that obligates governments to address women's poverty.

Classical Constitutionalism and Substantive Equality

The notion that a rights regime could be considered complete without any public social and economic entitlements rests on a conception of rights that we refer to as classical constitutionalism.⁸⁵ Tracing the source of classical constitutionalism takes one back to the basic principles of classical legal thought, which were central to American jurisprudence during the nineteenth century.⁸⁶ Classical constitutionalism embraced a conception of the individual as autonomous and freely choosing and, of society, as a threat to freedom. The idea was that there should be a large sphere of "privacy" in which individuality could flourish and a limited sphere for "public" regulation. In economic matters, *laissez-faire* policies were thought to have a natural ability to maximize individual freedom and to reward each person fairly according to his contribution. 'Unnatural,' 'public,' redistributive legislation was seen as an interference with the market and a threat to individual liberty. A role for the courts as a protector of liberty against the tyranny of government was seen as desirable—this was the function of constitutional rights.

Classical constitutionalism endorsed a formalistic, individualistic conception of equality, known as formal equality, which consisted of the right of like individuals to be treated alike according to facially neutral laws. A corollary was that a facially neutral law could not constitute a violation of the right to equality. Formal equality was understood to be a negative injunction against different treatment of similarly situated individuals, rather than a positive injunction to do anything. The politics of classical constitutionalism were rooted in nineteenth-century liberal ideology⁸⁷ and in a view that presumed that the preservation of freedom requires the existence of decentralized political and economic institutions. Morton Horwitz sums up this world view nicely: "A self-regulating, market economy presided over by a neutral, impartial, and decentralized 'night-watchman' state embodied the ... vision of why America had uniquely been able

85. See Gwen Brodsky, *The Transformation of Canadian Equality Rights Law* (D. Jur. thesis, York University, 1999) at 6-22, for a critique of classical constitutionalism.

86. For an excellent discussion of the modernizing of the American judiciary's understanding of law and adjudication, see Morton J. Horwitz, *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992).

87. On liberal ideology and constitutional interpretation, see Joel Bakan, "Constitutional Interpretation and Social Change: You Can't Always Get What You Want (Nor What You Need)" (1991) 70 *Canadian Bar Review* 307; Colleen N. Sheppard, "Equality in Context: Judicial Approaches in Canada and the United States" (1990) 39 *University of New Brunswick Law Journal* 111. See also Scott and Macklem, *supra* note 56.

to avoid falling victim to tyranny.”⁸⁸ Attachment to these values led the Supreme Court of the United States to strike down hours of work legislation in the notorious *Lochner v. New York*⁸⁹ decision of 1905.⁹⁰ Reactions against *Lochner* gave impetus to American legal realist critiques, which substantially undermined the influence of classical constitutionalism in the United States.⁹¹ A substantial body of Canadian scholarship also addresses the inadequacies of interpretive approaches to constitutional rights that are narrowly fixated on libertarian concerns and hostile to the entrenchment of social and economic entitlements.⁹²

It is understandable that a decision-maker operating within a classical constitutional framework would see issues of social and economic inequality as largely falling outside the rights framework. However, notwithstanding some ongoing scholarly and populist efforts to revive classical constitutionalism,⁹³ it

88. Horwitz, *supra* note 86 at 4. Scott and Macklem, *supra* note 56, note that conservative commentators object to social rights being justiciable precisely because these rights are redistributive in nature and interfere with the free operation of markets (at 39).

Advocates for small government tend to consider positive rights a threat to a free and democratic society and are likely to support the libertarian view that “[l]egislating equality through social-welfare programs ... undermine[s] personal liberty.” John Ibbitson, citing Robert Nozick with approval, “The Man behind the ‘Night Watchman’ Budget,” *Globe and Mail*, 28 January 2002, A13. There is a sense in which this argument is unanswerable, since it is, at bottom, a rejection of the value of equality. As Scott and Macklem, *supra* note 56 at 39, point out, treating civil and political rights as justiciable through individual or group complaints, while treating social rights as not real rights at all but rather as “generalized policy considerations” has the effect of marginalizing “the centrality of social rights, the values they seek to vindicate, and most significantly, the persons whose chance to be human and whose place in society is most dependent on these rights.”

89. *Lochner v. New York*, 198 U.S. 25 S.Ct. 539 (1905).

90. For an overview of United States constitutional law decisions, see Gerald Gunther, *Individual Rights in Constitutional Law*, 5th ed. (New York: Foundation Press, 1992).

91. Horwitz, *supra* note 86 at 33, put it this way: “*Lochner*, which struck down a maximum hours law for bakers as an unconstitutional interference with freedom of contract, galvanized progressive opinion and eventually led to a fundamental assault on the legal thought of the old order.” See also William W. Fisher III, Morton J. Horwitz, and Thomas A. Reed, eds., *American Legal Realism* (New York: Oxford University Press, 1993). This is a collection of annotated essays by American legal realists, such as Karl N. Llewellyn, Roscoe Pound, Wesley Newcomb Hohfeld, John Dewey, and Oliver Wendell Holmes.

92. Canadian scholars have provided extremely useful commentary on the issue of drawing a bright line between civil and political rights, on the one hand, and social and economic rights, on the other, and treating social and economic rights as non-justiciable rights. See Scott and Macklem, *supra* note 56; Porter, *supra* note 47; Martha Jackman, “Constitutional Contact with Disparities in the World: Poverty as a Prohibited Ground of Discrimination under the Canadian *Charter* and Human Rights Law” (1994) 2(1) *Review of Constitutional Studies* 76; Martha Jackman, “Poor Rights: Using the *Charter* to Support Social Welfare Claims” (1993) 19 *Queen’s Law Journal* 65; and Jackman, *supra* note 73.

