Court File No. 27418

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for Quebec)

BETWEEN:

LOUISE GOSSELIN

APPELLANT

and

LE PROCUREUR GÉNÉRAL DU QUÉBEC

RESPONDENT

and

ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF MANITOBA
ATTORNEY GENERAL OF NEW BRUNSWICK, ATTORNEY GENERAL OF ONTARIO
ATTORNEY GENERAL OF BRITISH COLUMBIA, RIGHTS AND DEMOCRACY
COMMISSION DES DROITS DE LA PERSONNE ET DE LA JEUNESSE,
THE NATIONAL ASSOCIATION OF WOMEN AND THE LAW
CHARTER COMMITTEE ON POVERTY ISSUES

INTERVENERS

FACTUM OF THE CHARTER COMMITTEE ON POVERTY ISSUES

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PARTS I and II - STATEMENT OF FACTS AND POINTS IN ISSUE

1. The Charter Committee on Poverty Issues ("CCPI") adopts the Statement of Facts and the Points in Issue set out in the Appellant's Factum.

PART III – ARGUMENT

A. What is at Stake in this Case?

2. This case provides the first opportunity for this Court to consider whether denying members of a disadvantaged group adequate financial assistance, resulting in homelessness and deprivation of other basic necessities, violates the *Canadian Charter*. The case raises the critical issue of whether ss. 7 nd 15 of the *Charter* impose positive legal obligations on governments to address the most basic needs of disadvantaged Canadians when they are unable to provide for themselves, as required under international human rights instruments which Canada has ratified.

3. What is at stake for poor people in this case is their legitimate place in Canada's constitutional democracy and the "rights revolution" that has occurred over the past twenty years. While disadvantaged groups have made important gains under the *Charter*, those living in poverty have seen their circumstances worsen. Since the *Charter*'s adoption, homelessness has grown from a rare phenomenon to what the mayors of Canada's ten largest cities have declared a "national disaster."[1] Distribution of emergency food through food banks, virtually unknown when the *Charter* was drafted, is now a critical means of survival for three quarters of a million people, including over 300,000 children.[2] The emergence of widespread hunger and homelessness has been largely the result of government choices made during times of economic prosperity and growing affluence among advantaged groups, in the context of increasingly discriminatory attitudes toward the poor.[3] While these government choices have

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[1]M. Hurtig, *Pay the Rent or Feed the Kids: The Tragedy and Disgrace of Poverty in Canada* (Toronto: McClelland & Stewart, 1999) at 51.

[2]B. Porter, "ReWriting the *Charter* at 20 or Reading it Right: The Challenge of Poverty and Homelessness in Canada" in *The Canadian Charter of Rights and Freedoms: Twenty Years Later* (Ottawa: Canadian Bar Association, April, 2001) at 8-9, 15-16; Hurtig, *Pay the Rent or Feed the Kids*, *supra,* at 35-53.

[3]Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Department of Justice, 2000) (Chair: Hon. G.V. LaForest) at 106-12; J. Swanson, *Poorbashing: The Politics of Exclusion* (Toronto: Between the Lines, 2001) at 9-28; M. Farrel, "Social and Economic Rights in Canada: Why Class Matters" (2000) 11 *N.J.C.L.* 225; P. Capponi, *The War at Home: An Intimate Portrait of Canada's Poor*

been identified by international human rights treaty monitoring bodies as among the most serious human rights violations in Canada, they have not, to date, been the subject of *Charter* scrutiny by this Court.[4]

4. Where lower courts in this and similar cases have excluded deprivations linked to poverty and homelessness from the scope of ss. 7 and 15 of the *Charter,*[5] their decisions have not, in CCPI's respectful submission, been based on reasoned interpretation of these provisions or on a consistent and principled application of this Court's *Charter* jurisprudence, but rather on an *a priori* rejection of poverty-related rights claims. This Court has held that *Charter* guarantees are to be given a broad and generous interpretation rather than a legalistic one, based on the "language chosen to articulate the specific right" and in reference to the objects and purposes of the *Charter* as a whole, which the Court has found to include substantive goals, such as a commitment to social justice and enhanced participation in society.[6] Aboriginal people, people with disabilities, single mothers, young people and members of other disadvantaged groups facing homelessness and hunger as a result of inadequate welfare benefits, have been denied enjoyment of the right to security of the person and to equality in any meaningful sense of these provisions or the broader purposes of the *Charter*. To find that such deprivations fall beyond the ambit of ss. 7 and 15 would be to deny Canada's poorest citizens the full and equal benefit of the *Charter*'s protections: to render the poor, in Justice McLachlin's words, "constitutional castaways."[7]

B. The Role of the Court

5. The Respondent's position in this case is that governments may leave poor people to starve or freeze on the streets, without the Court having any constitutional role in reviewing the decisions leading to these consequences. On the grounds that courts are neither authorized nor competent "to review social policies

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(Toronto: Viking, 1999) at ix-xiii.

4United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations on Canada*, E/C.12/1/Add.31 (10 December 1998); B. Morton, "The Reality of the Past, Present, and Future of Human Rights in Canada" (2000) 20 *Canadian Women's Studies* 60.

5 D. Wiseman, "The *Charter* and Poverty: Beyond Injusticiability" (2001), 51(4) *U.T.L.J.* (forthcoming); B. Porter, "Judging Poverty: Using International Human Rights Law to Refine the Scope of *Charter* Rights" (2000) 15 *J. Law & Soc. Pol'y* 117; M. Jackman, "Poor Rights: Using the *Charter* to Support Social Welfare Claims" (1993) 19 *Queen's L.J.* 65.

6 *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 344; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 64; *R.* v. *Oakes*, [1986] 1 S.C.R. 103 at 136; *Irwin Toy Ltd.* v. *Québec (A.G.)*, [1989] 1 S.C.R. 927 at 1003-4; *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 64; *Eldridge v. British Columbia (Attorney General),* [1997] 3 S.C.R. 624 at para. 73.

7*R.* v. *Prosper*, [1994] 3 S.C.R. 236 at 302.

financed by state budgets"[8] the Respondent urges the Court to limit the *Charter* to negative rights, in order to prevent courts from imposing positive obligations on governments to address economic disadvantage.

