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VIA REGULAR MAIL

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Dear Mr. Pecaut and Ms. Pigott:

Re: MISWAA - Development of New Architecture for Income Security in Canada

You have asked us to provide an opinion on the constitutional implications of the policy proposal being developed by the "Modernize Income Security for Working Age Adults" ("MISWAA") project group ("the MISWAA Proposal"). We are pleased to do so. Set out below is our understanding of the Proposal, the questions you have asked us to address, and our conclusions.

A. The MISWAA project and proposal

We understand that MISWAA is an initiative of St. Christopher House and the Toronto City Summit Alliance. The initiative arises out of community concerns regarding the growing economic insecurity of working age adults, and in particular the inadequacy of the minimum wage, especially in urban areas, and the inadequacy of welfare as a means of escaping poverty. Whereas child poverty and seniors' poverty have received significant attention over the last number of years, strategies for addressing the poverty of working age adults have remained relatively constant. MISWAA is interested in developing new policy choices to address ongoing deficiencies in the current policy mix.

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In particular, MISWAA has determined that it would like to see "welfare" changed to a program for emergency needs only, with income security programming delivered through a comprehensive minimum income plan, guaranteeing a basic minimum income to all individuals, whether or not they are working. MISWAA's Proposal is that a tax benefit similar to the national child tax benefit be created for working age adults, so that by filing a tax return every person would have access to a basic minimum income. Eligibility for the benefit would depend on the amount of income available to the person from all sources, and the amount of the benefit would decrease as other income went up, ceasing at a specified threshold. A minimum age threshold is being considered, to ensure that children cannot get the benefit, and some threshold is also being considered to prevent the benefit from going to young people who live with their parents. As with the child tax benefit, the benefit would be delivered directly, via a monthly cheque from the federal government, to the individuals who qualify.

The national child tax benefit includes a supplementary amount for the poorest families. For persons who receive this amount and also receive social assistance, the amount is clawed back by the province (ie. deducted from the welfare cheque) dollar for dollar, and the amount is required to be re-invested in programs for poor children. This "recovery-reinvestment" model is an integral part of the design of the program, intended to ensure that social assistance recipients are not put in a better position than working people who have the same level of income.

MISWAA suggests a similar recovery-reinvestment model for its proposed adult income benefit. That is, amounts payable to social assistance recipients should be deducted from social assistance payments (in whole or in part), with the recovered amount being re-invested, by the province, in programs for poor working age adults. MISWAA suggests that the federal money devoted to this program could be an amount earmarked in the yearly Canada Social Transfer[1] payment to each province.

B. Issues and brief conclusions

You have asked us to consider various constitutional implications of the MISWAA Proposal. The questions addressed and brief conclusions are as follows:

(1) Would the MISWAA Proposal be a valid exercise of a federal head of power?

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[1] Payments under the *Canada Health and Social Transfer Act* are made in two parts: the Canada Social Transfer (which subsidizes education, social assistance etc.) and the Canada Health Transfer (which subsidizes health). See *Federal-Provincial Fiscal Arrangements Act*, R.S.C. 1985, c. F-8, as amended.

The federal government is entitled to use its "spending power" to create and deliver social programs. Such programs are permissible even when they involve spending in areas of provincial jurisdiction, such as health or education, as long as they do not amount to regulation of such matters. Conditions on federal spending may be used to influence provincial government policy without amounting to regulation. Conditions under federal legislation, such as the *Federal-Provincial Fiscal Arrangements Act*, or a new and different piece of legislation similar to the *Canada Health Act*,[2] could be used to create an incentive for the provincial government to adhere to MISWAA's recovery-reinvestment model.

(2) Would denying the proposed benefit to social assistance recipients, young people and/or young people living at home with their parents, constitute discrimination that violates section 15 of the *Charter*?

The proposed exclusions could legitimately be challenged as discriminatory under section 15 of the *Canadian Charter of Rights and Freedoms*,[3] based on the protected grounds of "receipt of social assistance", age and family status. Defence of the proposed distinctions would depend on the ability of the government to articulate and demonstrate a reasonable justification that was not based on stereotypical assumptions.

(3) Is a guaranteed minimum income mandated by the *Charter*?