93. See Rainer Knopff and F.L. Morton, *Charter Politics* (Scarborough, ON: Nelson Canada, 1992); F.L. Morton and Rainer Knopff, “The Supreme Court as the Vanguard of the Intelligentsia: The Charter Movement as Postmaterialist Politics,” in *Occasional Papers Series Research Study 8.1* (Calgary, AB: Research Unit for Socio-Legal Studies, Faculty of Social Sciences, University of Calgary, 1992). See also Thomas Schiller and Hugh Finnamore, “Supreme Court out of touch on unions,” *National Post*, 4 January 2002, FP11; Neil Seeman, “A Right to Welfare Is a Loss of Democracy” *Globe and Mail*, 31 October 2001, A17; Jeffrey Simpson, “Supreme Court as Battering Ram,” *Globe and Mail*, 7 October 1999, A18.

cannot serve as an adequate theory of constitutional interpretation in Canada in our time. A view of government as being exclusively an oppressor and not an important actor in providing social benefits and remedying inequalities between groups does not reflect the history of Canadian political institutions. The creation of the post-Second World War social safety net, the signing of the *ICESCR* and the *CEDAW*, the enactment of human rights legislation, and the development of regulatory bodies in a wide variety of areas, ranging from the environment to workers' compensation, are some examples that indicate a different vision of government than that originally envisaged by classical constitutionalism.

In a modern society characterized by urbanization, concentrated corporate power, and significant inequalities in social condition, freedom is often contingent on government protections and benefits. In *McKinney v. University of Guelph*, Justice Bertha Wilson put it this way:

Canadians recognize that government has traditionally had and continues to have an important role to play in the creation and preservation of a just Canadian society. The state has been looked to and has responded to demands that Canadians be guaranteed adequate health care, access to education and a minimum level of financial security to name but a few examples. It is, in my view, untenable to suggest that freedom is co-extensive with the absence of government. Experience shows the contrary, that freedom has often required the intervention and protection of government against private action.⁹⁴

For women, the highly individualistic and anti-statist thinking that informs classical constitutionalism is particularly inadequate because they need government protections and benefits as a bulwark against oppression by men and as a counter to longstanding discrimination.

Although classical constitutionalism is consistent with a formal conception of equality, it is inconsistent with the norm of substantive equality. Formal equality is often associated with the highly mechanical and discredited 'similarly situated' test, which has been understood to require women to show that they are just like men in order to establish their entitlement to equal treatment and to require remedies that treat women the same as men. In the framework of classical constitutionalism, equality's primary preoccupation is ensuring that governments and the laws they promulgate are blind to factors such as sex and race, which are understood to be personal characteristics that are irrelevant to law-making. However, this narrow fixation on superficial symmetry in law-making is not the only problematic aspect of formal equality. As used in constitutional law, formal equality is also steeped in the classical constitutional view of government as always a threat to individual flourishing, rather than a potential enhancer of it. The idea that governments might be under a positive obligation to recognize the inequality of women as a group and to take steps to reduce that inequality is alien

94. *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at 357.

to formal equality. It may be that the most important thing about formal equality is what it lacks. Formal equality lacks a normative commitment to reducing disparities between groups.

For women, the idea that equality rights represent only a restraint on government power to treat women differently from men is a central flaw of formal equality thinking. This approach does not serve to address women's substantive inequality. Nor is it intended to do so. Women's efforts to replace formal equality with a substantive understanding of equality are animated by a recognition of the inadequacies of formal equality. Whereas formal equality is concerned with treating men and women the same, the whole point of a substantive equality approach is to achieve equality of results, through whatever measures may be necessary to overcome women's acknowledged inequality. This necessarily entails recognizing that equality cannot be achieved by adopting a merely negative or 'hands-off' approach to government responsibility for addressing women's material conditions of inequality, including their disproportionate poverty.

To return to the *Gosselin* case, if a formal equality approach were taken, an acceptable remedy for the facially explicit age-based discrimination could be to place all welfare recipients on the lower rate. Notwithstanding the fact that the government had identified the higher rate as an amount necessary to meet basic needs, this remedy would satisfy the formal equality requirement of treating every individual the same, without regard to age (assuming that age is irrelevant to need). Moreover, such an approach would be consistent with the classical constitutional law precept that a constitution is a negative rights instrument that does not compel government to enact or maintain any legislative scheme, but only to ensure that there is an absence of discrimination within any existing one.

However, reducing all welfare recipients to a below subsistence rate does not satisfy the norm of substantive equality. Not only would this response amount to what has been called 'equality with a vengeance,'⁹⁵ it would also mean that destitute women would still be denied access to assistance in an amount adequate to meet basic needs, thereby perpetuating their poverty and ignoring their heightened vulnerability to sex-specific violations of their rights to autonomy and security—rights that have long been deemed worthy of constitutional protection.

Canadian Constitutionalism

The distinction between negative rights and positive rights, its relationship to competing approaches to equality, and its supposed relevance to *Charter*

95. This expression was adopted by the Supreme Court of Canada in *Schachter*, *infra* note 115 at para. 702, in reference to a decision in which welfare benefits for single mothers had been nullified in order to place single mothers and single fathers on a footing of equality. The Court agreed with the Women's Legal Education and Action Fund, which was an intervenor in the appeal, and said: "nullification of benefits to single mothers does not sit well with the overall purpose of s. 15 of the *Charter* and for s. 15 to have such a result clearly amounts to 'equality with a vengeance.'"

interpretation need to be re-examined. The *Charter* is not purely a negative rights instrument. And, increasingly, the jurisprudence of the Supreme Court of Canada recognizes this fact. Classical constitutionalism, while it still exerts a strong pull, especially in the lower courts, is significantly out of step with Supreme Court of Canada *Charter* jurisprudence. Once we recognize the extent to which it has already been accepted that positive governmental obligations flow from *Charter* rights, the resistance to such obligations in the economic rights sphere should abate.