6. This type of reasoning has been unequivocally rejected by this Court in relation to other forms of disadvantage. In *Eldridge* and *Vriend,* as in the present case, governments argued that legislative decisions as to whether or how to deal with pre-existing disadvantage were policy choices beyond the purview of courts. The Court's unanimous response in those cases was that its responsibility is to interpret and apply the rights guaranteed in the *Charter*. It is the substance of the rights which determines the Court's role, and not *vice versa*.[9] The Court has recognized that all *Charter* rights have budgetary implications and there is no basis for excluding claims related to pre-existing disadvantage or those requiring the allocation of resources from *Charter* review.[10] The Court has emphasized that, where appropriate, deference "will be taken into account in deciding whether a limit is justified under s. 1 and again in determining the appropriate remedy for a *Charter* breach" but that deference cannot be used "to completely immunize certain kinds of legislative decisions from *Charter* scrutiny."[11]

7. This Court has also emphasized that judicial competency must be assessed in the context of particular cases, and not invoked as a basis for a wholesale abandonment of judicial review of social and economic policy.[12] In the present case there is no competing social science evidence which is beyond the competence of the Court to adjudicate.[13] While a precise definition of the poverty line may be subject to debate, that determination is not required here.[14] No one, including the Respondent, argues that $170/month was sufficient for food, clothing, housing and other necessities required for the Appellant's

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8Respondent's Factum, at para. 207.

9*Eldridge*, *supra*, at paras. 72-73; *Vriend*, *supra,* at paras. 132-142.

10*Eldridge*, *supra,* at para. 73; *Schachter* v. *Canada*, [1992] 2 S.C.R. 679 at 709.

11*Vriend*, *supra,* at para. 54; *Symes v. Canada*, [1993] 4 S.C.R. 695 at 753; see Wiseman, "The *Charter* and Poverty: Beyond Injusticiability", *supra*.

12*RJR-MacDonald Inc. v Canada (A.G.),* [1995] 3 S.C.R. 199 at para. 68; *Symes, supra,* at 753.

13 The Appellant's benefit under the *Regulation* was $173/month. On appeal, Justice Robert noted that a room cost $180-$200/month and a one-room apartment, $320/month; clothes cost $50/month; personal necessities cost $37/month; and food, $120/month. As he points out, the *Loi sur l'aide sociale (*L.R.Q., c. A-16) ["the *Act*"] itself states that a person's "ordinary needs" amount to $440 a month; *Gosselin* v. *Québec (Procureur général)*, Appellant's Record, Vol. 18 at 3479 *per* Robert J.

14The rate of $440 has not been challenged in the present case and can be presumed to represent an adequate level of assistance to meet basic needs, in compliance with adequacy standards in *CAP*.

basic dignity, security and equality.

8. The task of assessing whether a particular level of income meets basic adequacy requirements is one which courts have performed without difficulty in other contexts. Courts have routinely determined adequacy issues in other areas of law, such as bankruptcy, limits to garnishment, and child and spousal support.[15] In the *Finlay* case, when governments argued that setting levels of social assistance entitlements should be left entirely to provincial discretion, this Court interpreted the *Canada Assistance Plan Act* as requiring that assistance be provided "in an amount that is compatible, or consistent, with an individual's basic requirements", and it reviewed provincial compliance with this standard.[16]

9. In the *Marshall* case, the Court was called upon to interpret the term "necessaries" which it found to be part of a treaty agreement. Justice Binnie interpreted the term as including such basics as "food, clothing and housing, supplemented by a few amenities .... It addresses day-to-day needs."[17] Subsequently, in response to an Intervener's arguments that economic matters of this sort are beyond the proper role of courts, the Court simply observed that s. 35 contains a commitment to aboriginal and treaty rights and that "[i]t is the obligation of the courts to give effect to that national commitment."[18]

10. In CCPI's submission, concerns raised by the Respondent and the courts below with respect to the legitimacy and competence of courts to address the matters at issue in the present case are misplaced. Rights ought not to be limited in a manner that undermines the purposes of the *Charter*, solely to satisfy a preconceived notion of the proper role of courts. As the Court noted in *RJR-Macdonald* and in *Vriend*, it is the court's responsibility as 'trustees of the rights' in the *Charter* to determine whether legislative choices are consistent with the Constitution.[19] This Court is not, in this case, being asked "to second guess policy decisions", but rather "to protect against incursions on fundamental values."[20] It is being asked to determine, on the basis of clear and largely undisputed evidence, whether s. 29(a) of the

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15 See paras. 46-47, below.

16 *Finlay v. Canada (Minister of Finance)* [1993] 1 S.C.R. 1080 at 1125.

17 *R.* v. *Marshall*, [1999] 3 S.C.R. 456 at paras. 7, 8 and 59.

18 *R. v. Marshall*, [1999] 3 S.C.R. 533 at para. 45.

19 *Vriend*, *supra,* at paras. 53, 54, *per* Cory J.; at para. 108, *per* Iacobucci J.; *RJR-Macdonald, supra*, at para. 136.

20 *Andrews* v. *Law Society of British Columbia,* [1989] 1 S.C.R. 143 at 194.

Règlement sur l'aide sociale[21] failed to provide a disadvantaged individual or group with a level of assistance necessary to ensure the rights to security of the person and to equality, and whether such a deprivation can be justified under the *Charter*. This determination falls squarely within the constitutional mandate and responsibility of the Court.

C. The Intention of Parliament

11. The Respondent argues on the basis of the legislative record that "social and economic" rights were intentionally excluded by the drafters of the *Charter* "because the purpose of the *Charter* was to impose limits on government action not to impose obligations on it."[22] In CCPI's submission, this is neither an accurate reading nor a reasonable interpretation of the record to which the Respondent refers. This is not a case, as in *Prosper,* in which the Court is asked to find, in an entrenched provision, a right which was expressly proposed and rejected by the drafters of the *Charter*.[23]

12. The Special Joint Committee of the Senate and of the House of Commons never considered a motion to include social and economic rights in the *Charter*. Rather, it considered an amendment to what is now s. 36 of the *Constitution Act, 1982* to add a "commitment to fully implementing the *International Covenant on Economic, Social and Cultural Rights* and the goals of a clean and healthy environment and safe and healthy working conditions."[24] All parties agreed that Canada had already committed itself to fully implementing the *Covenant* by ratifying it in 1976. MP James McGrath noted that no one was opposed to the "principles embodied in the amendment" but he was against "cluttering up" the section by trying to put "everything" in.[25] Then Minister of Justice Jean Chretien reiterated that Canada was already committed to implementing the *ICESCR* and that "we cannot put everything [in s. 36]."[26] There is nothing in the record to suggest that this amendment was rejected because of a view that the *Charter* should be restricted to negative limits on government.

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21 *Règlement sur l'aide sociale*, R.R.Q., 1981, c. A-16, r. 1 ["the *Regulation*"].

22 Respondent's Factum, at para. 208 (Translation).

23 *Prosper, supra,* at 267; *Irwin Toy, supra,* at 1003.

24 Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, First Session of the Thirty-second Parliament, 1980-1981, Issue no. 49 (30 January 1981) at pp. 65-71.

25 *Special Joint Committee Minutes*, *supra,* at 49:68-49:69.

26 *Special Joint Committee Minutes*, *supra,* at 49:70.