There is no express requirement of a minimum income in the *Charter*, but such a requirement can be articulated through section 7, which protects "life, liberty and security of the person", and section 15, which requires the government to promote dignity and equality, and to fight against social exclusion. The arguments of low income advocates have not yet been successful on these points, but building blocks are being put in place. The case law demonstrates a rejection of arguments that the *Charter* does not require positive actions by government, and that the *Charter* does not protect any economic interests. International law commitments to provide an adequate standard of living are increasingly important because the Supreme Court of Canada has acknowledged that the *Charter* is a vehicle for enforcing international commitments.

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2 R.S.C 1985, c.C-6 as amended.

3 Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

C. Discussion

(1) Would the Proposal be a valid exercise of a federal head of power?

The federal government's jurisdiction to spend money (its "spending power") is an incident of its right under section 91(1A) of the *Constitution Act, 1867* [4] to legislate in relation to its own debt and property. As an incident of this power, the federal government is entitled to spend its money in areas of provincial jurisdiction, so long as it does not directly regulate in those areas.[5] Common examples of federal spending in relation to matters within provincial jurisdiction include contributions to provincial health, education, and housing programs. The federal tax system is a common way of delivering such expenditures to individuals, either directly, as in the case of the G.S.T. or child tax credits, or indirectly, as in the case of education credits.

The inability to *regulate* in relation to provincial matters does not mean that the federal government is unable to control the way its funds are used in the provincial sphere. The federal government is entitled to make receipt of its funds conditional on the recipient behaving in a particular way. Where the recipient is the provincial government this may compel the province to regulate in a specified manner. This will be objectionable if it amounts to a "colourable device" or a "pretence" for regulation,[6] but this is not likely to be the case where the recipient can choose to avoid the conditions by refusing to take the funds.

The ability to impose conditions means that the federal spending power is a powerful mechanism for the federal government to impose its views on policy relating to social

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[4] (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

[5] *YMHA Jewish Community Centre of Winnipeg Inc. v. Brown*, [1989] 1 S.C.R. 1532 at 1548; *Central Mortgage and Housing Corp. v. Co-operative College Residences Inc*. (1975), 13 O.R. (2d) 394 at 410 (C.A.); *Greater Toronto Airports Authority v. Mississauga (City)* (2000), 50 O.R. (3d) 641 at 661 (C.A.); Peter W. Hogg, Constitutional Law of Canada, loose-leaf ed. (Scarborough: Carswell, 2001) at 6-15 to 6-16[1]; Gerard V. La Forest, The Allocation of Taxing Power Under the Canadian Constitution (Toronto: Canadian Tax Foundation, 1967) at 36.

[6] *Canada (A.G.) v. Ontario (A.G.)*, [1937] A.C. 355 (P.C.) (known as *Reference re The Employment and Social Insurance Act, 1935*) at p. 433. This case involved a challenge to the federal government's creation of the unemployment insurance scheme in the 1930s, which was found to be objectionable not because it was a social program but because it required contributions from employers and thus amounted to regulation of property and civil rights in a province. The scheme required a constitutional amendment, which came into force in 1940.

It is interesting to note that unlike the Privy Council, the Supreme Court of Canada, [1936] S.C.R. 427 said nothing in this case about the limits of the spending power (i.e. it did not refer to any concerns about "pretence"). Rather, Kerwin J. stated that the spending power could be used by Parliament "in any manner that it sees fit", without any suggestion that impacts on provincial priorities could be relevant to the constitutional analysis.

programs that are otherwise within the provincial heads of power. A prime example of this is the *Canada Health Act*, which specifies that federal contributions will be provided *only if* the provincial health program has certain specified characteristics: it must be administered publicly, it must be comprehensive and universal, it must provide for portability from one province to another and it must be accessible to everyone.[7] As the Supreme Court of Canada noted recently in the case of *Chaoulli v. Quebec (Attorney General)*, "in practice" the federal government "… imposes its views on the provincial governments in the health care sphere by means of its spending power".[8]

Similarly, the *Canada Assistance Plan Act* (now repealed) specified that certain social transfers would only be made if provincial social assistance programs met specified standards, *viz*: no workfare provisions, benefit amounts based on budgetary need, and no residency requirements. In *Reference Re Canada Assistance Plan (B.C.)*[9] the question was whether the federal government could alter the level of transfers that it had originally promised under the Act. The Supreme Court of Canada commented on the impact of the CAP conditions in the provincial sphere, stating that the simple fact that a federal spending statute "impacts upon [a] constitutional interest" outside federal jurisdiction was "not enough to find that a statute encroaches upon the jurisdiction of the other level of government".[10]

Winterhaven Stables v. Canada (Attorney General)[11] involved a challenge to several federal spending statutes on the basis that they encroached on provincial regulatory jurisdiction. The Alberta Court of Appeal stated that "the consequence [of legislation authorizing conditional grants to the provinces] is to impose considerable pressure on the provinces to pass complementary legislation or otherwise comply with the conditions of the allocation", but this effect is not itself sufficient to impugn its constitutional validity.