The Supreme Court of Canada has recognized in a number of contexts that in order to make *Charter* rights meaningful, positive steps are required. For instance, in the language rights case of *R. v. Beaulac*,⁹⁶ the Court said:

Language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided. This is consistent with the notion favoured in the area of international law that the freedom to choose is meaningless in the absence of a duty of the State to take positive steps to implement language guarantees.⁹⁷

Moreover, in the labour relations context, the Court recently held that in order to make meaningful the section 2(d) *Charter* freedom to organize, governments have an obligation to extend protective legislation to unprotected groups.⁹⁸ In *Dunmore v. Ontario (Attorney General)*,⁹⁹ it held that the *Charter* imposed a positive obligation on the government to extend legislative protection against unfair labour practices to agricultural workers. While acknowledging that the content of the freedom to organize is generally characterized as negative, the Court said:

In this context it must be asked whether, in order to make the freedom to organize meaningful, s. 2 (d) of the *Charter* imposes a positive obligation on the state to extend protection to unprotected groups. More broadly, it may be asked whether the distinction between positive and negative state obligations ought to be nuanced in the context of labour relations, in the sense that excluding agricultural workers from a protective regime substantially contributes to the violation of protected freedoms.¹⁰⁰

Although, historically, equality rights were considered negative rights that only restrain government from making facially explicit distinctions between similarly situated individuals, the Supreme Court of Canada established, both implicitly and explicitly, that equality rights require a substantive interpretation. Adopting such an approach, in turn, requires government to play a positive role in creating and sustaining equality. Beginning with its decision in *Andrews v. Law Society of British*

96. *R. v. Beaulac*, [1999] 1 S.C.R. 768.

97. *Ibid.* at para. 20; cited in *Dunmore v. Ontario (Attorney General)* (2001), S.C.C. 94 [hereinafter *Dunmore*], L'Heureux-Dubé J. concurring.

98. *Dunmore*, *supra* note 97.

99. *Ibid.*

100. *Ibid.* at para. 20.

Columbia,¹⁰¹ the Court has put distance between its section 15 jurisprudence and formal equality. Chief Justice Beverley McLachlin has put it this way:

The *Andrews* decision ... pointed out the potential vacuity of formalistic concepts of equality and emphasized the need to look at the reality of how differential treatment impacts on the lives of members of stigmatized groups. The purpose of the *Charter* guarantee of equality, the Court affirmed, was not to guarantee some abstract notion of similar treatment for the similarly situated ... [but] rather to better the situation of members of groups which had traditionally been subordinated and disadvantaged.¹⁰²

Despite the shift in thinking about equality rights that is evident in this *Charter* jurisprudence, the distinction made in the lower courts in cases such as *Gosselin* between fully justiciable rights, on the one hand, and social and economic policy objectives, on the other, is reminiscent of the distinction drawn between benefits and penalties in *Bliss v. Canada*,¹⁰³ which was decided in the pre-*Charter* era. At that time, the Supreme Court was interpreting the *Canadian Bill of Rights*,¹⁰⁴ and it took the view that equality analysis should be applied differently to a penalizing provision, such as a criminal prohibition, which treats one segment of the population more harshly than others, than to legislation providing “additional benefits” to a group of women.¹⁰⁵

The distinction made by the Court in *Bliss* was in keeping with the classical constitutional framework. The justices were more attuned to the rights-violating potential of a penalizing provision than they were to the rights-violating potential of a government failure to treat women equally with respect to unemployment insurance—a scheme that they assumed government was not obliged to provide in the first place. This same mindset about what does and does not constitute a threat to human freedom informs the lower court decisions in *Gosselin*. A regulation cutting the welfare rate of a particular group to a below-subsistence level is not perceived to represent the same kind of threat to rights, or to engage judicial responsibility in the same way as a criminal provision from which incarceration

101. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 [hereinafter *Andrews*].

102. See Beverley McLachlin, “The Evolution of Equality” (address to the Canadian Bar Association, Constitutional Law Section, 24 November 1995) [unpublished]. In *Andrews*, *supra* note 101, the Supreme Court of Canada identified the purpose of section 15 as being “not only to prevent the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society” (at para. 65).

103. *Bliss v. Canada (Attorney General)*, [1979] 1 S.C.R. 183 [hereinafter *Bliss*], affirming (1977) 77 D.L.R. (3d) 609 [hereinafter *Bliss*].

104. *Canadian Bill of Rights*, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III.

105. *Bliss*, *supra* note 103 at 191. According to the Court, [t]here is a wide difference between legislation which treats one section of the population more harshly than all others by reason of race as in the case of *Regina v. Drybones*, [[1970] S.C.R. 282] and legislation providing additional benefits to one class of women, specifying conditions which entitle a claimant to such benefits and defining a period during which no benefits are available.

could result. This is the same problematic mindset that underlies the assumption that rights are negative restraints and not prods to action.

At issue in *Bliss* was a provision of the unemployment insurance regime that barred a pregnant woman from claiming regular benefits in the fifteen weeks immediately surrounding the birth of her child.¹⁰⁶ Stella Bliss was pregnant and therefore could not claim regular benefits, although she was otherwise eligible for them. She also could not claim pregnancy benefits because she had not been employed for “ten weeks ... in the twenty weeks immediately preceding the thirtieth week before her expected date of confinement.”¹⁰⁷ Since she could not meet this “magic ten” rule, Bliss could not get benefits at all. She was refused pregnancy benefits because she did not qualify and refused regular benefits because she was pregnant.

Looking back on *Bliss*, it can be seen to provide an early blue print for government arguments to defend against challenges to under-inclusive government benefit schemes. There are a number of elements that have been used repeatedly to defeat equality rights challenges, particularly in the social benefits context. As we have indicated, one manoeuvre consists of drawing a categorical distinction between benefits and penalties, such that the discriminatory imposition of penalties is seen to raise true rights concerns, but a discriminatory failure to provide benefits is seen to fall outside the realm of rights. Another manoeuvre is to shift blame away from the legislative scheme and towards nature, as the Supreme Court did in *Bliss* by ruling that any disadvantage experienced by pregnant women was attributable to nature. A third manoeuvre is to sever the link between the harmful effects complained of and the legal ground of discrimination claimed, thereby disaggregating the affected group. Thus, in *Bliss*, the Court found that discrimination based on pregnancy was not discrimination based on sex because not all women were affected, and because all non-pregnant persons, male and female, were treated the same. This reasoning overlooked the fact that only women were affected by the pregnancy restriction.

