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PART I – STATEMENT OF FACTS

The Intervenor, the Attorney General of Ontario, adopts the Statement of Facts set out in the Factum of the Respondent the Attorney General of Quebec, and makes the following additional submissions regarding the facts.

Factum of the Respondent the Attorney General of Quebec at paras. 1- 76

The Appellant and certain of the intervenors would have this Honourable Court consider the lower scale of benefits provided to some 18-30 year olds under section 29(a) without considering the fact that higher benefits were available on condition of participation in a program to improve employability. They focus their review of the facts on the inadequacy of \$163 per month to meet the basic needs of young adults.

Reasons for Judgment of the Court of Appeal for Quebec, at para. 199 (per Robert J.A.)

Ontario agrees with the Attorney General of Quebec that the lower scale of benefits should not be viewed in isolation but in the context of the overall social assistance program offered by Quebec between 1987 and 1989. This means taking into account the programs available to 18-30 year olds, which included job training, educational upgrading and community involvement. Payments made for participation in these programs raised the total revenues available to recipients in this age group. Furthermore, recipients between 18 and 30 years old were allowed to keep more earned income without losing their eligibility for benefits than recipients more than 30 years old. The effect was to make younger beneficiaries eligible for up to an equal or even higher income than an older beneficiary.

Factum of the Respondent the Attorney General of Québec at paras. 34-36, 61, 114, 250

Reasons for Judgment of the Quebec Superior Court at para. 58

The Quebec social assistance regime provided the lower scale of benefits only to those 18-30 year olds who did not participate in a program to improve their employability. While the availability of higher benefits

should have functioned as an incentive to participate, this approach did not result in the levels of participation the government had expected. Many 18-30 year olds did not participate in programs and consequently received benefits at the lower scale. Complete information as to why young adults made this choice is not available; however, between 60 and 70% of beneficiaries at the lower scale were in fact living at their parents' home while receiving benefits.

Factum of the Respondent the Attorney General of Quebec at paras. 59, 60, 100

Reasons for Judgment of the Court of Appeal for Quebec, at para. 29 (per Baudouin J.A.) (C.A.)

Reasons for Judgment of the Quebec Superior Court at para. 158

During the time period relevant to the present case, Quebec not only directed its monetary incentives but also its training and employment programs to persons in the 18-30 age group. This was an attempt to address a youth employment crisis in Quebec in the 1980s: young adults age 18 and 30 were seen as those most urgently in need. Quebec did not direct similar measures toward improving the job prospects of older recipients, who could obtain welfare benefits at the higher scale without the condition of participation in training. (The policy has since been revised by authorizing the minister to impose the condition of participation in employment programs on persons over 30 as well.)

Factum of the Respondent the Attorney General of Quebec at paras. 33-37

Reasons for Judgment of the Court of Appeal for Quebec, at paras. 57, 202-19

Loi sur le soutien du revenu et favorisant l'emploi et la solidarité sociale, L.R.Q., c. S-32.00 (1998, c.36), ss. 45,7

Ontario's current social assistance program (Ontario Works) similarly contains provisions for mandatory participation in employment programs as a condition for the receipt of income support. Persons in receipt of financial assistance are expected to make reasonable efforts to accept and maintain employment and are required to participate in one or more employment assistance activities. Employment assistance includes job search, job search support services, literacy assessment and training, other basic education and job-specific skills training, community participation, self-employment programs and supports to self-employment. Requirements may be temporarily deferred for certain recipients such as sole support parents whose children are not of school age. The Ontario legislation allows for the imposition of these participation requirements irrespective of the age of the individual recipient. Failure to participate results in ineligibility for financial assistance -- there is no lower scale of benefits for persons who decline to participate.

Ontario Works Act, 1997, S. O. c. 25, s. 7(4)

There has been an evolution in the purposes of social assistance programs over the years. Programs are not only designed to meet basic needs; there is also an increasing emphasis on facilitating the entry of unemployed persons into the workforce. Provincial governments have attempted various means of helping recipients improve their prospects of finding employment. All provincial social assistance regimes in Canada include conditions for the receipt of financial assistance, and the majority now specifically authorize the imposition of mandatory conditions intended to improve employment prospects and facilitate entry into the

workforce as a condition for the receipt of welfare.

Social Development Act, R.S.A. 1990, c. S-16, s. 16(2)(d) (Alberta)

***BC Benefits (Income Assistance) Act*, R.S.B.C. 1996, c. 27, s. 9(1), (2) (British Columbia)**

Family Income Security Act, S.N.B. c. F-2.01, General Regulation 95-61, s. 6(b) (New Brunswick)

Employment and Income Assistance Act, C.C.S.M. c. E98, Employment and Income Assistance Regulation, s. 10 (1) (a), (g) (Manitoba)

Loi sur le soutien du revenu et favorisant l'emploi et la solidarité sociale, L.R.Q., c. S-32.00 (1998, c.36), ss. 45,47 (Quebec)

Consolidation of Social Assistance Act, R.S.N.W.T. 1988, c. S-10, Consolidation of Social Assistance Regulations, R.R.N.W.T. 1990, c. -16, ss. 13.1 (5), (6) (Nunavut, North West Territories)

Ontario Works Act, 1997, S. O. c. 25, s. 7(4) (Ontario)

Based on the facts of this case as outlined in the factum of the Attorney General of Quebec, it is inaccurate for the Appellant and certain intervenors to characterize section 29(a) as simply a provision that provided an amount of assistance to persons under age 30 that was insufficient to meet their needs. The fact is that benefits up to an amount equal or greater than those received by older adults were available to young adults, on condition of participating in job training or other programs. This was intended to achieve the important purpose of helping young adults find jobs.