In *Central Mortgage and Housing Corp. v. Co-operative College Residences*, the Ontario Court of Appeal stated that Parliament … "has power under s. 91(1a) to legislate in relation to its own debt and property. It can spend money which it has raised through a proper exercise of its taxing power. It can impose conditions on the disposition of such funds while

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7 *Canada Health Act*, R.S.C. 1985, c. C-6.

8 2005 SCC 35 at para. 16.

9 [1991] 2 S.C.R. 525.

10 *Ibid*. at 567.

11 (1988), 53 D.L.R. (4th) 413 (Alta. C.A.).

they are still in its hands. It has used this power to make federal grants-in-aid, which are subject to compliance with conditions that the Parliament of Canada has prescribed."[12]

Finally, in *Canada Mortgage and Housing Corporation v. Iness* the Ontario Court of Appeal was dealing with conditions on federal subsidies to provincially regulated subsidized housing. The court acknowledged that conditions on spending are a powerful tool for influencing social policy in the provincial sphere:

> [33] Interestingly, over the years, the federal government has frequently usedits spending power to influence social and economic policies in a broad range of areas, such as education, heath care, housing, highways and social programs, that come within the provincial competence with few, if any, challenges. Currently, there are over one hundred federal/provincial shared-cost programs, mostly of a continuing nature: Hogg, supra, at 6-11.
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> [34] In this case, I am satisfied that the impugned condition [requiring social assistance recipients to pay rent on a different scale than other residents of a federally funded co-operative] … is a valid exercise of the federal government's exclusive power to spend its own money. It was not, in substance, an attempt to regulate in the provincial areas of housing or human rights relating to housing.
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> [35] The grant to the Co-op with the impugned condition was not mandatory. The Co−op was free to accept or reject it. The voluntary nature of the grant argues against the condition being construed as a regulation. Moreover, s. 2(9) is manifestly linked to an exercise of Parliament's spending power. It is a provision that limits the amount of the grant that is available to certain individuals. The condition **reflects a federal government policy…** [emphasis added].[13]

In light of this case law it is apparent that a federal recovery-reinvestment policy, as contemplated in the MISWAA Proposal, could be achieved through this power to impose conditions on spending. Currently the federal government makes contributions to provincial social assistance programs under the *Federal-Provincial Fiscal Arrangements Act*.[14] That *Act*, or a new Act, could be amended to reduce or eliminate the entitlement of a province whose social assistance program did not include the requisite recovery-reinvestment scheme. A specific

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12 *Supra* note 2 at 410.

13 (2004), 70 O.R. (3d) 148 (C.A.) at 157-58.

14 *Supra* note 1.

portion of funding could be subject to this condition (ie. earmarking of part of the Canada Social Transfer payment as the funding for MISWAA's proposed tax credit), and the consequence of failing to have a recovery-reinvestment model would be to withhold the funds.

A question might legitimately arise as to whether the degree of specificity required to ensure the desired recovery-reinvestment model might cross the line between conditional spending and regulation. None of the cases to date considers such a detailed programming response by the provincial authorities; they deal, rather, with broad principles (such as portability of health care). It could be argued that a very specific programming requirement is a "colourable device" or "pretence" for regulation, but the answer to this would be that receipt of funds by the province remains voluntary and thus cannot be deemed regulatory.

(2) Would denying the proposed benefit to social assistance recipients, young people and/or young people living at home with their parents, constitute discrimination that violates section 15 of the *Charter*?

Denying a social benefit to a subgroup of persons who would otherwise be eligible for that benefit may constitute discrimination contrary to section 15 of the *Charter*.[15] Identifying whether this is so requires us to address two questions: whether the exclusion is based on an enumerated or analogous ground under the *Charter*, and whether the effect of the exclusion is discriminatory in the sense that it is demeaning or otherwise harms the dignity of the persons excluded.