In the 1980s, the *Bliss* decision became notorious, a symbol of what had gone wrong in Canadian equality rights law in the 1970s and of what was wrong with formal equality in general.¹⁰⁸ The idea that discrimination based on pregnancy was not discrimination based on sex was absurd. *Bliss* revealed the capacity of formal equality reasoning to render women’s inequality problems invisible. Fortunately, ten years later, the reasoning of *Bliss* was repudiated in *Brooks v. Canada Safeway Ltd.*,¹⁰⁹ a human rights case handed down at the same time as *Andrews v. Law Society of British Columbia*. Susan Brooks challenged a Canada Safeway disability plan that barred pregnant women from receiving benefits for a seventeen-week period. The Supreme Court of Canada’s reasoning in *Brooks* reveals a very different understanding of equality.

106. *Unemployment Insurance Act*, 1971, S.C. 1970-71-72, c. 48, s. 46.

107. *Ibid.* at c. 48, s. 30(1).

108. The critique that we have provided of *Bliss* is drawn from Brodsky, *supra* note 85 at 111-18.

109. *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, 10 C.H.R.R. (1989) D/6183 [hereinafter *Brooks*].

In *Brooks*, the Court recognized that women are a group that has been disadvantaged and penalized because they are the society's child-bearers. "That those who bear children and benefit society as a whole thereby should not be economically or socially penalized seems to bespeak the obvious," wrote Chief Justice Robert Dickson for a unanimous Court. He continued:

It is only women who bear children; no man can become pregnant ... [I]t is unfair to impose all of the costs of pregnancy on one-half of the population. It is difficult to conceive that distinctions or discriminations based on pregnancy could ever be regarded as other than discrimination based upon sex ... It is difficult to accept that the inequality to which Stella Bliss was subject was created by nature and therefore there was no discrimination; the better view ... is that the inequality was created by legislation.¹¹⁰

At virtually the same time, the Court recognized in *Andrews* that the language of section 15 was intended to overcome the shortcomings of *Bill of Rights* jurisprudence, and of *Bliss* in particular.¹¹¹ Directly relevant to the question of section 15's application to social benefit schemes was the decision to add the rights to "equality under the law" and "equal benefit of the law" to the old *Canadian Bill of Rights* guarantees of equal "protection of the law" and "equality before the law", thus giving section 15 a much richer and more modern text.¹¹² Also relevant is section 28, which was added to increase protection for women's rights, as is the tightening of the language of section 1 to allow rights to be limited only where limits are shown to be "demonstrably justified in a free and democratic society."¹¹³ These amendments were a direct response to the concerns of women that the language of the *Charter* should signal a departure from the discredited jurisprudence that had grown up under the equality provision of the *Canadian Bill of Rights*. In particular, changes to section 15 were animated by an intention to depart from the approach in *Bliss*. In its subsequent section 15 jurisprudence, the Court has repeatedly confirmed its agreement with the overall approach of *Andrews*.¹¹⁴

In discerning whether the Court's commitments to substantive equality entail a departure from the treatment of equality rights as negative restraints, the decision in

110. *Ibid.* at 1243-4.

111. *Andrews*, *supra* note 101 at 171-2: "It is readily apparent that the language of s. 15 was deliberately chosen in order to remedy some of the perceived defects under the *Canadian Bill of Rights*. The antecedent statute is part of the "linguistic, philosophic and historical context" of s. 15 of the *Charter*."

112. See Gwen Brodsky and Shelagh Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989) at 15-17, for a discussion of women's concerns about the language of the *Charter* at the time of its drafting.

113. *Ibid.*

114. See *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, in which the Court affirmed its ongoing commitment to the approach in *Andrews*, *supra* note 101.

*Schachter v. Canada*¹¹⁵ is of particular note. In the course of justifying its order that an under-inclusive benefit scheme be extended to a wrongfully excluded group, the Court explicitly characterized the equality guarantee as neither positive nor negative but rather a hybrid.¹¹⁶ The Court acknowledged that in some contexts it will be proper to characterize section 15 as providing positive rights, and it recognized that the right to the equal benefit of the law is a positive right.¹¹⁷

Similarly, in *Eldridge v. British Columbia (Attorney General)*,¹¹⁸ the Court rejected an argument that section 15 does not require governments to take positive steps to make government services available to everyone in a way that provides substantively equal outcomes. More particularly, the Court rejected the reasoning of the Court of Appeal,¹¹⁹ denying government responsibility for providing interpreter services to enable deaf people to access medical services because government cannot be said to be discriminating when it provides the same medical services to the hearing and deaf populations. The Court of Appeal reasoned that the government could not be held responsible for inequality caused by deafness rather than by legislation. However, the Supreme Court of Canada viewed the situation differently. The Court stated: "[T]his position bespeaks a thin and impoverished vision of s. 15."¹²⁰ The Court recognized that section 15 may be implicated not only when harmful effects are caused exclusively by legislation but also when legislation reinforces the exclusion of a disadvantaged group from enjoying a benefit.¹²¹ The Court directed the government to rectify the situation by ensuring that, in future, interpreter services would be provided where they are necessary for effective communication in the delivery of medical services.

In *Vriend v. Alberta*,¹²² the question of whether section 15 can be triggered by legislative omission was revisited by the Court because the attorney general of Alberta argued that the *Individual's Rights Protection Act*¹²³ merely omitted any reference to sexual orientation and, therefore, could not be understood to create a distinction that implicated section 15.¹²⁴ *Vriend* challenged the refusal of the Alberta government to add the ground 'sexual orientation' to its human rights legislation. Alberta argued that since the *Act* treated homosexuals and heterosexuals identically there was no distinction and, hence, no discrimination. The argument that legislative inaction cannot be challenged under the *Charter* was successful before Justices Willis E. O'Leary and John W. McClung in the Alberta Court of Appeal and is consistent with a negative rights approach, but, as the

115. *Schachter v. Canada*, [1992] 2 S.C.R. 679 [hereinafter *Schachter*].