It is in this context that the Appellant's attack on the lower scale must be assessed. Given the availability of higher benefits, it is apparent that her real objection is to fulfilling the conditions for the receipt of higher levels of assistance. In effect, what is being sought in this appeal is a constitutional right to a publicly funded minimum income without any need to cooperate with reasonable measures intended to help beneficiaries find employment.

PART II – POINTS IN ISSUE

The Constitutional Questions, as stated by the Chief Justice of Canada are:

1. Did s. 29(a) of the Regulation Respecting Social Aid, R.R.Q. 1981, c.A-16, r.1, adopted under the *Social Aid Act*, R.S.Q., c.A-16, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms* on the ground that it established a discriminatory distinction based on age with respect to individuals, capable of working, aged 18 to 30 years?
2. If so, is the infringement justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

3. Did s. 29(a) of the Regulation Respecting Social Aid, R.R.Q. 1981, c.A-16, r.1, adopted under the *Social Aid Act*, R.S.Q., c.A-16, infringe s.7 of the *Canadian Charter of Rights and Freedoms* on the ground that it deprived those to whom it applied of their right to security of the person contrary to the principles of fundamental justice?
4. If so, is the infringement justified in a free and democratic society under s.1 of the *Canadian Charter of Rights and Freedoms*?

The Attorney General of Ontario submits that the Constitutional Questions should be answered as follows:

1. No.
2. Yes.
3. No.
4. Yes.

Ontario's submissions relate primarily to *Charter* section 7 (i.e. Constitutional Question #3).

PART III – ARGUMENT

Charter section 7

The position of the Attorney General of Ontario is that the *Charter of Rights and Freedoms* does not include a justiciable guarantee of a minimum standard of living or minimum level of income, and in particular that the right to security of the person in section seven does not include a right to social assistance. Determining the definition of poverty and the amount of assistance required to meet basic needs is inherently a policy/political matter for determination by legislatures. Courts in Ontario and throughout Canada have consistently rejected claims for a right to social assistance on the basis that this is an economic right and that section seven does not impose positive obligations on governments.

General

Section seven of the *Charter* is violated where there is a "deprivation", the deprivation is of one of the rights of "life, liberty or security of the person", and the deprivation is not in accordance with "the principles of fundamental justice". Each of these aspects of the section seven right must be met for a section 7 *Charter* violation.

Blencoe v. B.C. (Human Rights Commission), [2000] 2 S.C.R. 307 at para. 47

While the section seven right is primarily engaged in the realm of criminal law, this Honourable Court has recognized a narrow and exceptional range of circumstances in which the rights in section seven can arise in a non-criminal context. Such exceptional circumstances have been recognized in state-initiated child protection proceedings for wardship or custody of a child, in civil committals under mental health legislation, or where bodily integrity is at stake.

New Brunswick (Minister of Health and Community Services) v. G.(J.), [1999] 3 S.C.R. 46 at para 65

B.(R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315 at para. 22

Blencoe v. B.C. (Human Rights Commission) at paras. 46, 81-83

In *Blencoe*, this Honourable Court stated that section 7 ought not to be interpreted overly broadly, and cited the decision of LaForest J. in *R. v. Beare* that "it is important not to overshoot the actual purpose of the right in question". Bastarache J. also cited with approval the following passage from *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*:

If liberty or security of the person under s. 7 of the Charter were defined in terms of attributes such as dignity, self-worth and emotional well-being, it seems that liberty under s. 7 would be all inclusive. In such a state of affairs there would be serious reason to question the independent existence in the Charter of other rights and freedoms such as freedom of religion and conscience or freedom of expression.

Blencoe v. B.C. (Human Rights Commission) at paras. 78, 80

Section 7 Does Not Protect Economic Rights

Section 7 of the *Charter* does not protect economic or property rights. In *Irwin Toy Ltd. v. Quebec*, this Honourable Court held that "economic rights as generally encompassed by the term 'property' are not within the parameters of the section 7 guarantee". However the Court did not rule out the possibility that some "economic rights fundamental to human life or survival" might fall within the ambit of section 7.

Irwin Toy Ltd. v. Quebec [1989] 1 S.C.R. 927 at 1003

Walker v. Prince Edward Island, [1995] 2 S.C.R. 407

A & L Investments Limited et al. v. The Queen (1997), 36 O.R. (3d) 127 at 135-6 (C.A.)

This Honourable Court in *Irwin Toy* explained its exclusion of purely economic interests from the protection of section 7 on the grounds that the framers had deliberately excluded property rights from the *Charter*. Alexander Alvaro has pointed out that the framers specifically intended to exempt from judicial consideration income support programmes as well as programmes restricting the ownership of land.

A majority of the provinces opposed the property rights clause, however worded. They argued that a property rights clause threatened to limit the scope of economic legislation enacted by elected governments. A number of provinces, particularly Quebec, had established their own income-security programmes ... All these activities were perceived to be threatened by the inclusion of a property rights clause in an entrenched bill of rights.

Alexander Alvaro, "Why Property Rights were Excluded from the Canadian Charter of Rights and Freedoms," (1991) 24 *CJPS* 309 at 319

See also:

Irwin Toy Ltd. v. Quebec at 1003

Peter Hogg, *Constitutional Law of Canada*, at 44-2-3, 44-8-9, 44-12-12.1

Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), [1990] 1 S.C.R. 1123 at 1164-1170

The inclusion in the 1992 Charlottetown Constitutional Accord of express reference to "reasonable access to housing, food and other basic necessities" and "a reasonable standard of living" illustrates that First Ministers did not perceive economic and social rights such as social assistance to have been guaranteed by section 7 in 1982. The proposed s. 36.1 of the *Charter*, in which these social and economic "policy objectives" were to be included, was also made expressly non-justiciable by the federal government, all provinces and territories:

36.1 (1) Without altering the authority of Parliament, the provincial legislatures or the territorial legislative authorities, the government of Canada and the provincial and territorial governments, are committed to ...