With respect to the first question, the exclusions contemplated in the Proposal are based on age, family status[16] and receipt of social assistance. The first two grounds are enumerated grounds of discrimination in the *Charter*, and the third ground has been found by the Ontario Court of Appeal to be an analogous ground.[17] This means that a young person living at home, or a social assistance recipient seeking to challenge the MISWAA proposal could easily satisfy the "grounds" requirement of the section 15 analysis.

Analysis of the dignity issues is less straightforward. Four factors must be considered: (1) whether the excluded group or individual experiences disadvantage, stereotyping, prejudice, or vulnerability; (2) the correspondence, or lack thereof, between the

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[15] *Falkiner v. Ontario (Director, Income Maintenance Branch, Ministry of Community and Social Services)* (2002), 212 D.L.R. (4th) 633 (Ont. C.A.); *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566.

[16] The inclusion of specific family relationships within the content of "family status discrimination" was confirmed by the Supreme Court of Canada in *B. v. Ontario (Human Rights Commission)*, [2002] 3 S.C.R. 403.

[17] *Falkiner*, *supra* note 12.

ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others; (3) the ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society; (4) the nature and scope of the interest affected by the impugned law.[18] These must be considered with respect to each of the three alleged grounds of discrimination.

(a) Social assistance recipients

The Ontario Court of Appeal has found that social assistance recipients are a protected group under the *Charter*. The exclusion of social assistance recipients from the benefits proposed by MISWAA is subject to challenge on the basis that it treats this group as being less important, or less worthy.

A challenge of this nature has been brought against the clawback of the national child tax benefit supplement. Our firm is counsel on behalf of the applicant social assistance recipients in that case. We intend to demonstrate that the impoverishment of social assistance recipients is equal to that of the people who *do* receive the benefits in question, so there is no valid justification for excluding them from a benefit that is intended to relieve poverty. The exclusion is based on a false and pejorative assumption that maintaining the desperate poverty created by social assistance creates an incentive for recipients to remove themselves from welfare and join the workforce. It ignores the fact that poverty is a result of structural factors, not personal choice or personal failure.

The very same arguments can be made in respect of MISWAA's proposed recover-reinvestment model.

(b) Young people

The exclusion of people under a specific age would presumably be based on assumptions that they do not have the same needs as the people included in the program, and that they require incentives to enter the workforce. The case of *Gosselin v. Quebec (Attorney General)* suggests that an exclusion based on these types of assumptions could survive a section 15 challenge.[19]

Gosselin involved a Quebec welfare rule which required under-30-year-olds to participate in specific work or study programs, failing which they would receive drastically reduced welfare benefits. The programs were not readily available at all times, and resulted in many under-30-year-olds being unable to access full benefits. The Supreme Court of Canada

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

[19] [2002] 4 S.C.R. 429.

decided that this was not discriminatory because (1) young people are not traditionally considered a disadvantaged group; (2) the intention was to improve the work situation of young people and thus was an enhancement (rather than an impairment) of their dignity; (3) the evidence did not show that young people were truly deprived (i.e. truly in need) under the rule. The Supreme Court found, therefore, that the differential treatment of under-30-year-olds was not discriminatory.

An important difference between the MISWAA Proposal and *Gosselin* is that the Quebec welfare rule did not result in complete exclusion of young people from all benefits. MISWAA's Proposal would be vulnerable if there was no alternate benefit available to meet the needs of young people who are not working and have no other source of income. Complete exclusion from all benefits is more likely to result in a finding of discrimination.

(c) Young people who live with their parents

Exclusion of young people living with their parents involves differential treatment based on both age and family status. It would be grounded in an assumption that these young people do not have the same needs as those who live away from home.

Similar rules in welfare schemes have been subject to challenge in Ontario and Alberta. The case in Ontario is based on section 15 of the *Charter* and has not yet been heard by the court. Our firm is counsel in that case. It is founded on evidence showing that the different treatment of young people is based on a stereotypical assumption of what their parents provide to them, and it negatively impacts their dignity by forcing them to move away from home, if their parents cannot support them, even if there are important reasons (such as caregiving needs) to remain at home. Poor families are penalized for being poor and choosing to live together.