13. In fact, the language and legislative history of s. 36 demonstrate a clear legislative commitment to adequate social assistance programs. S. 36(1)(c) jointly obligates the federal and provincial governments to "providing essential public services of reasonable quality to all Canadians." On tabling the resolution prior to the Special Joint Committee hearings, Justice Minister Chretien spoke of s. 36 as recognizing that "[s]haring the wealth has become a fundamental right of Canadians ..."[27] In rejecting the proposal to extend s.36 to include a broader array of social, environmental and labour rights, MP James McGrath insisted that the core commitments to essential public services should be "the bottom line and should remain the bottom line."[28] Thus, the legislative record referred to by the Respondent shows only an insistence that the commitment to essential public services in s.36, of which social assistance under CAP was a pre-eminent component,[29] remain clear and unequivocal.

14. In pleadings before U.N. human rights treaty monitoring bodies, Canada has pointed to s. 36 as being "particularly relevant in regard to ... the protection of economic, social and cultural rights" and has at the same time pointed to ss. 7 and 15 of the *Charter* as providing legal remedies where individuals are deprived of basic necessities.[30] Far from excluding such rights from the *Charter*, s. 36 reflects and reinforces a constitutional commitment to adequate health and social assistance programs which are critical to the implementation of social and economic rights such as the right to an adequate standard of living. The direct justiciability of s. 36 is not at issue in the present case.[31] However, s. 36 clearly mandates a substantive reading of ss. 7 and 15 of the *Charter* consistent with the constitutionalization of these commitments and with Canada's international human rights obligations.

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27 *House of Commons Debates* (6 October 1980) at 3287.

28 *Special Joint Committee Minutes*, *supra,* at 49:69.

29 "Shared-cost programs in the health and welfare fields ... considered essential [should be] available to all Canadians." Government of Canada, *Federalism and Decentralization: Where Do We Stand?* (Ottawa: Government of Canada, 1981) at 28.

30 *Core Document Forming Part of the Reports of States Parties (Canada*), HRI/CORE/1/Add.91 (12 January, 1998) at para. 127; United Nations Committee on Economic, Social and Cultural Rights, *Summary Record of the Fifth Meeting*, E/C.12/1993/SR.5 (25 May, 1993) at paras. 3, 21; Government of Canada, *Responses to the Supplementary Questions to Canada's Third Report on the International Covenant on Economic, Social and Cultural Rights,* HR/CESCR/NONE/98/8 (October, 1998) questions 16, 53. Canada also stated to the United Nations Human Rights Committee that the right to life in the *ICCPR* imposes obligations on governments to provide basic necessities. *Supplementary Report of Canada in Response to Questions Posed by the United Nations Human Rights Committee*, CCPR/C/1/Add.62 (March, 1983) at p. 23.

31 On the justiciability of s. 36 see: A. Nader, "Providing Essential Services: Canada's Constitutional Commitment under Section 36" (1996) 19 *Dalhousie L.J.* 306; L. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Carswell, 1999) at 184-91; see also *Winterhaven Stables Ltd.* v. *A.G. Canada* (1988), 53 D.L.R. (4th) 413 (Alta. C.A.) at 432, 434.

D. The International Context

15. The right to social security and to an adequate standard of living, including food, clothing and housing, are recognized as fundamental human rights in the *Universal Declaration of Human Rights* and in virtually all human rights instruments that have been adopted since that time.[32]

16. The Court has taken an expansive approach to the use of international law as an interpretive framework for domestic law. In considering the effect of international law when interpreting domestic legislation enacted with a view to implementing international obligations in the *National Corn Growers* case, Justice Gonthier held that courts should not only turn to relevant international law to resolve blatant ambiguities in the domestic legislation, but rather, should "strive to expound an interpretation which is consonant with the relevant international obligations."[33]

17. A similarly expansive approach to the use of international human rights law has been adopted by this Court to ensure that Canadians are provided the "full benefit of the *Charter*'s protection."[34] The Court's approach has been founded on the 'interpretive presumption' laid out in *Slaight.* Referring to protections in the *International Covenant on Economic, Social and Cultural Rights*, the Court found that "the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified."[35] In *Baker*, this Court strongly

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32 *Universal Declaration of Human Rights*, G.A. Res. 217(III) UN GAOR, 3d Sess., Supp. No. 13, A/810(1948) 71, articles 22, 25; *International Covenant on Economic, Social and Cultural Rights*, Can. T.S. 1976 No. 46, articles 9, 11; *Convention on the Elimination of All Forms of Discrimination against Women*, Can. T.S. 1982 No. 31, articles 11(1)(e), 11(2)(b), 13(a); *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, articles 26, 27; *International Convention on the Elimination of All Forms of Racial Discrimination*, Can. T.S. 1970 No. 28, article 5(e)(iv); *European Social Charter (Revised)* E.T.S. No. 163, Articles 12, 13, 14, 30, 31. Part II; see generally S. Liebenberg, "The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa," (2001) *South African Journal of Human Rights* (forthcoming).

33 *National Corn Growers Assn. v. Canada (Import Tribunal),* [1990] 2 S.C.R. 1324 at 1371.

34 *Slaight Communications Inc. v. Davidson,* [1989] 1 S.C.R. 1038 at 1056; S. Raponi "Grounding a Cause of Action for Torture in Transnational Law," in C. Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Ligitation* (Portland, Oregon: Oxford, University Press, 2001) 373 at 386-87.

35 *Slaight Communications*, *supra,* at 1056-1057, 1078-1081. See also R. Sullivan, *Driedger on the Construction of Statutes*, 3d ed (Toronto: Buterworths, 1994) at 330: "... the legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. In so far as possible, therefore, interpretations that reflect these values and principles are preferred"; cited in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 70 and in *R. v. Sharpe*, [2001] 1 S.C.R. 45 at para. 175.

reaffirmed the interpretive presumption in *Slaight*, and declared that international law is "a critical influence on the interpretation of the scope of the rights included in the *Charter*."[36] Justice L'Heureux-Dubé further elaborated on this point in *Ewanchuk*, where she stated that "our *Charter* is the primary vehicle through which international human rights achieve a domestic effect." "In particular," she noted that ss. 7 and 15 "embody the notion of respect of human dignity and integrity."[37]

18. The interdependence and indivisibility of all human rights has been a central tenet of international human rights law since the adoption of the *Universal Declaration* in 1948.[38] These principles have been reinforced by jurisprudence from all of the U.N. treaty monitoring bodies, both in general, and in the particular context of periodic reviews of Canada. As noted by the Intervener Rights and Democracy, a rigid distinction between "positive" social and economic rights and "negative" civil and political rights, on which the Respondent relies, is legally untenable and is now generally rejected.[39] In its *General Comments*, and in deciding individual complaints, the Human Rights Committee has made it clear that civil and political rights, particularly the right to life and to non-discrimination, place positive obligations on governments which intersect with obligations under the *ICESCR*.[40]

19. The Committee on Economic, Social and Cultural Rights (CESCR) has similarly recognized that the interdependence and indivisibility of all human rights makes it impossible to justify any categorical distinction between the two sets of rights with respect to the provision of legal remedies. As the Committee explains:

> 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

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36*Baker*, *supra,* at para. 70.