(b) providing adequate social services and benefits to ensure that all individuals resident in Canada have reasonable access to housing, food and other basic necessities; ...

(d) ensuring that all Canadians have a reasonable standard of living;

Charlottetown, 28 August 1992, Final Text (Ottawa: Supply and Services Canada, 1992)

The proposal to include economic and social objectives in the Charter, including access to basic necessities and a reasonable standard of living, was rejected by Canadians along with the balance of the Charlottetown Accord in the 1992 referendum.

Professor Hogg has also cautioned that section 7 should not become a residual right which envelopes all of the legal rights in the *Charter*, or that permits a party to bootstrap an economic rights claim into section 7 under the guise of lack of liberty, stress, stigma or loss of privacy:

It also requires ... that those terms [liberty and security of the person] be interpreted as excluding economic liberty and economic security, otherwise property, having been shut out of the front door, would enter by the back.

Peter Hogg, *Constitutional Law of Canada*, looseleaf (Toronto, Ontario: Carswell, 1997) at 44.9

Courts in Ontario have consistently rejected the idea that the right to security of the person includes the right to a particular job or livelihood.

Aluminum Co. of Canada v. Ontario (1986), 55 O.R. (2d) 522, 29 D.L.R. (4th) 583 (Div. Ct.)

Arlington Crane Services Ltd. v. Ontario (Minister of Labour) (1988), 67 O.R. (2d) 225 (H.C.J.)

R. v. Miles of Music Ltd. (1990), 74 O.R. (2d) 518 (C.A.)

Ontario Nursing Home Association v. Ontario (1990), 74 O.R. (2d) 365 (H.C.J.)

Lister v. Ontario (Attorney General) (1990), 72 O.R. (2d) 354 (H.C.J.)

Biscotti v. Ontario Securities Commission (1990), 74 O.R. (2d) 119, 72 D.L.R. (4th) 385 (Div. Ct.) (affd (1991), 1 O.R. (3d) 409, 76 D.L.R. (4th) 762 (C.A.)

Haddock v. Ontario (Attorney General) (1990), 73 O.R. (2d) 545 (H.C.J.)

Cosyns v. Canada (Attorney General) (1992), 7 O.R. (3d) 641 at 652-54 (Gen. Div.)

Kopyto v. Law Society of Upper Canada (Ont. Div. Ct.), [1993] O.J. No. 2550

Markandey v. Ontario (Board of Ophthalmic Dispensers) (Ont. Ct. (Gen. Div.)), [1994] O.J. No. 484

Assn. of Professional Engineers of Ontario v. Karmash, [1998] O.J. No. 2161 (Ont. Ct. J. (Gen.Div.))

Boucher v. Public Accountants Council for the Province of Ontario, [2000] O.J. No. 3126 (S.C.J.)

The Quebec courts have endorsed the same principle.

Chaoulli c. Québec (Procureure générale), [2000] J.Q. no 479 at para. 226 (C.S.)

It may be noted that the competing line of British Columbia economic rights cases starting with *Wilson v. British Columbia (Medical Services Commission)* (B.C.C.A.) has now been expressly repudiated by the British Columbia Court of Appeal.

Waldman v. British Columbia (Medical Services Commission) (1997), 150 D.L.R. (4th) 405 at para. 293, affirmed in *Waldman v. British Columbia (Medical Services Commission)* (1999), 177 D.L.R. (4th) 321 at para. 52 (B.C.C.A.)

The decision of this Honourable Court in *New Brunswick (Minister of Health and Community Services) v. G. (J.)* does not represent a departure from the established law on economic rights. This Honourable Court found a violation of section 7 and imposed an obligation on the New Brunswick government to provide legal representation to a parent in child protection proceedings. However, there was no finding under the first step of the section 7 analysis that economic assistance to hire a lawyer was an interest protected under section 7 – rather, the deprivation under the first step arose from the province’s direct interference with the parent’s psychological integrity through proceedings to remove their child. Having established this deprivation of

security of the person under the first step, the obligation to provide legal representation arose under the principles of fundamental justice. Accordingly ***G. (J.)* does not depart from the principle that economic rights are not included in security of the person under section 7.**

New Brunswick (Minister of Health and Community Services) v. G. (J.) at 61, 68-91

Social assistance is an economic benefit

As part of this line of analysis, the Ontario courts have also rejected challenges to social assistance legislation under section 7 of the *Charter*, holding that these challenges in effect seek to entrench the right to receive an economic benefit.

Masse v. Ontario (Ministry of Community and Social Services) (1996), 134 D.L.R. (4th) 20 (Ont. Div. Ct.) at 59-60, leave to appeal refused, 40 Admin L.R. (2d) 87 (Ont. C.A.) at 87, leave to appeal refused, 40 Admin. L.R. (2d) 87 (note) (S.C.C.) per O'Driscoll at 42; per O'Brien J. at 58 per Corbett J. at 60

Clark v. Peterborough Utilities Commission (1995), 24 O.R. (3d) 7 at 25, 27-9 (Gen. Div.).

In *Masse v. Ontario (Ministry of Community and Social Services)*, the Court considered whether a reduction in social assistance benefits violated the rights protected in section 7. O'Driscoll, O'Brien and Corbett JJ. all rejected the submission that section 7 protected any entitlement:

In my view, s. 7 does not provide the applicants with any legal right to minimal social assistance. The legislature could repeal the social assistance statutes (FBA and GWAA); there is no question that the Lieutenant Governor in Council is empowered to increase and/or decrease the rates of social assistance.