The case in Alberta was grounded in human rights legislation and was successful.[20] The human rights tribunal found that there was no justification for excluding a person based on the fact that the person lived with his or her parent:

> Mr. Weller was treated differently than others eligible for social allowance who required shelter allowances, solely because he lived with his mother and paid rent to her rather than to a non-related party. Rent is rent no matter who it is paid to, and to hold Mr. Weller to a different standard because he paid rent to his mother, is discrimination. There is no requirement in law for a parent to support a non-student adult children in a non-divorce situation, and,

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[20] *Weller v. Alberta Human Resources and Employment and Citizen's Appeal Panel* (Complaint #N2002/06/0065, Alberta Human Rights Panel, November 3, 2004).

therefore, there was no compelling reason for Mr. Weller's mother to take him in to live rent free.

The strength of a challenge of this nature to the MISWAA Proposal would depend on the government's ability to demonstrate that the exclusion was based on some rational evidence that the excluded young people were being supported by their parents. It would be safest for the government to tailor a rule to a person's actual needs, rather than to have a blanket rule based on generalized statistics about parents supporting adult children. It is possible, however, that general information would be enough to satisfy a court that the exclusion was rational.

(3) Is a guaranteed minimum income mandated by the *Charter*?

The *Charter* does not contain a specific right to a minimum level of income, or to a basic standard of living. However, there are two general sections that could be interpreted to provide such a right. These are sections 7 and 15 of the *Charter*, which state:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
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> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Under section 7, the argument is that persons who lack a basic level of income, for whatever reason, are under a perpetual threat to their life, liberty and security of the person. Such a threat, in a wealthy country such as Canada, cannot be justified by reference to any principle of fundamental justice. The principles of fundamental justice are the basic tenets underlying our justice system, such as procedural fairness and, substantively, the right to have laws that are not arbitrary, or overly broad. There are no such principles that can be used to justify a government choice to permit and perpetuate extreme poverty, where a different governmental choice could relieve that deprivation.

Under section 15, the argument is that the purpose of the equality guarantee is to protect individual human dignity, which means that the law must be used to enable all persons to enjoy equal participation and inclusion in society. Low income people are a disadvantaged group that is analogous to those which are protected in section 15, and government choices which result in the exclusion of this group from full participation in society violates their equality rights. The absence of a basic level of income creates not only economic inequality, but social exclusion,

and thus is unacceptable under section 15. Moreover, the groups that are most likely to experience poverty are the same vulnerable groups that are protected under section 15 (eg. women, single mothers, racialized persons, disabled individuals, aboriginal persons).

Both of these arguments are bolstered by reference to Canada's international law commitments, which *expressly* obligate Canada to ensure that everyone in this country has an adequate standard of living. Rights to social security including food, clothing and housing are recognized as fundamental human rights in the *Universal Declaration of Human Rights*.[21] Article 11 of the *International Covenant on Economic, Social and Cultural Rights*, which Canada ratified in 1976, requires Canada to progressively realize the right of everyone to an adequate standard of living including adequate food, clothing, and shelter.[22] The Supreme Court of Canada has expressly stated that international law obligations should be used to interpret *Charter* rights and values.[23]

Disputes regarding these issues often centre around two basic debates about what kind of government actions the *Charter* is *intended* to address. The first debate is about whether "economic rights" are beyond the scope of the *Charter*. Opponents argue that in the absence of express language the *Charter* must be understood to exclude "economic rights". The second debate involves a question of whether the *Charter* creates only negative constraints on government or whether it creates, in addition, positive obligations to take steps in furtherance of the guaranteed rights.

The position of welfare rights opponents, with respect to these debates, has been gradually eroded in the Supreme Court of Canada. In the early days of the *Charter*, the Supreme Court acknowledged that "property" rights had been expressly excluded from the *Charter*, but concluded that this did not necessarily result in the exclusion of all economic interests. It said that there may be an "economic component" to some *Charter* rights, and that these rights might be protected even if purely economic rights are not:

> [The exclusion of the term "property" from s. 7]… leads to a general inference that economic rights as generally encompassed by the term "property" are not within the perimeters of the s. 7 guarantee. This is not to

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[21] GA Res. 217(III), UN GAOR, 3d Sess., Supp. No.13, UN Doc A/810 (1948) 71, Article 25.

[22] 16 December 1966, GA Res. 2200A (XXI), UN Doc. A/6316 (entered into force 3 January 1976).