37*R.* v. *Ewanchuk,* [1999] 1 S.C.R. 330 at para. 73.

38C. Scott & P. Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" (1992) 141 *U. Pennsylvania L.R.* 1 at 80-81; S. Day, "The Indivisibility of Women's Human Rights" (2000) 20 *Canadian Women's Studies* 11.

39Factum of the Intervener Rights and Democracy at paras.14 *et seq*. Even in the United States, where courts continue to give some credence to this distinction, there has been considerable recognition of "positive rights" in state constitutions; see H. Hershkoff, "Positive Rights in State Constitutions: The Limits of Federal Rationality Review" (1999) 112 *Harv. L. Rev.* 1139. In many other jurisdictions, such as South Africa, social and economic rights are recognized as fully justiciable; see *Government of the Republic of South Africa v. Grootboom* (2001) (1) South African Law Reports 46 (CC).

40See, for example, *Zwaan-de Vries v. the Netherlands*, Supp. No. 40 (A/42/40) (9 April 1987), at p. 160; see also C. Scott, "Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight?" (1999) 10:4 *Constitutional Forum* 97 at 104.

> 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.[41]

20. The CESCR emphasizes that, even where social and economic rights are not directly incorporated into domestic law through specific legislation, legal remedies may be provided by way of other human rights provisions, particularly the guarantee of equality which "should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights."[42] Consequently, in its review of *Charter* jurisprudence related to Canada's obligations under the *ICESCR*, the Committee has expressed concern that in poverty-related cases governments have argued for and lower courts have adopted *Charter* interpretations which are inconsistent with Canada's obligations under the *ICESCR,* and which could leave claimants "without the basic necessities of life and without any legal remedy."[43] The Committee has criticized the characterization of social and economic rights "as mere 'policy objectives' of governments rather than as fundamental human rights" in lower court decisions, including in the trial decision in the present case.[44]

21. Further support for an interpretation of ss. 7 and 15 of the *Charter* to provide remedies for the denial of basic necessities is provided in the most recent review of Canada's compliance with the *International Covenant on Civil and Political Rights*.[45] The Human Rights Committee found that social program cuts in Canada have had a discriminatory impact on women, and may violate the obligation to take positive measures to protect children.[46] In addition, the Committee noted that "homelessness has led to serious health problems and even to death" and recommended that governments in Canada "take positive measures required by article 6 [the right to life] to address this serious problem."[47] As Professor Craig

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41 United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 9*, E/C.12/1998/24 (4 December, 1998) at para. 10.

42 *General Comment No. 9*, *supra,* at para. 15; C. Scott & P. Alston, "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney*'s Legacy and *Grootboom*'s Promise" (2000) 16 *South African Journal of Human Rights* 206 at 221-23.

43 *Concluding Observations*, *CESCR, 1998*, *supra,* at paras. 14, 15.

44 United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations on Canada*, E/C 12/1993 (10 June 1993) at para. 21; on the Committee's consideration of the trial decision in the present case, see B. Porter, "Judging Poverty", *supra,* at 139-40.

45 *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No.47.

46 United Nations Human Rights Committee*, Concluding Observations on Canada,* CCPR/C/79/Add. 105 (1999) (7 April 1999) at para. 20.

Scott notes, the most recent reviews of Canada by the Human Rights Committee and the CESCR provide strong support for finding, within sections 7 and 15 of the *Charter*, "firm legal obligations vis-à-vis the less advantaged in an affluent state like Canada."[48]

22. The two overarching guarantees contained in ss. 7 and 15 of the *Charter* have their origins in the second and third articles of the *Universal Declaration*[49] and express the individual and community dimensions of fundamental rights. Inasmauch as Canada's commitments under international human rights law were central to the "historical origins of the concepts enshrined" in the *Charter*,[50] these broadly framed rights must be presumed to protect against assaults on human dignity and integrity arising from violations of the right to an adequate standard of living.

E. The *Regulation* Violates s. 15 of the *Charter*

23. CCPI supports the position of the Intervener National Association of Women and the Law with respect to s. 15. CCPI emphasizes that ss. 7 and 15 need to be understood as interdependent and mutually reinforcing rights. In the context of the present claim, ss. 7 and 15 should be read together as placing substantive obligations on governments to provide those in need with an adequate level of assistance. These obligations arise from the intersecting requirements under both sections that governments protect physical and psychological integrity and dignity, and "recognize the full place of all individuals and groups within Canadian society."[51]

24. This Court noted in *Andrews* that equality is "a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises."[52] The analysis must consider not only the "particular legal distinction being

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47 *Concluding Observations, HRC, 1999,* at para. 12.

48 C. Scott, "Canada's International Human Rights Obligations", *supra,* at 99.

49 Article 2 of the *Universal Declaration* states, *inter alia*, that: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Article 3 states that "Everyone has the right to life, liberty and security of person."

50 *Big M Drug Mart*, *supra,* at 344*; Baker*, *supra,* at para. 70.

51 *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 53; *New Brunswick (Minister of Health and Community Services)* v. *G. (J.)*, [1999] 3 S.C.R. 46 at para. 115.

52 *Andrews*, *supra,* at 164; *Law*, *supra*, at paras. 24, 56; *R. v. Turpin*, [1989] 1 S.C.R. 1296 at 1331-32.

challenged" but also look to "disadvantage that exists apart from and independent of [it]"[53] and to those characteristics of the group which "act as headwinds to the enjoyment of society's benefits."[54] In the present case, as in *Vriend*, there are two dimensions to the discrimination and two implicit comparisons. The formal or differential treatment is between those under thirty in need of social assistance, who are denied the higher rate, and those thirty and over who receive it. However, the substantive violation of equality - "the more fundamental one"[55]- arises from the failure to provide an adequate benefit to the younger group. By analogy to *Vriend*, the comparison here is between younger people who require adequate social assistance in order to enjoy "society's benefits" and those members of society who, because of their relative advantage, have no need of the protection provided by social assistance.

25. In the same way that in *Vriend*, a failure to provide human rights protections for gays and lesbians deprived them of essential human dignity because of the social reality of discrimination and disadvantage, so in this case, failure to provide an adequate level of assistance to those under thirty who cannot provide for themselves, is an affront to the dignity and integrity of younger people.[56] In both cases, the benefit that has been denied to the disadvantaged group in comparison to the advantaged is legislative protection made necessary by the broader context of social inequality and discrimination.