116. *Ibid.* at 722. Chief Justice Antonio Lamer, of the Supreme Court of Canada, said: "[T]he equality right is a hybrid of sorts since it is neither purely positive nor purely negative. In some contexts it will be proper to characterize s. 15 as providing positive rights."

117. *Ibid.*

118. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 [hereinafter *Eldridge*, S.C.C.].

119. *Eldridge v. British Columbia (Attorney General)* (1995), 7 B.C.L.R. (3d) 156 (C.A.).

120. *Eldridge*, S.C.C., *supra* note 118 at para. 73.

121. *Ibid.* at para. 75.

122. *Vriend v. Alberta*, [1998] 1 S.C.R. 493 [hereinafter *Vriend*].

123. *Individual's Rights Protection Act*, R.S.A. 1980, c. 1-2.

124. *Vriend*, *supra* note 122 at para. 75.

Supreme Court of Canada noted, it is not consistent with the requirements of substantive equality. The Court described the position that government inaction is incapable of triggering *Charter* concerns, as based on the thin and impoverished notion of equality criticized in *Eldridge*.¹²⁵

Thus, *Vriend* represents an even further departure than *Eldridge* from the limiting idea that a constitution is merely a negative rights instrument that does not require governments to act. Although, on its facts, *Vriend* can be viewed as a case of under-inclusiveness, its implication is that a government refusal or failure to act is challengeable under the *Charter*. Particularly telling is the Court's acknowledgement that the substantive inequality in this case flows from a comparison between those who experience sexual orientation discrimination and, therefore, require protection against it (gays and lesbians) and those who primarily do not (heterosexuals).¹²⁶ The significance of this acknowledgment is that it entails a comparison between groups outside of the four corners of the legislation. The fact is that, on its face, the Individual's Rights Protection Act accorded gay men and lesbians and heterosexuals a measure of formal equality, which the Court also noted. However, the crucial point is that the Court recognized that the absence of protection against discrimination based on sexual orientation—while facially neutral—has a significant detrimental impact on gay men and lesbians.

Similarly, the absence of legislative measures establishing adequate social assistance is neutral on its face. However, as in *Vriend*, the effects are not neutral. The substantive inequality caused by a lack of adequate social assistance flows from a comparison between those who experience poverty, and therefore require protection from it, and those who do not. Once it is accepted, as it has been in *Eldridge* and in *Vriend*, that section 15 is a substantive equality guarantee, which, by definition, must protect against legislative inaction as well as actions that have an adverse effect on a disadvantaged group, it becomes much more difficult to assert that challenges to government cuts to welfare schemes and failures to provide adequate social assistance, which have the effect of reinforcing women's inequality, are not justiciable section 15 *Charter* claims.¹²⁷ In addition, both *Eldridge* and *Vriend*, following on *Brooks*,¹²⁸ give short shrift to *Bliss*-like arguments that seek to justify discrimination by pointing to differences that are allegedly caused by nature or bad social attitudes for which government should not be held responsible.

The fact that American judges at the turn of the nineteenth century were rarely involved in the adjudication of constitutional claims involving social programs, since few programs existed, indicates that understandings of constitutional rights derived from that era may offer little assistance to the task of

125. *Ibid.* at para. 76.

126. *Ibid.* at paras. 79-84.

127. Although, on its facts, *Vriend* is a case of under-inclusiveness, the Court left open the possibility that section 15 might be triggered where government has failed to act at all. *Vriend*, *supra* note 122 at paras. 61-4.

128. *Brooks*, *supra* note 109.

interpreting a modern, and uniquely Canadian, *Charter*. In the past, some people have viewed it as inevitable that *Charter* interpretation in Canada will follow the formula of classical constitutionalism.¹²⁹ We see things differently. We see that there is a crucial interpretive choice to be made, one that the Supreme Court of Canada has already begun to make in its own, distinctive way.

The jurisprudence confirms the proposition that the *Charter* is not a purely negative rights instrument. Increasingly, it is apparent that the invocation of rigid categorical approaches that claim that constitutional rights are civil and political rights, and also purely negative, are not persuasive. The point of *Andrews* and subsequent section 15 cases, including *R. v. Turpin*¹³⁰ and *Law v. Canada (Minister of Employment and Immigration)*,¹³¹ is to focus the section 15 inquiry on the question of whether the challenged legislative choice reinforces pre-existing group disadvantage, stereotyping, prejudice, or vulnerability¹³² or whether it causes severe deprivations of constitutionally significant interests.¹³³ Cuts to welfare schemes that have the effect of denying women access to the means to meet needs for food, clothing, and shelter meet both of these criteria.

Applying a Feminist Substantive Equality Analysis to Welfare Cuts

What are the implications of what we have said for *Charter* interpretation? How should a conception of substantive equality that encompasses women's rights to poverty-alleviating measures be given effect as a *Charter* right? Is this a section 7 right or a section 15 right? Should women be understood to have a section 15 *Charter* right to adequate social assistance and an adequate standard of living? One way of approaching the question of where the right to poverty-alleviating measures resides is to say that the sex equality guarantees in sections

129. See Bakan, *supra* note 87; Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997); Michael Mandel, "Rights, Freedoms and Market Power," in Daniel Drache et al., *The New Era of Global Competition: State Policy and Market Power* (Montreal: McGill-Queens University Press, 1991) 127; Andrew Petter, "The Politics of the Charter" (1986) 8 *Supreme Court Law Review* 473; Judy Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles" (1987) 25 *Osgoode Hall Law Journal* 485; Judy Fudge and Harry Glasbeek, "The Politics of Rights: A Politics with Little Class" (1992) 1 *Social and Legal Studies* 45.

130. *R. v. Turpin* [1989] 1 S.C.R. 1296.

131. *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 [hereinafter *Law*]. See also *Corbiere v. Canada*, [1999] 2 S.C.R. 203; *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703; *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, applying the criteria in the *Law* case.

132. *Ibid.* at paras. 63-8.

133. *Ibid.* at paras. 74-87. In *Law*, *supra* note 131, the Court says: "The discriminatory calibre of differential treatment cannot be fully appreciated without evaluating only the economic but also the constitutional and societal significance attributed to the interest or interests adversely affected by the legislation in question" (at para. 74). This statement was originally made by L'Heureux-Dubé J. in *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 64.