[23] For example, in *Baker v. Canada*, [1999] 2 S.C.R. 81 at para. 70 the Supreme Court of Canada stated that international human rights law is a "critical influence on the interpretation of the scope of the rights included in the Charter". In *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at para. 23 it stated 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 that Canada has ratified".

> declare, however, that no right with an economic component can fall within "security of the person". Lower courts have found that the rubric of "economic rights" embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property – contract rights. To exclude all of these at this early moment in the history of Charter interpretation seems to us to be precipitous. We do not, at this moment, choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights. In so stating, we find the second effect of the inclusion of "security of the person" to be that a corporation's economic rights find no constitutional protection in that section.[24]

In subsequent cases the Supreme Court has found violations of *Charter* rights in several cases where the interests at issue were related, at least in part, to the economic needs or circumstances of the claimant. For example, in *Schacter v. Canada* the court extended parental benefits (an economic benefit) to adoptive parents, when Parliament had chosen to limit such benefits to biological parents.[25] In *Eldridge v. British Columbia (Attorney General)* the court held that state-paid sign language interpretation must be included in the health care system.[26] In *New Brunswick v. G.J.* the court found that where the state has apprehended a child, parents are entitled to state-funded legal assistance.[27] All of these cases support the argument that the failure to provide a benefit – including an economic benefit – may constitute discrimination.

These cases demonstrate not only that benefits of an economic nature are not excluded from the *Charter*, but also that the *Charter* may be used to require governments to take action – and to spend money – in circumstances where they have otherwise chosen not to do so. That is, these cases demonstrate that *Charter* rights can have a positive component. Over time, the Supreme Court has come to acknowledge this. In *New Brunswick v. G.J.* the court stated that the *Charter* right to counsel may not require create a positive obligation in all circumstances, but that it could (and in that case did) do so where the absence of counsel resulted in the violation of a section 7 right.[28] In *Schacter* the court expressly acknowledged section 15 as a "hybrid" right, being neither strictly negative nor strictly positive. In many cases the Supreme Court

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24 *Irwin Toy ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 1003.

25 [1992] 2 S.C.R. 679.

26 [1997] 3 S.C.R. 624.

27 [1999] 3 S.C.R. 46.

28 *Ibid*. at para. 107.

emphasized that the purpose of section 15 is not just to protect against discrimination, but to "promote" equality. Since promotion requires activity, section 15 would appear to require not just restraint, but action.

In addition to the concerns underlying the debates about the nature of the rights protected by the *Charter*, the specific tests developed in the case law have created hurdles to the recognition of a right to a basic level of income. For example, with respect to section 7, its location in the *Charter* under the heading "Legal Rights" gave rise to a suggestion that it is intended to protect individuals only in relation to their dealings with the justice system. This concept at first limited the right to the criminal justice system, and then expanded to include all aspects of the justice system. Extension of section 7 to welfare rights takes it beyond the sphere of the justice system entirely, and thus requires a court to move beyond the more narrow conception of section 7 as being related only to the administration of justice. To date only two justices of the Supreme Court of Canada have made this move.[29]

With respect to section 15, the legal test has always been based on comparison. The claimant must show that there is differential treatment that results in a detrimental impact on human dignity, by perpetuating a negative stereotype or otherwise creating a further disadvantage for the disadvantaged group. Opponents of welfare rights argue that the claim to a minimum income does not invoke any relevant comparative exercise, since any differential treatment is created by economic circumstance, not government action. Any impact on dignity is due to the inability to purchase goods, not government treatment, and it does not create or reflect negative attitudes or stereotypes.

Keeping all of these underlying concerns in mind, how has the right to a minimum standard of living fared in the courts? Two cases that are most directly on point were both unsuccessful. But in our view neither is fatal to claiming the right in the long run.

The first case is *Masse v. Ontario (Ministry of Community and Social Services)*, a Divisional Court case challenging the 21.6 percent cut to welfare in Ontario in 1995.[30] The court rejected a claim that the reduction of welfare by 21.6 percent violated section 7, saying that section 7 does not protect purely economic rights. It also rejected the section 15 claim on the basis that poor people are too diverse a group to constitute an analogous ground under section 15. The case was very disappointing for low income people in Ontario, but its importance is increasingly slim. It predates the Supreme Court jurisprudence discussed above, vis-à-vis positive obligations, and its section 15 reasoning was directly overruled by the Court of Appeal in *Falkiner*.