26. The nature of the benefit at issue in this case is critical "in terms of its importance to human dignity and personhood."[57] As in *Vriend*, the benefit that was denied goes to the core of what it means to enjoy meaningful citizenship and equal participation in society. Unlike the benefit at issue in *Law*, which the Court noted was not designed to remedy "immediate financial need"[58] the benefit denied in this case is a universal entitlement to adequate financial assistance for those in immediate need, recognized as a fundamental right under international law. The scope and nature of the affected interest could not be more profoundly related to the dignity interests underlying s. 15 and the *Charter* as a whole. It is for this reason that the provision of an adequate benefit is fundamental to the discharge of governments' constitutional obligation to protect the most vulnerable, and a cornerstone of the right to substantive equality:

> [T]he twin considerations of social justice and equality warrant society's active protection

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53 *R. v. Turpin*, supra, at 1331-32.

54 *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at para. 67, *per* Sopinka J.

55 *Vriend*, *supra,* at para. 82.

56 *Vriend*, *supra,* at para. 82.

57 *Vriend*, *supra,* at para. 183, *per* L'Heureux-Dubé.

58 *Law*, *supra,* at para. 100.

> of its vulnerable members. Democratic and constitutional principles dictate that every member of society be treated with dignity and respect and accorded full participation in society.[59]

F. The *Regulation* Violates s. 7 of the *Charter*

i) The Right to Life, Liberty and Security of the Person Under s. 7 of the *Charter*

27. Given its preeminence within the overall scheme of the *Charter*, "the need to safeguard a degree of flexibility in the interpretation and evolution of section 7" is, as Justice LeBel suggests in *Blencoe*, crucial.[60] So too, as Justice L'Heureux-Dubé asserts in *G. (J.)*, is the need to interpret s. 7 through an equality rights lens in order "to recognize the importance of ensuring that our interpretation of the Constitution responds to the realities and needs of all members of society."[61] This is especially important if poor people are to benefit equally from the s. 7 guarantee.

28. The Respondent relies on this Court's existing s. 7 jurisprudence in the area of criminal law and the administration of justice, to argue that s. 7 only protects against state action intruding on life, liberty or security of the person, but does not protect against state inaction leading to the same results. The Respondent argues that "the state has no constitutional obligation to adopt measures to promote or ensure the security of persons."[62] In CCPI's submission, this position fails to recognize the full scope of the rights and corresponding obligations on governments under s. 7 of the *Charter*.

29. It is widely recognized that, even in the area of criminal law, states have positive obligations to enact and enforce protections, for example, against extra-judicial killings. A restriction of s. 7 to situations where the state itself has actively intruded on a protected interest would clearly be insufficient even in the context of the administration of justice.

30. In relation to poverty issues, and in the context of a market oriented economy where government policy and regulation play a significant role, the distinction between legislative "action" and "inaction" is particularly problematic. In is unclear, for example, whether providing an inadequate level of financial assistance to those in need, and thus jeopardizing security of the person, should be characterized as "action" or "inaction." Moreover, it is unclear why the application of s. 7 of the *Charter* should turn on

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59 *Sharpe*, *supra,* at para.133, *per* L'Heureux-Dubé, Gonthier & Bastarache JJ.

60 *Blencoe* v. *British Columbia (Human Rights Commission)*, 2 S.C.R. 307 at para. 188.

61 *G. (J.)*, *supra,* at para.115; *R.* v. *Mills*, [1999] 3 S.C.R. 668 at para. 21, *per* McLachlin & Iacobucci JJ.

62 Respondent's Factum, para. 21 (Translation).

how the government's involvement is framed.[63]

31. This Court has emphasized that a purposive approach to *Charter* rights will focus on the "interest meant to be protected" and aim at ensuring the full benefit of the protection rather than disqualifying certain categories of rights claims based on "the very problematic distinction ... between legislative action and inaction."[64] The applicability of the guarantees under s. 7 are subject only to the restriction imposed by s. 32 of the *Charter*. As was noted by the unanimous Court in *Vriend*, there is nothing in the wording of s. 32 "to suggest that a positive act encroaching on rights is required." Rather, s. 32 is "worded broadly enough to cover positive obligations on a legislature such that the *Charter* will be engaged even if the legislature refuses to exercise its authority."[65]

32. The Court has read s. 7 as protecting interests fundamentally related to human life, liberty, personal security, physical and psychological integrity, dignity and autonomy. It has held that these interests are protected because they are "intrinsically concerned with the well-being of the living person ... based upon respect for the intrinsic value of human life and on the inherent dignity of every human being."[66] The Court has rejected the view that s. 7 may not impose positive obligations on governments.[67]

33. The Respondent and the court below have characterized the Appellant's s. 7 claim as "purely economic in nature."[68] The Respondent argues that such interests were intentionally excluded by the drafters of the *Charter* when "enjoyment of property" was "replaced" by "security of the person" in s. 7. This argument misconstrues not only the life, liberty and security interests asserted by the Appellant, but the legislative history of s. 7 itself. The proposal to add "enjoyment of property" to s. 7 during the debates on *Bill C-60* was defeated largely due to provincial concerns that entrenching such a right could

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63 In the present case, the impugned measure can be characterized either as state action (adopting a provision which deprives those under thirty of the full benefit) and inaction (failing to provide an adequate benefit to those in need). In Canada, poverty related claims will rarely, if ever, arise in the context of a complete absence of government action.

64 *Vriend, supra*, at para. 53.

65 *Vriend*, supra, at para. 60. See also D. Pothier, "The Sounds of Silence: *Charter* Application When the Legislature Declines to Speak" (1996), 7 *Constitutional Forum* 113, at p. 115.

66 *Rodriguez* v. *B.C. (A.G.)*, [1993] 3 S.C.R. 519 at 585, *per* Sopinka J.

67 *Schachter*, *supra,* at 721; *G. (J.)*, *supra,* at para. 91.

68 *Gosselin* v. *Québec (Procureur général)* (C.S.), Appellant's Record, Vol. 18 at 3405;*Gosselin* v. *Québec (Procureur général)*, Appellant's Record, Vol. 18 at 3436-7, *per* Mailhot J.; 3462-3, *per* Robert J.

interfere with environmental, zoning and other land and natural resource-related regulation.[69]

34. While it is accurate to suggest that the omission of property rights from s. 7 was intended to forestall *Charter* based objections to government regulation of private property, it is incorrect to read the legislative history of s. 7 as a basis for rejecting all individual economic-related claims. Rather, as this Court held in *Irwin Toy*, "corporate-commercial economic rights" must be distinguished from "such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter" which may be included under the *Charter*.[70]

35. As submitted above, recognizing the right to an adequate level of social assistance in the case of need as a necessary element of s. 7 is mandated by Canada's international human rights obligations; in particular by articles 9 and 11 of the *ICESCR* and by article 6 and of the *ICCPR*.[71] For a person with no other means of economic subsistence, an adequate level of social assistance is crucial to each of the interests which the Court has recognized under s. 7.[72] A lack of food, shelter, clothing, or sufficient income to obtain these things, imperils not only an individual's psychological security, dignity and autonomy, but his or her mental and physical health, and even life itself.