In my view, s. 7 does not confer any affirmative right to governmental aid. (per Driscoll J.)

Masse v. Ontario (Ministry of Community and Social Services) per O'Driscoll at 42; per O'Brien J. at 57; per Corbett J. at 60

In *Clark v. Peterborough Utilities Commission*, the Court addressed the constitutionality of the Commission's practice of requiring a security deposit from customers without a "satisfactory payment history." The applicant submitted that this violated section 7 because it threatened a right to housing protected under the security of the person. The Court rejected this submission:

This submission goes beyond s. 7's right to life and security of the person to seek a certain level of means and service as a guaranteed right. It is a plea for economic assistance which goes beyond a claim with an economic component to claim utility services as a basic economic and social right devoid of any responsibility to prove oneself to be credit-worthy.

Clark v. Peterborough Utilities Commission at 27

Courts in other provinces have also adopted the position that social assistance is an economic benefit, and, as

such, is not protected by section 7.

Conrad et al. v. Halifax (County) et al. (1993), 124 N.S.R. 251 at 270-272 (S.C.), appeal dismissed on other grounds (1994) 130 N.S.R. 305 (C.A.).

Re Fernandes and Director of Social Services (Winnipeg Central) (1992), 93 D.L.R. (4th) 402 at 414 (C.A.).

Peter Hogg, *Constitutional Law of Canada*, at 44.8 to 44-9

Section 7 does not impose positive obligations on governments

The position of the Ontario courts that an economic right to social assistance does not fall within the meaning of security of the person is supported by the principle that section 7 does not impose positive obligations on the state. Section 7 only provides protection from direct state action that deprives a person of security of the person. Section 7 exists to constrain government action, rather than to impose an obligation on the government to provide a minimum guaranteed income.

In *Canadian Egg Marketing Agency v. Richardson*, Iacobucci J., writing for the majority, reviewed the jurisprudence relating to the general nature of the protection afforded by the *Charter*. He concluded:

... what may appear obvious to some, that the primary purpose of the *Charter* is to constrain government action in conformity with certain individual rights and freedoms, the preservation of which are essential to the continuation of a democratic, functioning society in which the basic dignity of all is recognized.

***Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157 at paras. 55-58**

This Honourable Court and other courts have rejected the idea that provisions of the *Charter* other than section 7 impose positive obligations on the state. In *Canadian Egg Marketing*, **the majority of this Honourable Court held that section 6 protected human dignity** "by forbidding the state from undermining this mobility and autonomy through discriminatory treatment based on place of residence, past or present." It did not create a positive right to work.

***Canadian Egg Marketing Agency v. Richardson* at paras. 58-60**

In *Native Women's Assn. of Canada v. Canada*, this Honourable Court held that section 2(b)'s guarantee of freedom of expression "does not guarantee any particular means of expression or place a positive obligation upon the Government to consult anyone."

***Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627 at para.73**

Similarly, in ***Delisle v. Canada (Deputy Attorney General)***, Bastarache J., for the plurality of this Honourable Court, found that there was no obligation on the government to create a legislative framework to support the freedom of association protected under section 2(d):

In my view, the conclusion of my colleagues and the compensatory remedy they propose is the equivalent of recognizing a right to positive action to give effect to freedom of association through legislation. The basis of such a right must necessarily follow from the right to union representation. I am of the view that this would be to enter the complex and political field of socio-economic rights and unjustifiably encroach upon the prerogative of Parliament.

Delisle v. Canada (Deputy Attorney General), [1999] 2 S.C.R. 989 at para. 23

In *Ferrel v. Ontario*, the Ontario Court of Appeal held that, while section 15(1) of the *Charter* imposes a duty on governments to ensure everyone the equal benefit of laws, "it is difficult to read section 15 as imposing a general obligation to advance equality values." Ontario submits that section 15 requires governments to ensure equal benefit of the law without discrimination but does not impose positive obligations on governments to establish programs to ameliorate the conditions of disadvantaged groups.

Ferrel v. Ontario (Attorney General) (1998), 42 O.R. (3d) 97 at 112 (C.A.)(application for leave to appeal to the Supreme Court of Canada dismissed December 9, 1999)

Those sections of the *Charter* that do impose positive obligations upon the state, such as sections 3 (the right to vote), 14 (the right to an interpreter in court) and 23 (the right to minority language instruction), do so explicitly or by necessary implication. Such provisions should be considered the exceptions to the general rule that the *Charter* does not require the government to take action.

Ferrel v. Ontario (Attorney General) at 112

With respect to section 7, the position is clear since the decision in *Blencoe* that, in order for there to be a "deprivation", there must be a *direct* causal connection between the state action and the deprivation of the right at issue. Such a direct connection can arise where, for example, the state imposes a prohibition through criminal legislation, such as criminal prohibition of assisted suicide or abortion. It can also arise where the state initiates legal proceedings to remove a child from parental custody. There is no "deprivation" where the link between the actions of government and the alleged *Charter* violation is indirect, uncertain, speculative or hypothetical.

Blencoe v. B.C. (Human Rights Commission) at paras 55-60, 64

Morgentaler v. The Queen, [1988] 1 S.C.R. 30

Rodriguez v. B.C. (A.G.), [1996] 3 S.C.R.

In the instant case, the harm complained of by the Appellant did not result from direct government action but from economic and social factors including the state of the Quebec economy and the high unemployment levels faced by young adults in Quebec between 1987 and 1989. This cannot be understood as direct state interference with the Appellant's physical and psychological integrity.