15 and 28 support an interpretation of the section 7 rights to life, liberty, and security of the person that encompasses rights to subsistence.

The decision of the Supreme Court of Canada in *New Brunswick (Min. of Health) v. G. (J.)*¹³⁴ illustrates the effective use of section 15 as an interpretive filter for section 7. In an unanimous decision, the Court found that failure to provide a parent with legal aid in a child apprehension proceeding may, and on the facts did, constitute a violation of the section 7 right to security of the person. While the majority's reasons do not refer to section 15, in a concurring minority opinion, three of the judges, Justices Claire L'Heureux-Dubé, Charles Doherty Gonthier, and Beverley McLachlin, identified sections 15 and 28 as a significant influence on interpreting the scope offered by section 7. In their view, in addition to section 7 issues, the case raised issues of gender equality because women, especially single mothers, are disproportionately and particularly affected by child-protection proceedings. They considered it important that the analysis of the section 7 issues take into account the principles and purposes of the equality guarantee in promoting the equal benefit of the law and ensuring that the law responds to the needs of those disadvantaged individuals and groups whose protection is at the heart of section 15 of the *Charter*. By interpreting section 7 through the lens of sections 15 and 28, the minority concluded that the failure to provide legal aid in this case violated the section 7 right to security of the person and triggered the section 7 right to liberty.

The minority opinion in *G. (J.)* illustrates, by analogy, how interpreting section 7 through the lens of sections 15 and 28 substantiates the claim that section 7 rights to life, liberty, and security of the person encompass rights to subsistence. However, in our view, women's right to poverty-alleviating measures can also be regarded as a free-standing section 15 sex equality claim. This view rests on the proposition that women have a right to share in all of the country's resources—a fair share of which must be allocated to ensuring the adequacy of basic social programs because women's equality depends on them. It also rests on the recognition that the deprivations of sexual and reproductive autonomy, and of psychological and physical security, which result when women do not have access to the necessities of life, are not only section 7 issues. Autonomy and security are central elements of women's equality and, therefore, must be understood as central to what section 15 is about.

We do not argue that *only* women should have access to adequate social assistance when in need. Deprivations associated with lack of access to the means necessary to meet basic needs should be understood to engage rights to security of the person, no matter who the affected individual is. However, the particular and disproportionate effects on women of being in a condition of extreme economic vulnerability require recognition that government denials of adequate social assistance constitute a violation of women's right to equality. The gendered dimensions of poverty are rarely acknowledged in Canada today. Poverty is seen as an indication of individual weakness, as individual tragedy, as an abstract social

134. *New Brunswick (Min. of Health) v. G. (J.)*, [1999] 3 S.C.R. 46, at 99-101.

ill, or, currently, as a problem of children but not of their mothers, grandmothers, and aunts.¹³⁵ Nonetheless, the fact is that women in Canada face a significantly higher risk of poverty than men and experience greater depths of poverty.

Women's poverty and overall economic inequality is a manifestation of their social, political, legal, and historical disadvantage in Canadian society. This disadvantage has been socially created, and governments have been major players, making legislative, policy, and budgetary decisions that have had the effect of maintaining women's secondary status and their unequal economic conditions. For centuries, women have been treated in law and custom as non-persons, unfit to vote, hold office, own or inherit property, testify in court, sit on a jury, decide to marry or divorce, have care and control of their own children, enter many professions and occupations, or enjoy personal or sexual autonomy.¹³⁶ Governments of every political stripe have put into place laws and policies that privilege men and subordinate women. Even when overtly discriminatory laws are repealed and gender neutral laws are put in their place, the subordination of women does not suddenly end. The economic inequality of women, of which poverty is an extreme example, is among the effects of this subordination.¹³⁷ And this discrimination is compounded, and its effects deepened, by racism, the continuing effects of colonialism, and discrimination based on disability and other factors.

Poverty is both an overt sign, and a result, of women's subordination. Many women are only a relationship breakdown or a pay cheque away from having to rely on social assistance to meet basic needs for food, clothing, and shelter for themselves and their children. Even though not all women are poor, and not all poor people are women, poverty is a condition closely associated with being female. Economic inequality and disproportionate vulnerability to poverty are characteristics of women as a group, just as being vulnerable to becoming pregnant or being vulnerable to sexual harassment are characteristics of women as a group. It does not take a great leap of logic to move from recognizing that pregnancy discrimination and sexual harassment are forms of sex discrimination, as the Supreme Court of

135. To the extent that poverty is a matter of concern at all, the concern in current Canadian political debate is "child poverty." The public discourse, which treats children as though they are free-floating beings, rather than acknowledging that children are poor because their parents are poor, appears to be a part of the effort to cast off state responsibility for adult poverty. Poor children may be owed a public responsibility because they are "innocent," "blameless," while poor adults are blameworthy; they are responsible for their poverty.

136. See, for example, T. Brett Dawson, ed., *Relating to Law: A Chronology of Women and Law in Canada*, 2nd ed. (North York, Ontario: Captus Press, 1994).

137. Similarly, the poverty and economic inequality of Aboriginal people, people of colour, and people with disabilities is a manifestation of systemic discrimination against these groups. The argument that being poor is an individual choice or an individual failure of initiative is contradicted by the strong and persistent patterns of who is poor. The poverty of women, Aboriginal people, people of colour, and people with disabilities is structural in nature.