36. The dialogue between human rights treaty monitoring bodies and Canadian governments with respect to s. 7 is particularly relevant in considering how an interpretive approach can be fashioned that is consistent with international human rights law. In its second and third periodic reviews under the *ICESCR*, Canada was questioned about domestic legal protections of the right to an adequate standard of

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69 Special Joint Committee, *supra,* Issues no. 44-46 (23, 25, 27 January 1981); J. McBean, "The Implications of Entrenching Property Rights in Section 7 of the Charter of Rights" (1988) 26 *Alta. Law Rev.* 548 at 550; A. Alvaro, "Why Property Rights Were Excluded from the Canadian Charter of Rights and Freedoms" (1991) 24 *Can. J. Pol. Sci.* 309 at 319-22.

70 *Irwin Toy, supra,* at 1003-4; see Jackman, "Poor Rights: Using the *Charter* to Support Social Welfare Claims", *supra,* at 75-77.

71 Article 9 of the *ICESCR* recognizes "the right of everyone to social security, including social insurance." Article 11(1) recognizes: "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." Article 6 of the *ICCPR* recognizes "right to life."

72 T. Scassa, "Social Welfare and Section 7 of the *Charter*: *Conrad* v. *Halifax (County of)*" (1994) 17 *Dalhousie L.J.* 187; I. Morrison, "Security of the Person and the Person in Need: Section 7 of the *Charter* and the Right to Welfare" (1988) 4 *J.L. & Social Pol'y* 1; I. Johnstone, "Section 7 of the *Charter* and the Right to Welfare" (1988) 46 *U.T.Fac.L.Rev.* 1; M. Jackman, "The Protection of Welfare Rights Under the *Charter*" (1988) 20 *Ottawa L.Rev.* 257.

living, and informed the CESCR that s. 7 protects against being deprived of basic necessities.[73] In its *Concluding Observations* in 1998, however, the CESCR noted with concern that lower courts, at the encouragement of provincial governments, had interpreted s. 7 as excluding the right to an adequate standard of living.[74]

37. The CESCR's concern about lower courts' failure to include issues of poverty and homelessness under s. 7 was reinforced by the *Concluding Observations* of the Human Rights Committee which, four months later, noted that "positive measures" are required to address homelessness in Canada in order to protect the "right to life."[75]

38. As the facts of the present case make clear, an adequate level of social assistance is a fundamental prerequisite to security of the person for people in need. For the Appellant, surviving on the rate of assistance provided by the *Regulation* meant living in inadequate and unsafe housing and, at times, homelessness.[76] She described one basement apartment in which she spent an entire winter: "it was badly lit, there were bugs everywhere, it wasn't heated, I rented it from the landlord heated but we froze like rats, my feet were blue all winter, my ankles hurt so much that I had trouble walking and I was cold."[77]

39. The inadequacy of the benefit under the *Regulation* meant that the Appellant was constantly hungry and malnourished. To get food, she was forced to rely on her family, soup kitchens, church and other charity-run food programs. As she explained: "when someone gave me food, I went."[78] She also faced the daily indignity and discomfort of being ill-dressed and under-clothed.[79] These circumstances exacerbated the employment barriers she already faced because of lack of education, social skills and training, and low self-esteem.[80] In describing the results of her job search efforts, the Appellant explained

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73 United Nations Committee on Economic, Social and Cultural Rights,Government of Canada, *Responses to the Supplementary Questions to Canada's Third Report on the International Covenant on Economic, Social and Cultural Rights,* HR/CESCR/NONE/98/8 (October, 1998) question 53.

74 *Concluding Observations, CESCR, 1998*, *supra,* at paras. 5, 14.

75 *Concluding Observations, HRC, 1999, supra,* at para. 12.

76 Appellant's Record, Testimony of L. Gosselin, Vol. 1 at 112, 126, 137.

77 Testimony of L. Gosselin, Vol. 1 at 106 (Translation).

78 Testimony of L. Gosselin, Vol. 1 at 134 (Translation).

79 Testimony of L. Gosselin, Vol. 1 at 102, 104, 111, 130, 137, 146.

80 Testimony of L. Gosselin, Vol. 1 at 106.

how she became, in effect, unemployable:

> and to sell myself as a good worker, I was completely lacking in terms of self-esteem and in terms of self-confidence, my meals weren't balanced, my social life wasn't either, I had absolutely nothing to keep myself together. Well, there was never anyone who called me back, I was unable to present myself properly to an employer her, to work, so often the places were filled. [81]

40. The Appellant was not only unable to find and keep paid work, but to establish or maintain any other normal social relations, including with members of her own family: "I lived in isolation, I had no one from a social point of view, no job, you know, a normal life there in society, so it was difficult for me to make it, and I couldn't rely on my sister, or on my mother, or on my father."[82]

41. As the expert evidence adduced by the Appellant clearly confirms, the inadequacy of the assistance provided under the *Regulation* made it impossible for the Appellant and others in her situation to meet basic needs: to obtain adequate food, clothing, shelter, and to maintain an acceptable standard of physical and mental health. Moreover, it perpetuated and exacerbated the hopelessness, vulnerability to violence, loss of self-esteem, social isolation and immobilization which unmitigated poverty creates.[83]

42. The *Regulation* denied the Appellant and others in her situation any real opportunity to make "basic choices going to the core of what it means to enjoy individual dignity and independence."[84] It reflected disregard for "the well-being of the living person" and disrespect "for the intrinsic value of human life and ... the inherent dignity of every human being."[85] By making it impossible to maintain a level of existence compatible with human life at a socially acceptable standard of physical and mental health, security, dignity, human decency and self-respect, the *Regulation* violated the Appellant's right to life, liberty and security of the person.

ii) The Violation of Principles of Fundamental Justice

43. An infringement of a s. 7 right will offend "principles of fundamental justice" if it violates "basic

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81 Testimony of L. Gosselin, Vol. 1 at 110 (Translation).

82 Testimony of L. Gosselin, Vol. 1 at 128 (Translation).

83 *Gosselin* v. *Québec (Procureur général)*, Appellant's Record, Vol. 18 at 3479-80.

84 *Godbout* v. *Longueil (City)*, [1997] 3 S.C.R. 844 at para. 66, *per* LaForest J.