Judicial review of the adequacy of income is not feasible

The position of the Attorney General of Ontario is that the definition of poverty and the appropriate level of social assistance to address poverty are not legal concepts that can be established or applied by the judiciary. These are policy/political matters for determination by legislatures.

There is no official definition of poverty in Canada, and no unanimity on what the poverty line should be or even on the conceptual basis for measuring poverty:

The term "poverty" is widely used in popular discussion. It is not uncommon to see references to the number of poor people in Canada, and to specific income levels below which someone is defined to be poor – so-called "poverty lines". However, there are major conceptual and practical difficulties in defining the extent of poverty. These difficulties are most evident from the wide variety of poverty lines and related statistics in use, not only in Canada but in many other countries. Unlike concepts such as Gross Domestic Product or the unemployment rate, there is no international consensus on how to measure poverty. This lack of consensus is a result of there being no firm or widely accepted conceptual basis for measuring poverty. Even approximate agreement is difficult because of the substantial political importance that attaches to "facts" about the extent, trend, and composition of the poor population.

M.C. Wolfson and J.M. Evans, (1989) "Statistics Canada's Low Income Cut-Offs: Methodological Concerns and Possibilities" Analytical Studies Branch Research Paper, Statistics Canada, Ottawa at 1.

The definition of poverty also varies with time and place and evolving social attitudes. Ivan P. Fellegi, Chief Statistician of Canada, has recently commented on the impossibility of any objective measure of poverty:

The underlying difficulty is due to the fact that poverty is intrinsically a question of social consensus, at a given point in time and in the context of a given country. Someone acceptably well off in terms of the standards in a developing country might well be considered desperately poor in Canada. And even within the same country, the outlook changes over time. A standard of living considered as acceptable in the previous century might well be viewed with abhorrence today. It is through the political process that democratic societies achieve social consensus in domains that are intrinsically judgmental. The exercise of such value judgements is certainly not the proper role of Canada's national statistical agency which prides itself on its objectivity, and whose credibility depends on the exercise of that objectivity.

Statistics Canada (Income Statistics Division), *Low Income Cutoffs from 1990 to 1999 and Low Income Measures from 1989 to 1998*, (Ottawa: Ministry of Industry, 2001) at 39-40.

There are a variety of different ways of calculating levels of poverty in Canada, based on different assumptions and methodologies. Both absolute and relative approaches are used. In the former category are those approaches that identify a 'basket' of goods and services and assess its cost: e.g. Montreal Diet Dispensary (MDD) guidelines, the Social Planning Council of Metropolitan Toronto (SPC) budget guidelines and the Fraser Institute's basic needs approach. The Canadian Council on Social Development considers the 'basket' approach's "arbitrary assumptions" to draw attention "to the subjective (and relative) nature of the poverty lines and how they are derived."

Canadian Council on Social Development, *Canadian Fact Book on Poverty, 2000* (Ottawa: Canadian Council on Social Development) at 25-26.

The other main approach to establishing poverty lines is the relative approach, based on income comparisons with the broader population. The CCSD has proposed a measure of 50% of the national median income to be the dividing line: those with incomes below this amount would be considered poor. Other groups use the Low Income Cut-Offs (LICO) established by Statistic Canada, despite Statistics Canada's statements that the LICO is not designed to serve that function. The LICO classification uses the percentage of income used for food, clothing and shelter to define low income. In 1968, the percentage used as a dividing line was set at 70%; it has subsequently been revised to 54.7% of family income. The use of an arbitrarily chosen percentage of the national median income, or percentage of income used to pay for basic needs, illustrates the relative and subjective nature of definitions of poverty.

Canadian Council on Social Development, *Canadian Fact Book on Poverty, 2000* at 13-29

Statistics Canada (Income Statistics Division), *Low Income Cutoffs from 1990 to 1999 and Low Income Measures from 1989 to 1998*, (Ottawa: Ministry of Industry, 2001) at 39-40.

The various approaches have produced a variety of poverty lines. The following table illustrates the different results for a family of three in 2000:

MDD basket approach (Montreal) \$18,336

SPC basket approach (Toronto) \$37,036

Fraser Institute basket approach (national) \$14,220

CCSD percentage approach (national): \$29,060

LICO percentage approach (large urban centers) \$28,275

Canadian Council on Social Development, *Canadian Fact Book on Poverty, 2000* at 16-29

Poverty is a highly complex problem. Poverty results from numerous social and economic factors, and is addressed through interrelated programs and policies of all three levels of government, as well as through the initiatives of non-government organizations. A finding that section 7 imposes on governments the obligation to provide a minimum standard of living would require the courts to determine the content of such a right in specific cases. This would require considering the causes of a complainant's poverty and the adequacy of various government programs to address it. It would be necessary to review the adequacy of social assistance levels in specific locales, and to order governments to provide an income adjusted to each locality so that it meets basic needs. Enforcing a constitutional right to a minimum level of social assistance would thereby engage the courts in detailed social and economic engineering to relieve poverty.

The courts could find themselves managing a wide range of intersecting social programs and policies within the context of a rapidly changing economy. Policies and programs in the following areas would have to be taken into account and could themselves become the subject of judicial review under s. 7:

- a. the supply of public and other housing
- b. limits on rent increases
- c. additions or deletions from the lists of publicly insured medical treatments
- d. public health
- e. the cost and distribution of utilities (water, electricity, gas)
- f. the price of drugs, including those covered by patent
- g. the availability of drugs, including those imported from other countries
- h. the costs of different foodstuffs
- i. food distribution, including foodstuffs imported from other countries.