Canada did in *Brooks*¹³⁸ and *Janzen and Govereau v. Platy Enterprises Ltd.*,¹³⁹ to acknowledging that women's poverty is a sex equality issue.¹⁴⁰

When governments cut social assistance programs that effectively deny women access to even a subsistence income, they not only exacerbate the pre-existing and disproportionate poverty of women, they also expose women to particular and extremely serious kinds of harms that reinforce their subordination. Such decisions must be understood to implicate section 15 of the *Charter*, precisely because they reinforce the inequality of an already disadvantaged group. The evidence in *Gosselin* reveals the seriousness of the harms caused by such cuts. The record shows that both the women and the men in the age eighteen to thirty group, whose welfare rate was reduced to \$170 per month, could not meet their basic needs for food, clothing, and shelter. They experienced extreme psychological and physical stress and had to resort to degrading and criminalized survival strategies such as begging and petty theft. They were often malnourished.¹⁴¹ Some attempted suicide; some committed suicide.¹⁴² The reduced rate also detracted from their chances of actually finding a job or participating in employability programs.¹⁴³

However, as highlighted by the factum filed by the National Association of Women and the Law in the Supreme Court of Canada, the reduced rate put women at risk in specific, gendered ways. As a survival strategy, some young women on the reduced rate bore children in order to become eligible for benefits at a higher rate.¹⁴⁴ The young women who were pregnant while on the reduced rate were particularly likely to have low birth weight babies, and these babies have a higher incidence of health and learning problems. According to the Montreal

138. *Brooks*, *supra* note 109.

139. *Janzen and Govereau v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, reversing (1986), 33 D.L.R. (4th) 32 (Man. C.A.).

140. As Margot Young and her co-authors, Joel Bakan, Bruce Ryder, and David Schneiderman explain in "Developments in Constitutional Law: The 1993–1994 Term" (1995) 6 *Supreme Court Law Review* (2d) 67 at 112–13:

[W]hat adverse effect discrimination recognizes is that certain social characteristics are, when looked at in context, so closely associated with other characteristics that treatment with respect to one set of characteristics has to be understood as treatment in terms of the other. It acknowledges that group characteristics have a variety of social and economic consequences. For example, clustered with gender is a wide range of associated behaviours and circumstances, such as child care responsibilities and vulnerability to harassment. And revealing new linkages and thus problematizing seemingly neutral distinctions is what equality theory at its best does.

141. Factum of the Intervenor, NAWL, Supreme Court of Canada in *Gosselin*, *supra* note 10, S.C.C. File no. 27418, at para. 3 [hereinafter Factum of the NAWL], citing from the *Gosselin* record testimony of psychologist D. Gratton, vol. 2 at 320–1; P-7, vol. 6 at 1039; P-9, vol. 8 at 1409; P-9.2, vol. 8 at 1440, 1143; P-10, vol. 9 at 1559; testimony of L. Gosselin, vol. 1, at 103; P-6, vol. 5 at 879.

142. *Ibid.*

143. *Ibid.* at para. 4, citing from the *Gosselin* record at P-6, vol. 5 at 878; testimony of psychologist D. Gratton, vol. 2 at 321–3, 334; P-7, vol. 6 at 1040–1, 1049. See also P-9, vol. 8 at 1410, 1413; P-9.1, vol. 8 at 1421–2; P-9.2, vol. 8 at 1441.

144. *Ibid.* at para. 5, citing from the *Gosselin* record testimony of community worker A. Sandborn, vol. 2 at 227; P-9, vol. 8 at 1412; P-9.2, vol. 8 at 1442.

Dietary Dispensary, some of these young women had a nutritional status comparable to those of pregnant women in Holland during the great famines at the end of Second World War.¹⁴⁵ Some of the young women engaged in prostitution. Some accepted unwanted sexual advances to try to keep their apartments, to pay monthly expenses, such as heat and electricity, or to buy food.¹⁴⁶

Louise Gosselin's circumstances fit the pattern. She engaged in prostitution in order to obtain money to buy clothes so that she could look for work.¹⁴⁷ The trial judge found that when she could not afford housing, she agreed to be "the companion of an individual for whom she had no affection, but who, in exchange for her sexual availability, offered her shelter and food."¹⁴⁸ She also survived an attempted rape.¹⁴⁹ Access to safe housing was a particular problem. When Louise Gosselin rented a room in a boarding house, she was sexually harassed.¹⁵⁰ At times, she was homeless and slept in shelters.¹⁵¹ It is a fact that, for women, homelessness and life in boarding houses and shelters increases the risk of sexual assault and sexual harassment.¹⁵² Louise Gosselin testified that when she turned

145. *Ibid.* at para. 6, citing from the Gosselin record P-9, vol. 8 at 1411-13; P-9.2, vol. 8 at 1441-2; testimony of community worker A. Sandborn, vol. 2, at 231; testimony of Dr. C. Colin, vol. 3 at 449, 451; P-10, vol. 9 at 1552; P-9.5, vol. 8 at 1505-8. In addition, the Gosselin record includes at P-9.2 comments presented to Minister Pauline Marois in 1985 by the professional orders of dietitians, social workers, psychologists, nurses and criminologists. Included in the comments were these observations:

The Great Famines that came about during the 1939-1945 War demonstrate the effects of malnutrition on the mother, especially during the prenatal period. Let us just recall that during the German Occupation of Holland in the year 1944-1945, the daily ration was 1,145 calories and 34 grams of protein. From the start, these low amounts caused various perinatal problems including insufficient birth weight.

According to the nutritional accounts of the Montreal Dietary Dispensary, because of the impossibility for the mother-to-be to satisfy her nutritional needs when she has to wait at least 10 weeks after conception before she can benefit from an increase in her social assistance benefit, currently, several young pregnant women find themselves in a situation comparable to that experienced in Holland in 1944-45. The result is that this young mother is confronted by multiple health problems that contribute to increasing the rate of infant mortality and morbidity in Quebec.

Another equally troubling aspect of the situation is the temptation, for the young woman on social assistance to turn to the false solution of procreation in order to increase her social assistance benefit in order to meet, in the short-term, her vital needs. This solution is even more serious because it engenders problems that have repercussions on a socio-sanitary level as well as in terms of children's education (at 1142) (translation by the NAWL co-counsel, Rachel Cox).

146. *Ibid.* at para. 7, citing from the Gosselin record testimony of community worker A. Sandborn, vol. 2 at 202, 210, 221-3; P-6, vol. 5 at 875, 876, 879; P-9, vol. 8 at 1406, 1409; P-9.2, vol. 8 at 1443.