85 *Rodriguez*, *supra,* at 585, *per* Sopinka J.

tenets of our legal system."[86] These tenets "may be reflected in the common-law and statutory environment which exists outside of the *Charter*, they may be reflected in the specific and enumerated provisions of the *Charter*, or they may be more expansive than either of these."[87] They include principles recognized both in domestic law and under international conventions.[88] As Justice LaForest explains in *Godbout* v. *Longueuil*:

> ... if deprivations of the rights to life, liberty and security of the person are to survive *Charter* scrutiny, they must be "fundamentally just" not only in terms of the process by which they are carried out but also in term of the ends they seek to achieve, as measured against basic tenets of both our judicial system and our legal system more generally. [89]

44. In 1986, when the Appellant launched her claim, the welfare rate under the *Regulation* represented 20% of the Statistics Canada Low Income Cut-Off; in no other province were welfare rates lower.[90] As noted above, there was no dispute that the rates were grossly inadequate to meet basic needs.[91] U.N. human rights treaty monitoring bodies have made it clear that inadequate welfare rates in Canada are incompatible with Canada's binding international treaty obligations.[92] By failing to meet basic needs, the *Regulation* therefore violates international human rights norms which, as the Court has recognized, constitute fundamental tenets of our domestic and international legal systems.

45. By setting a rate of social assistance which does not provide the basic means of subsistence, the *Regulation* also violates other fundamental constitutional principles and guarantees, most notably the values of equality and human dignity, recognized under s. 15 of the *Charter* and the importance of equal access to essential public services, recognized under s. 36 of the *Constitution Act, 1982*.

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86 *Re B.C. Motor Vehicle Act*, *supra,* at 503.

87 *R.* v. *S. (R.J.)*, [1995] 1 S.C.R. 451 at para. 49, *per* Iacobucci J.; *R.* v. *Ruzic*, 2001 SCC 24 at para. 28, *per* LeBel J.; *R.* v. *Seaboyer*, [1991] 2 S.C.R. 577 at 603, *per* McLachlin J.

88 *Re B.C. Motor Vehicle Act*, *supra,* at 503, *per* Lamer J.; *United States v. Burns*, 2001 SCC 7 at paras. 79- 81.

89 *Godbout* v. *Longueil* (City), [1997] 3 S.C.R. 844 at para. 74.

90 National Council of Welfare, *Welfare Incomes 1999* (Ottawa: Minister of Public Works and Government Services Canada, 2000) at 55.

91 Paragraph 7 above.

92 *Concluding Observations, CESCR, 1998*, *supra,* at paras. 21, 23, 25, 28; *Concluding Observations, CESCR, 1993*, *supra,* at para. 15; *Concluding Observations, HRC, 1999, supra,* at paras. 12, 20.

46. The right not to be deprived of basic necessities has "animated legislative and judicial practice"[93] as a fundamental tenet of the legal system in a wide array of policy areas in Canada. As noted above, all cost-shared social assistance programs were required under *CAP* to provide sufficient assistance to meet basic requirements, and compliance with this condition was subject to judicial review.[94] In the field of debtor-creditor law, all jurisdictions have exemptions, from both asset seizures and income garnishees, which ensure that low-income people will have sufficient resources to provide for basic necessities and the ability to participate in society.[95] In the bankruptcy area, provision is made to ensure that a bankrupt and his/her family has both sufficient income and assets to "maintain themselves and their families at a reasonable standard of living."[96]

47. For decades, in family law, the judiciary assumed the primary responsibility for ensuring that child support awards were sufficient to meet children's needs. More recently, these requirements have been codified by way of guidelines under the *Divorce Act* and parallel provincial legislation. In the area of spousal support, courts are responsible for determining reasonable awards "taking into consideration the means, needs and other circumstances of each spouse."[97] Within the *Criminal Code* itself, the duty to provide basic necessities for dependents is so fundamental as to be the basis for a criminal offence, and it is the courts which are responsible for determining whether basic necessities have been provided.[98] In all of these areas, judicial and legislative practice has been guided by the principle that everyone should have access to basic necessities. By contravening this fundamental tenet of our legal system, the *Regulation* violates the principles of fundamental justice.

48. The decision to maintain the rate of assistance under the *Regulation* at a level which fails to meet basic needs further violates principles of fundamental justice because it reflects and reinforces the social and political vulnerability and exclusion of younger social assistance recipients in a manner which is

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93*R. v. Fitzpatrick*, [1995] 4 S.C.R. 154 at para. 26.

94*Finlay, supra,* at 1125.

95C.R.B. Dunlop, *Creditor-debtor Law in Canada* (Toronto: Carswell, 1995) at p.449 *et. seq*. In Nova Scotia, for example, setting the dollar level of the exemption for low-income earners is delegated to the judiciary; see *Nova Scotia Civil Procedure Rules*, Rule 53.05(1) (amended February, 2001) (Toronto: Butterworths, looseleaf edition).

96*Re Pearson* (1997), 46 C.B.R. (3d) (Alta. Q.B.) at para. 24; see generally ss. 67 and 68 of the *Bankruptcy and Insolvency Act*, R.S.C.1985, c. B-3

97*Divorce Act,* R.S.C. 1985, c. 3 (2nd Supp.) s. 15.2(4).

98*Criminal Code*, R.S.C. 1985, c. C-46, as amended, s. 215.

incompatible with the "constitutional and democratic principles" dictating "that every member of society be treated with dignity and respect and accorded full participation in society."[99] As early as 1984, the government recognized that the amount provided under the *Regulation* did not meet basic needs.[100] Despite its severe adverse impact on those affected, the decision to maintain the *Regulation* was made without taking any measures to ensure that the rights or concerns of younger welfare recipients were heard or properly represented. There were no consultations with the affected group, or with relevant experts, and no legislative hearings. Indeed, experts called by the Respondent itself were unable to clearly explain why a differential welfare rate was originally put in place.[101]

49. The *Regulation* remained in force because younger welfare recipients, like the poor in general, have little or no power or representation at the legislative or regulatory level.[102] In fact, the effect of the *Regulation* was to further isolate and disempower recipients individually, and as a group. Malnourished, ill-clothed, vulnerable to physical and mental illness, insecure and subject to rejection and public scorn, they were engaged in the most basic struggle for existence – a far remove from the *Charter*'s democratic ideal of autonomy, participation and voice. Reflecting and perpetuating a systemic bias against welfare recipients within the political process, the *Regulation* is inherently and fundamentally unjust.[103]

50. Finally, the *Regulation* violates s. 7 principles of fundamental justice because it is arbitrary.[104] Given its objective of encouraging work-force attachment, the government had the option of creating programs or benefits which genuinely enhanced recipients' ability to seek and find work. Instead it chose the highly punitive route of maintaining welfare rates on which it was impossible to survive with any dignity. As the Appellant's experience demonstrates, the *Regulation* exacerbated, rather than addressed the real employment related barriers facing young welfare recipients, while perpetuating the stereotype that members of that group remain dependent on welfare because they are lazy or lacking in initiative.

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99 *Sharpe*, *supra,* at para.133, *per* L'Heureux-Dubé, Gonthier & Bastarache JJ.

100 *Gosselin* v. *Québec (Procureur général)*, Appellant's Record, Vol. 18 at 3445 *per* Robert J.