See: Peter Hogg, *Constitutional Law of Canada*, at 44-11 to 44-12

Furthermore, provincial governments have taken a number of initiatives in their social assistance programs to help unemployed persons find employment, be it through financial incentives, mandatory requirements to participate in programs as a condition of receipt of assistance, or other approaches. Governments may wish to employ new approaches and not all will enjoy the same level of success. The Court should be reluctant to interpret section 7 in a manner that would constrain and discourage necessary innovation in remedial social programs.

Since establishing the level of income sufficient to meet basic needs is a policy/political determination involving the interaction of complex social and economic factors, it is a matter uniquely suited to determination by legislatures. Accordingly this Honourable Court should avoid establishing a constitutional right to a guaranteed minimum level of income under s. 7. As Howden J. commented in *Clark v. Peterborough Utilities Commission*, a claim to a minimum standard of living:

... requires the kind of value and policy judgments and degree of social obligation which should properly be addressed by legislatures and responsible organs of government in a democratic society, not by courts under the guise of "principles of fundamental justice" under s. 7. I want to be very clear. This is not a matter of judicial deference to elected legislatures; it concerns limits and differences between the political process and the judicial in a democracy. It raises issues of priority and extent of social assistance and quality of life to which all should be automatically entitled. Courts are well equipped to hear and consider evidence, analyze concepts of law and justice, and apply those principles to the evidence. I think in these submissions the applicants seek to introduce social and economic ideas and policies which were intended to be considered and debated in a political forum when property-economic rights were excluded from s. 7.

***Clark v. Peterborough Utilities Commission* (1995) at 28**

As stated by Oliver Wendell Holmes, there is a distinction to be made between the roles of the judiciary and the legislatures in relation to social and economic rights:

Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire.

Lochner v. New York (1905), 25 S. Ct. 539 at para. 59

See also:

R. v. Mills, [1999] 3 S.C.R. 668 at 711-13

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

Other interpretative aids

The Intervenor the Attorney General of New Brunswick submits that s. 36 of the *Charter* ("Equalization and Regional Disparities") should be used to interpret the content of s. 7. However, the language of s. 36(1) makes it clear that the government's role in promoting "equal opportunities for the well-being of all Canadians" was placed exclusively under the control of legislatures. Section 36 expresses non-justiciable social and economic objectives. Any government commitments to income support programmes contained in it are not subject to judicial enforcement.

Factum of the Intervenor the Attorney General of New Brunswick at paras. 11, 17

To the extent that section 36(1) can be used to inform the legal issue in this case, its usefulness is to emphasize that government commitments to programs like social assistance are not justiciable and should not be incorporated into the guarantees under *Charter* section 7.

The 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 Professor Craig Scott, whom they rely upon, has acknowledged that to a "legal mind" 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.

Craig Scott, *Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight?* (1999) 10:4 *Constitutional Forum/forum constitutionnel* 97 at 97-98

Factum of the Intervenor Rights & Democracy, *passim*

Factum of the Appellant at para. 68

Certain of the Intervenor submit that the commentaries of the United Nations Committee on Economic, Social and Cultural Rights (CESCR) can serve as an authority for the imposition under section 7 of an obligation on the government to ensure a minimum standard of living for every individual.

Factum of the Intervenor the Charter Committee on Poverty Rights at paras. 19-21

Factum of the Intervenor Rights & Democracy at paras. 16-26, 90-92, 98-99

Yet, even in South Africa, whose constitution contains express socio-economic rights including positive obligations on the state, the courts have rejected the commentaries of the CESCR as a useful source for determining the content of specific constitutional guarantees. The South African constitution includes a right of access to adequate housing under section 26(1), and the state has an obligation under s. 26(2) to take reasonable measures to progressively realise the right under s. 26(1). In ***South Africa v. Grootboom***, relied upon by certain of the intervenors, no program had been established for the relief of persons in desperate need of housing, and the Constitutional Court accordingly held that the state had not met its obligations under s. 26. It ordered the establishment of a "reasonable" program. However, the Court rejected the notion that the CESCR's commentaries could be used to identify the specific content of the right to housing under s. 26(1), and declined "to determine what would comprise the minimum core obligation [of the right of access to housing] in the context of our Constitution." The Constitutional Court noted that the determination of a minimum core would be a complex and difficult task, entailing consideration of variations in need and opportunity as well as geographical, social and economic factors. The Court lacked the information comparable to that possessed by the U.N. committee that would be necessary to determine a minimum core. It is submitted that, as a judicial institution, it was simply not in a position to make this kind of assessment.

South Africa v. Grootboom, [2000] S.A.J. No. 57 (S.A.C.C.) at paras. 26-33

The Attorney General of Ontario submits that this Honourable Court should likewise reject the notion that the general commentaries of the CESCR could assist courts to establish minimum guaranteed income levels for Canadians under *Charter* section 7.

Ontario also notes that the South African constitution is exceptional among national constitutions in guaranteeing positive rights to a minimum standard of living. While the constitutions of some foreign states such as Ireland, Spain and India do refer to basic needs, in virtually all instances apart from South Africa they do not impose positive and justiciable obligations on governments.

Craig Scott, Patrick Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" (1992) *U. Penn L. Rev.* 1 at 37 n. 114

Conclusion on the first step of the section 7 analysis

In summary, judicial review of the adequacy of specific income levels is not feasible because the definition of poverty is fundamentally subjective, and driven by one's political, economic and social perspective. The determination of poverty lines and similar measures is inherently a policy/political judgment. Such measures vary from time to time and place to place. The content of a right to a minimum income cannot be determined by the application of justiciable principles to evidence. Furthermore, poverty is a highly complex and multi-faceted problem. Enforcing a right to a minimum income would require courts to consider a myriad of interrelated programs and policies and engage in detailed social and economic engineering to reduce poverty. These are not matters for which judicial institutions are equipped.