147. *Ibid.* at para. 8, citing from the Gosselin record testimony of Louise Gosselin, vol. 1 at 106.

148. *Ibid.* at para. 8, citing from the Gosselin record, vol. 18 at 3391 (translation by NAWL co-counsel, Rachel Cox).

149. *Ibid.* at para. 9, citing from the Gosselin record testimony of Louise Gosselin, vol. 1 at 128; P-6, vol. 5 at 876.

150. *Ibid.*, citing testimony of psychologist D. Gratton, vol. 2 at 332; P-7, vol. 6 at 1047.

151. *Ibid.* at para. 10, citing from the Gosselin record, vol. 1 at 126-7.

152. *Ibid.* at para. 43, citing from the Gosselin record. E. Bouchard, B. White, and S. Fontaine, eds., *Les femmes itinérantes: une réalité méconnue* (Québec: Conseil du statut de la femme, 1988); S. Lenon, "Living on the Edge: Women, Poverty and Homelessness in Canada" (2000) 20(3)

thirty and qualified for the regular rate of welfare, she felt as though she had won a victory simply by managing to stay alive.¹⁵³

In preparation for its intervention in *Gosselin*, the National Association of Women and the Law held consultations in Vancouver, Montreal, and Halifax to gather information from women living on welfare about their experiences. The comments of women participants confirmed that the experience of the women affected by the benefit cut that was challenged in *Gosselin* is typical of the experiences of poor women. The comments confirmed that poverty intensifies the commodification of women's sexuality. Young, poor women resort to prostitution or to exchanging sexual favours for shelter and food.¹⁵⁴ Poor, single, childless women "are social and sexual targets. They are constantly subjected to rude remarks, preyed upon because men know these women are desperate."¹⁵⁵ The women reported that inadequate welfare rates make it hard to refuse unwanted sexual advances or to leave relationships.¹⁵⁶ Since inadequate rates result in some women having to commit welfare fraud to survive, women become vulnerable to blackmail from intimate partners whom they want to leave, but who are in a position to inform on them to welfare authorities.¹⁵⁷ Inadequate rates also result in women staying in violent relationships or returning to them. Women who have sought refuge in women's shelters and transition houses often feel forced to return to abusive situations because they cannot adequately support themselves and their children on social assistance.¹⁵⁸ Fear of having their children taken away haunts women living in poverty.¹⁵⁹ Women are sometimes threatened with losing their children because they are living in inadequate housing or because they are ill.¹⁶⁰

Women reported that housing is a key issue: "[L]ack ... of control over where they live makes [women] particularly vulnerable to sexual assault and exploitation ... [W]omen are not safe in cheap hotels and motels or in rooming houses."¹⁶¹ Women said:

Canadian Woman Studies 123 at 125; S. Novac, J. Brown, and C. Bourbonnais, *No Room of Her Own: A Literature Review on Women and Homelessness* (Ottawa: Canada Mortgage and Housing Corporation, 1996) at 20-3.

153. Factum of the NAWL, *supra* note 141 at para. 13, citing from the *Gosselin* record, testimony of Louise Gosselin, vol. 1 at 143.

154. Rachel Cox, *Welfare Rights Are Women's Rights: Report on the Consultation Held by the National Association of Women and the Law on the Gosselin Case* (Ottawa: NAWL, 2001) at 17-18.

155. *Ibid.*

156. *Ibid.* at 16.

157. *Ibid.* at 12.

158. *Ibid.* at 16. See also Ontario Association of Interval and Transition Houses [hereinafter OAITH], *Report to the Special Rapporteur on Violence against Women* (Toronto: OAITH, 1996).

159. Rachel Cox, *Welfare Rights Are Women's Rights: Report on the Consultation Held by the National Association of Women and the Law on the Gosselin Case* (Ottawa: NAWL, 2001) at 11.

160. *Ibid.* at 11-12.

161. *Ibid.* at 13.

In inner-city rooming houses, women get beat up, they get raped and they get their food and clothing stolen. Male social workers say, "What's the problem with the room?" You try to tell the guy that she doesn't feel safe there.¹⁶²

In a squat, women might as well pick who they are going to have sex with as these places are totally ruled by guys and the women have to give sex.¹⁶³

Further, women noted that shelters are provided principally for men, that there are few specific services for homeless women, and that mixed shelters are not safe for women.¹⁶⁴

The fact is that, for women, poverty enlarges every dimension of women's inequality, not just the economic dimension. Poor women get women's inequality writ large. They are sexually commodified and subordinated in their daily interactions, and they accept sexual commodification and subordination in order to survive; they lose reproductive decision-making autonomy about when and whether to bear children as well as sexual autonomy in relationships; they are subjected to stereotyping as sexually irresponsible women, as whores, and bad mothers; their vulnerability to assault and rape is magnified; their ability to care for their children is compromised; and they have no political voice or influence. Without access to adequate social assistance and social services, including transitional housing, access to training and education, and effective legal rights, including *Charter* rights, women are much less able to resist or escape their subordination.

There are fundamental interests at stake. Cuts to social assistance rates that leave women without the means to meet their needs for food, clothing, and shelter do not simply deprive women of dollars. They also threaten interests that have central constitutional and social significance, namely women's interests in autonomy, liberty, psychological and bodily integrity, and equal social citizenship.¹⁶⁵ Clearly, such cuts constitute substantive discrimination within the meaning of section 15. Finally, given the gravity of the harms caused by cuts to social assistance, the significance of the interests affected, and the vulnerability of women who live in conditions of poverty, the standard for justifying these cuts as a reasonable limit on the right to equality must be a high one. Making the standard of justification less onerous in poverty-related claims will deny the substantive equality protection that section 15 is intended to provide. It is time to recognize that women have a *Charter* equality right to adequate social assistance and to an adequate standard of living.

162. *Ibid.*

163. *Ibid.* at 14.

164. *Ibid.* at 16.

165. In *Falkiner v. A.G. Ontario*, Docket C35052, C34983, 13 May 2002, Justice of Appeals John Laskin states that "[s]ocial assistance may well constitute a fundamental social institution" (at para. 100).