101 Testimony of D. Fugère, Appellant's Record, Vol. 3 at 475.

102 Canadian Human Rights Act Review Panel, *Promoting Equality*, *supra,* at 106-12; M. Jackman, "Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination Under the *Canadian Charter* and Human Rights Law" (1994) 2 *Review of Constitutional Studies* 76 at 95-100.

103 J. Whyte, "Fundamental Justice: The Scope and Application of Section 7 of the *Charter*" (1983) 13 *Man.Law J.* 455 at 475.

104 *Rodriguez*, *supra,* at 619-620.

51. Notwithstanding its fundamental incompatibility with domestic and international human rights norms, its democratic process-related defects, and its arbitrariness, the Respondent asserts that the *Regulation* should not be subject to s. 7 scrutiny on the grounds that this is not the proper role of the Court. The effect of the Respondent's reasoning would be to immunize the very type of state action for which judicial scrutiny is most necessary, and leave certain fundamental human rights violations without judicial remedy.[105] Were it to be adopted, this approach would represent a clear violation of the rule of law, profoundly at odds with s. 7 principles of fundamental justice.

G. The Regulation Cannot be Justified Under s. 1

52. CCPI adopts the submissions of the Appellant and the National Association of Women and the Law with respect to s. 1. The Respondent contends that discouraging welfare dependency among those under thirty is a "pressing and substantial objective." In CCPI's submission, such an objective may only qualify as "pressing and substantial" if it is applied in a non-discriminatory fashion to all recipients, and pursued in a manner consistent with the primary purpose of the *Act* itself - to provide basic necessities to all individuals and families in need. Targeting younger people and denying them basic necessities because of discriminatory stereotypes about their likelihood of becoming chronically dependent on welfare is a constitutionally impermissible purpose which "simply cannot be construed as pressing or substantial."[106]

53. With respect to the proportionality of the means chosen to achieve the purported objective, the Respondent, in essence, asks this Court to simply defer to the Government's choice of means because this choice falls within the broad category of "social policy involving resource allocation." As noted above, however, this Court has found that deference is not a rule which can be categorically applied to a particular type of government activity. In *M. v H.*, Justice Bastarache set out a number of factors which this Court has considered in determining the degree of deference to be accorded to legislatures: the nature of the interest involved; the vulnerability of the group affected; the complexity of the issue being determined; the source of the rule or decision; and the extent to which the provision is adopted as a result of "moral judgments in setting social policy."[107] While the majority in that case cautioned that these

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105"The neglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations"; *General Comment No. 9*, *supra*, at para.14. F.I. Michelman, "Welfare Rights in a Constitutional Democracy" (1979) *Wash. U.L.Q.* 659; F.I. Michelman, "The Supreme Court, 1968 Term – Foreword: On Protecting the Poor Through the Fourteenth Amendment" (1969) 83 *Harv. L. Rev.* 7; S. Loffredo, "Poverty, Democracy and Constitutional Law" (1993) 141 *U. Pennsylvania L.R.* 1277-1389.

106*Egan* v. *Canada*, [1995] 2 S.C.R. 513 at para. 210*, per* Iacobucci J.

107*M. v H.*, [1999] 2 S.C.R. 3 at paras. 305-321, *per* Bastarache J.

factors ought not to constitute a "threshold inquiry" or to immunize certain categories of legislative decisions from *Charter* scrutiny, they are instructive in the present case in considering the extent to which the Court ought to defer to the legislature's choice of means to reduce welfare dependency.

54. The interest involved in the present case is, as outlined above , a human right "fundamental to human life or survival" and inherently linked with the over-riding constitutional values of dignity, equality and security. The group affected, younger people relying on social assistance, is one of the most vulnerable in society. As outlined by the Appellant, younger people living in poverty are almost completely marginalized from the political process. They are, in the words of John Hart Ely, a group "to whose needs and wishes elected officials have no apparent interest in attending."[108]

55. In terms of the complexity of the issue involved, the Respondent argues that determining appropriate means of reducing welfare dependency is a complex social policy issue for which broad latitude ought to be granted to the legislature.[109] However, while other policies aimed at reducing welfare dependency may involve "polycentric" considerations and competing interests, the issue in the present case is not entangled with these other considerations. The impugned policy attempts to reduce welfare dependency within one group by setting the benefit for that group at a level that is grossly inadequate. The Respondent refers to no evidence of the government having established priorities or arbitrated among competing social needs and simply asserts without evidence that the effect of granting parity in rates would be "disastrous" in terms of the integration of young people into the labour market.[110] Such a claim has little credibility. The *Regulation* was revoked in 1989 without catastrophic effects. Further, throughout the period at issue, other provinces provided comparable levels of social assistance to all eligible recipients without apparent adverse effects.

56. With respect to granting deference to consultative democratic processes, Justice Bastarache notes that "processes which are more procedurally careful and open deserve greater deference."[111] As noted above,[112] the present case falls clearly into the category of decisions made without public debate or

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108 J. H. Ely, *Democracy and Distrust* (Boston: Harvard University Press, 1980) at 151, cited in *Andrews, supra,* at 152.

109 Respondent's Factum, at paras. 221, 255.

110 Respondent's Factum, at paras. 70, 187.

111 *M. v. H., supra*, at para. 315; see also *R. v. Mills*, *supra*, at paras. 59 and 125, *per* McLachlin, Iacobucci JJ.; *RJR-MacDonald Inc., supra*, at paras. 69 and 98, *per* La Forest J.

112 See para. 49 above.

consultation.

57. With respect to deference accorded policy choices "based on some fundamental conception of morality" the Respondent underscores the value of workforce participation. However, depriving people of food, clothing and housing as a means of pursuing this end cannot be characterized as a shared or morally acceptable value. As noted above, the evidence suggests that such deprivation actually increased marginalization from the workforce. To the extent that the conception of morality underlying the *Regulation* relies on a stereotype of "morally undeserving" young social assistance recipients, prone to avoiding work, such a consideration is clearly discriminatory in its assumptions and contrary to the "moral obligation of inclusion that informs the spirit of our *Charter*."[113]

58. On the basis of all of the above factors, CCPI submits that the legislature is owed little deference in the circumstances of this case, and as a result the *Regulation* cannot be justified under s. 1.

H. The *Regulation* Violates s. 45 of the Quebec *Charter*

59. CCPI adopts the submissions of the Appellant and the Commission des Droits de la Personne et des droits de la Jeunesse with respect to s.45 of the *Charte des droits et libertés de la personne*.

PART IV: NATURE OF THE RELIEF REQUESTED

60. CCPI requests that the *Regulation* be declared unconstitutional and contrary to s. 45 of the Québec *Charte des droits et libertés de la personne*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Vincent Calderhead	Martha Jackman
Counsel for CCPI	Counsel for CCPI

113*M. v. H., supra*, at para. 308, *per* Bastarache J.