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29 See discussion of *Gosselin*, *infra*.

30 [1996] O.J. 363 (Div. Ct.).

Of greater importance is *Gosselin v. Quebec (Attorney General)*, decided by the Supreme Court of Canada in 2002.[31] As described above, it involved a welfare rule in Quebec which persons under 30 were given significantly lower social assistance than persons 30 years or older. She claimed that the welfare rule violated sections 7 and 15 of the *Charter*. The decision from the Supreme Court was split, with only two out of nine justices accepting the section 7 claim, and four out of nine accepting the section 15 claim.

With respect to section 7, one judge held that section 7 relates only to the administration of justice, and should not be extended beyond that sphere. Five judges rejected this categorical approach, but were unwilling to grant the required extension in the circumstances of the case at hand. The reasons of McLachlin C.J. on this issue stated:

> 81 Even if s. 7 could be read to encompass economic rights, a further hurdle emerges. Section 7 speaks of the right not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice. Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to deprive people of these. Such a deprivation does not exist in the case at bar.
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> 82 One day s. 7 may be interpreted to include positive obligations. To evoke Lord Sankey's celebrated phrase in Edwards v. Attorney-General for Canada, [1930] A.C. 124 (P.C.), at p. 136, the Canadian Charter must be viewed as "a living tree capable of growth and expansion within its natural limits": …The question therefore is not whether s. 7 has ever been -- or will ever be -- recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.
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> 83 I conclude that they do not. With due respect for the views of my colleague Arbour J., I do not believe that there is sufficient evidence in this case to support the proposed interpretation of s. 7. **I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances.** However, this is not such a case. The impugned program contained compensatory "workfare" provisions and the evidence of actual hardship is wanting. The frail platform provided by the facts of this case cannot support the weight of a positive state obligation of citizen support [emphasis added].

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[31] *Supra* note 19.

As Chief Justice McLachlin notes, Arbour J. found that the evidence was sufficient to warrant an extension of section 7 to include the right to a basic standard of living. L'Heureux-Dube J. concurred.

With respect to section 15 there was a five-four split in the court. The majority held that there was no violation of section 15, based on a finding – rejected by the minority – that the rule did not impact on the dignity of the young people affected. In fact, they said, it enhanced dignity by addressing the specific circumstances of young people looking for work.

The case was argued on the basis of age discrimination, not the broader question of whether poverty itself is an analogous ground, and whether minimum income is necessary to promote equality. The broader analysis would be supported, however, by the findings of the minority, which focused on the indignity caused by the deprivation resulting from the welfare rule. The minority found that the "bright line" based on age did not reflect the actual needs of under-30-year-olds, and there was no evidentiary basis for the assumption that these young people got support from their families. This resulted in living conditions that showed no respect for young people's value as individual human beings. This result would be the same not just for the exclusion of a particular group from an existing program, but also for the failure to provide any minimum income whatsoever.

For low income advocates the message from *Gosselin* is mixed. On a positive note, it is comforting that only one justice rejected the idea that section 7 can protect against dire poverty, with the rest either leaving the question open for another day (six judges), or finding an actual violation (two judges). The very close vote on section 15 issues is also of some comfort, recognizing that *Charter* values develop in small increments, and membership on the court has changed since then.

On the other hand, it is truly disturbing to find that the evidence was considered insufficient by so many judges. There was extensive evidence of the destitute circumstances that Ms. Gosselin and others had faced, including severe hunger and malnourishment, homelessness, despair, degrading and criminalized survival strategies such as begging and petty theft, and even suicide. The fact that so many judges discounted this evidence seems to indicate a very significant blind spot on these issues.

Overall, in our view there remain significant hurdles to the acceptance of a right to minimum income, but the arguments in favour of such a right are sound. The building blocks of the argument are grounded in increasingly well-established jurisprudence, as well as in commitments made by Canada in various international treaties. In these circumstances there remains a good chance that a right to a minimum income will one day be recognized under the *Charter*.

4. Conclusions

We would be pleased to answer questions or provide any further information or analysis that you require. Please do not hesitate to contact us in this regard. We look forward to following the work of MISWAA and would be happy to be of assistance in the future.

Yours truly,

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RA/jss

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