Ontario's position is supported by the consistent jurisprudence of the Ontario courts and courts elsewhere in Canada rejecting a constitutional right to social assistance. The courts have consistently ruled that guaranteeing a right to a minimum income would constitute protection of an economic right in section 7. They have also ruled that section 7 does not impose positive legal obligations on governments including any obligation to provide a particular level of income. As this Honourable Court held in *Blencoe*, section 7 is restricted to the protection of individuals from direct state interference with physical and psychological integrity.

The international sources and other interpretative aids cited by the intervenors merely emphasize the non-justiciability of government obligations to relieve poverty. Assisting Canadians in poverty to meet their basic needs is an important political and social responsibility, but it is not a constitutional obligation.

Principles of fundamental justice

If this Honourable Court finds it necessary to deal with the second step of the section 7 analysis and considers the principles of fundamental justice, the Attorney General of Ontario adopts the submissions of the Attorney General of Quebec in this regard.

Factum of the Attorney General of Quebec at paras. 232-247

Charter section 15(1)

The Attorney General for Ontario adopts the argument of the Attorney General of Quebec on the interpretation of section 15(1) of the *Charter* and on the application of the *Law* case in the specific circumstances of this case.

Factum of the Attorney General of Quebec at paras. 120-193

In particular, the Attorney General of Ontario submits that what is at issue is a targeted remedial program involving incentives to young adults to increase their ability to become economically self-sufficient. The program allowed younger beneficiaries to receive up to an equal or even higher total income than older beneficiaries without loss of eligibility. "[A] reasonable person in circumstances similar to those of the claimant" would not find such a legislative scheme had "the effect of demeaning his or her dignity."

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497 at para.

As this Honourable Court held in *Law*, young adults have not historically been the victims of negative stereotyping. Rather, that phase in life has been seen as one crucial to an individual's growth and development as an autonomous person. Programs designed to assist disadvantaged young adults in that growth and development cannot be seen as reinforcing marginalization. To the contrary these programmes indicate the state's presumption that the young people have greater potential than older beneficiaries to recover economic independence.

***Law v. Canada (Minister of Employment and Immigration)* at para. 95**

Attaching a condition to an income support program does not demean an individual's dignity unless the condition itself is demeaning. Education, community service and skills training are not demeaning experiences but rather are intended to assist young adults to become self-sufficient and to take their place in the economy and society.

Section 1 of the Charter

If this court finds that the impugned provision does violate section 15 of the *Charter*, the Attorney General of Ontario submits that the violation can be justified under section 1. Ontario adopts the submissions of the Attorney General of Quebec on this issue.

Remedy

Ontario adopts the submission of the Attorney General of Quebec that it is inappropriate in this case to combine a declaratory remedy under section 52 with an award of damages under section 24(1).

Factum of the Attorney General of Quebec at paras. 290-332

In particular, Ontario agrees that there is no reason in the instant case to depart from the rule established by this Honourable Court against awarding retroactive monetary damages in cases where the only issue is the validity of legislation.

Guimond v. Quebec (Attorney General), [1996] 3 S.C.R. 347 at paras. 13-19

Schachter v. Canada, [1992] 2 S.C.R. 679 at 720

Given that Quebec's social assistance reforms of 1989 have already eliminated the distinction between social assistance rates based on age 30, the appropriate remedy in the event of a finding that s. 29(a) is unconstitutional is simply a declaration of invalidity pursuant to s. 52.

PART IV – ORDER REQUESTED

Ontario submits that the appeal should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated this 7th day of September, 2001

Janet E. Minor

Peter Landmann

Counsel for the Intervenor the
Attorney General of Ontario

PART V – LIST OF AUTHORITIES

	<u>PAGE REFERENCES</u>
<u>LEGISLATION</u>	
<i>Ontario Works Act</i> , 1997, S. O. c. 25, s. 7(4)	3, 4
	3
<i>Social Development Act</i> , R.S.A. 1990, c. S-16, s. 16(2)(d)	
<i>BC Benefits (Income Assistance) Act</i>, R.S.B.C. 1996, c. 27, s. 9(1), (2)	4
<i>Family Income Security Act</i> , S.N.B. c. F-2.01, General Regulation 95-61, s. 6(b)	4
<i>Employment and Income Assistance Act</i> , C.C.S.M. c. E98, Employment and Income Assistance Regulation, s. 10 (1) (a), (g)	4
<i>Loi sur le soutien du revenu et favorisant l'emploi et la solidarité sociale</i> , L.R.Q., c. S-32.00 (1998, c.36), ss. 45,47	3, 4

Consolidation of Social Assistance Act, R.S.N.W.T. 1988, c. S-10,
Consolidation of Social Assistance Regulations, R.R.N.W.T. 1990, c. -16,
 ss. 13.1 (5), (6)

JUDGMENTS

A & L Investments Limited et al. v. The Queen (1997), 36 O.R. (3d) 127
 (C.A.)

Aluminum Co. of Canada v. Ontario (1986), 55 O.R. (2d) 522, 29 D.L.R.
 (4th) 583 (Div. Ct.)

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

Arlington Crane Services Ltd. v. Ontario (Minister of Labour) (1988), 67
 O.R. (2d) 225 (H.C.J.)

Assn. of Professional Engineers of Ontario v. Karmash, [1998] O.J. No.
 2161 (Ont. Ct. J. (Gen.Div.))

B.(R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R.
 315

Biscotti v. Ontario Securities Commission (1990), 74 O.R. (2d) 119, 72
 D.L.R. (4th) 385 (Div. Ct.), affirmed (1991), 1 O.R. (3d) 409, 76 D.L.R.
 (4th) 762 (C.A.)

Blencoe v. B.C. (Human Rights Commission), [2000] 2 S.C.R. 307

Boucher v. Public Accountants Council for the Province of Ontario,
 [2000] O.J. No. 3126 (S.C.J.)

Canadian Egg Marketing Agency v. Richardson, [1998] 3 S.C.R. 157

Chaoulli c. Québec (Procureure générale), [2000] J.Q. no 479 (C.S.)

Clark v. Peterborough Utilities Commission (1995), 24 O.R. (3d) 7 (Gen.

Div.)	
<i>Conrad et al. v. Halifax (County) et al.</i> (1993), 124 N.S.R. 251 (S.C.), appeal dismissed on other grounds (1994) 130 N.S.R. 305 (C.A.).	13
<i>Cosyns v. Canada (Attorney General)</i> (1992), 7 O.R. (3d) 641 (Gen. Div.)	10, 20
<i>Delisle v. Canada (Deputy Attorney General)</i>, [1999] 2 S.C.R. 989	15
<i>Ferrel v. Ontario (Attorney General)</i> (1998), 42 O.R. (3d) 97 (C.A.), application for leave to appeal to the Supreme Court of Canada dismissed December 9, 1999	14
<i>Guimond v. Quebec (Attorney General)</i> , [1996] 3 S.C.R. 347	27
<i>Haddock v. Ontario (Attorney General)</i> (1990), 73 O.R. (2d) 545 (H.C.J.)	10
<i>Irwin Toy Ltd. v. Quebec</i> [1989] 1 S.C.R. 927	7, 8
<i>Kopyto v. Law Society of Upper Canada (Ont. Div. Ct.)</i>, [1993] O.J. No. 2550	10
<i>Law v. Canada (Minister of Employment and Immigration)</i>, [1999] 1 S.C.R. 497	25, 26
<i>Lister v. Ontario (Attorney General)</i> (1990), 72 O.R. (2d) 354 (H.C.J.)	10
<i>Lochner v. New York</i> (1905), 25 S. Ct. 539	21
<i>Markandey v. Ontario (Board of Ophthalmic Dispensers) (Ont. Ct. (Gen. Div.))</i>, [1994] O.J. No. 484	10
<i>Masse v. Ontario (Ministry of Community and Social Services)</i> (1996), 134 D.L.R. (4 th) 20 (Ont. Div. Ct.), leave to appeal refused, 40 Admin L.R. (2d) 87 (Ont. C.A.), leave to appeal refused, 40 Admin. L.R. (2d) 87 (note) (S.C.C.)	11, 12

<i>Morgentaler v. The Queen</i> , [1988] 1 S.C.R. 30	15
<i>Native Women's Assn. of Canada v. Canada</i> , [1994] 3 S.C.R. 627	14
<i>New Brunswick (Minister of Health and Community Services) v. G.(J.)</i> , [1999] 3 S.C.R. 46,	7, 11
<i>Ontario Nursing Home Association v. Ontario</i> (1990), 74 O.R. (2d) 365 (H.C.J.)	10
<i>R. v. Miles of Music Ltd.</i> (1990), 74 O.R. (2d) 518 (C.A.)	10
<i>R. v. Mills</i> , [1999] 3 S.C.R. 668	21
<i>Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)</i> , [1990] 1 S.C.R. 1123	8
<i>Re Fernandes and Director of Social Services (Winnipeg Central)</i> (1992), 93 D.L.R. (4 th) 402 (C.A.)	13
<i>Rodriguez v. B.C. (A.G.)</i> [1996] 3 S.C.R.	16
<i>Schachter v. Canada</i> , [1992] 2 S.C.R. 679	27
<i>South Africa v. Grootboom</i> , [2000] S.A.J. No. 57 (S.A.C.C.)	23
<i>Waldman v. British Columbia (Medical Services Commission)</i> (1997), 150 D.L.R. (4 th) 405 (B.C.S.C.), affirmed in <i>Waldman v. British Columbia (Medical Services Commission)</i> (1999), 177 D.L.R. (4 th) 321(B.C.C.A.)	11
<i>Walker v. Prince Edward Island</i> , [1995] 2 S.C.R. 407	7

PUBLICATIONS

Alexander Alvaro, "Why Property Rights were Excluded from the Canadian Charter of Rights and Freedoms," (1991) 24 <i>CJPS</i> 309 at 319	8
Canadian Council on Social Development, <i>Canadian Fact Book on Poverty, 2000</i> (Ottawa: Canadian Council on Social Development)	17, 18
Charlottetown, 28 August 1992, Final Text (Ottawa: Supply and Services Canada, 1992)	9
Peter Hogg, <i>Constitutional Law of Canada</i> , looseleaf (Toronto, Ontario: Carswell, 1997)	8, 9, 13, 19
Craig Scott, Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight?" (1999) 10:4 <i>Constitutional Forum/forum constitutionnel</i> 97	22
Craig Scott, Patrick Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" (1992) <i>U. Penn L. Rev.</i> 1	24
Statistics Canada (Income Statistics Division), <i>Low Income Cutoffs from 1990 to 1999 and Low Income Measures from 1989 to 1998</i> , (Ottawa: Ministry of Industry, 2001)	17, 18
M.C. Wolfson and J.M. Evans, "Statistics Canada's Low Income Cut-Offs: Methodological Concerns and Possibilities" Analytical Studies Branch Research Paper, (Ottawa: Statistics Canada, 1989)	16