Positive Obligations Under Sections 15 and 7 of the Charter: A Comment On Gosselin V. Québec

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POSITIVE OBLIGATIONS
UNDER SECTIONS 15 AND 7
OF THE CHARTER:
A COMMENT ON
GOSSELIN V. QUÉBEC

Jamie Cameron *

I. LINGERING DOUBTS

From the outset, the Canadian Charter of Rights and Freedoms has had its detractors.¹ Today it is predictable, and healthy too, for commentators to debate judicial review’s consequences for parliamentary government. The Charter’s significance should not be understated: just as individuals became entitled to challenge actions by the state which interfere with their liberty, courts acquired the authority to enforce those entitlements against the democratic branches of government. Still, the Supreme Court of Canada declared, in the early years of Charter interpretation, that the adjudication of constitutional rights “must be approached free of any lingering doubts as to its legitimacy.”²

Despite that pronouncement, the Court realizes that doubts persist and are an adjunct of the institutional tension that accompanies judicial review. The tension can surface when a “negative” remedy invalidates a legislative provision that violates the Charter, but is aggravated by claims which seek to impose positive obligations on governments, or which otherwise displace economic and social policy. Claims of that nature pose a dilemma for courts. On the merits, they may be as compelling as other entitlements which can be enforced by a negative order limiting the government’s authority. At the same

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time, the legitimacy of review is most vulnerable when the exercise of judicial power interferes with functions that are dedicated to the representative branches of government. In such instances it is uncertain whether the claim should prevail on substantive grounds or fail for institutional reasons.

Surprisingly, the Supreme Court has not been hesitant to recognize positive rights and impose positive obligations under the Charter. Though the judges are aware of limits on their powers of review, the question of institutional boundaries has played a minor role in this jurisprudence. It is the merits of claims, rather than doubts about the legitimacy of review, that determine the outcome in these cases. *Gosselin v. Québec*, which tested the constitutionality of Québec’s welfare policy, provides a recent example of the Court’s tendency to subordinate institutional considerations to the question of entitlement.4

There, the question was provoked by the province’s two tier social assistance program, which reduced the benefits payable to those under the age of 30 to a fraction of what those over 30 were entitled to receive. Younger welfare recipients could become eligible for nearly equivalent benefits, though, by participating in prescribed incentive programs.5 The issue for the Court was whether this age-based differential for benefits violated sections 15 or 7 of the Charter. On its face, the program singled welfare recipients out for unequal treatment on the basis of their age, which is one of section 15’s prohibited

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3 See *Schacter v. Canada*, [1992] 2 S.C.R. 679 (invalidating unemployment benefits which were underinclusive because “natural” parents were not given the same benefits as adoptive parents); *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (declaring that it was unconstitutional for the province’s health care services not to provide sign language interpretation and directing the government to comply with s. 15’s requirements); *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (adding “sexual orientation” to the prohibited grounds of discrimination in the province’s human rights legislation); *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 181 [hereinafter “Provincial Judges Reference”] (holding that the provinces are constitutionally obligated to establish independent commissions to address the question of judicial remuneration); *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 (imposing a positive obligation on governments, under s. 7 of the Charter, to provide state-funded counsel, in certain circumstances, for child custody proceedings), and *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016 (imposing an affirmative obligation on Ontario to protect the meaningful exercise of agricultural workers’ freedom of association under s. 2(d) of the Charter). See also *Auton (Guardian ad Litem of) v. British Columbia (Attorney General)* (2002), 220 D.L.R. (4th) 411 (B.C.C.A.); leave to appeal granted May 15, 2003, [2002] S.C.C.A No. 510 (ordering the province to fund specified medical treatment for children suffering from autism).

4 2002 SCC 84.

5 The base amount of welfare payable to those under age 30 was roughly one-third of the base amount payable to those 30 and over. Under a scheme introduced in 1984 and since repealed, those under 30 could increase their welfare payments, over and above the basic entitlement, to nearly the same level as those ages 30 and over. Increased benefits were conditional, however, on participation in one of three training programs.
grounds of discrimination. The section 7 claim was more innovative. Under that guarantee, the applicant maintained that Québec’s failure to provide minimum benefits to those under age 30 violated section 7’s security of the person. In either case, the question was whether the Charter required Québec to provide equal or adequate benefits.

Five of the Court’s nine judges wrote to explain their conception of the applicant’s entitlement in this case. Though it is tempting to address their differences of opinion, doing so would deflect attention from the question of institutional boundaries, when the purpose of this article is to explain why the Court’s avoidance of that question is problematic. In this, it should be recognized that the constitutional status of positive rights and obligations raises “irksome” issues. These entitlements cannot be excluded from the Charter, but nor can the questions they raise be ignored. In the circumstances, Gosselin v. Québec provides an opportunity to explore the interpretative challenges those issues present. The inquiry begins by reviewing the status of institutional boundaries in the jurisprudence prior to Gosselin. In discussing the Court’s analysis of the right to equal or adequate welfare benefits, the next part comments on the Chief Justice’s majority opinion in Gosselin, which dismissed the applicant’s claim under sections 15 and 7. In doing so, it explains how she warped the definition of equality to avoid conducting a section 1 analysis and addressing the institutional considerations at stake. Thereafter, it discusses Arbour J.’s dissent, which proposed an extraordinary theory of positive rights under section 7. Despite its far-reaching consequences for the legitimacy of review, Arbour J.’s support for rights of performance under section 7 also failed to address the institutional considerations at stake.

Taken together, the Court’s five opinions create the impression that the substantive entitlement was not only determinative, but the exclusive issue at stake. Yet the fundamental question in Gosselin was not whether the age distinction infringed the applicant’s right to equality or security of the person. More to the point, the issue was whether the Court’s mandate includes the power to set constitutional standards for the distribution of welfare benefits.

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6 Chief Justice McLachlin’s majority opinion upholding the program under ss. 15 and 7 was joined by Gonthier, Iacobucci, Major and Binnie JJ.; a minority of four, comprising L’Heureux-Dubé, Bastarache, Arbour, and LeBel JJ. found it unconstitutional under s. 15; Arbour and L’Heureux-Dubé JJ. alone found that the program also violated s. 7 of the Charter.

7 Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803) (explaining the delicacy of the Court’s task when legal issues create confrontations between the branches of government).

8 Justice Bastarache also wrote a substantial opinion, in dissent from the majority opinion’s s. 15 analysis, and in disagreement with Arbour J.’s theory of s. 7. Though his judgment is not considered separately, his comments on the reasons of the Chief Justice and Arbour J. are included in the analysis of their opinions.
That issue was inherent in Gosselin’s claim, and unavoidable as a result. It can be noted, in this regard, that boundaries limit the scope of review and, in doing so, guard its legitimacy. To pretend that there are no boundaries, or to ignore their presence — as the Court did in Gosselin — can only place the legitimacy of review at risk. In developing that theme, the paper concludes by explaining why institutional considerations must inform the Court’s analysis of positive rights and obligations under the Charter.

II. THE INSTITUTIONAL BOUNDARIES OF REVIEW

The judiciary’s mandate to enforce constitutional rights is based on an understanding that there are institutional boundaries, or limits, on the power of the courts. Where those boundaries should be placed and how they should be defined are questions that defy answer. Even so, two observations can be offered. First, the legitimacy of review is dependent on a concept or theory of institutional role. To put it another way, the Supreme Court’s authority to enforce rights rests on a concept of function that separates and distinguishes the respective responsibilities of the courts and legislatures. Second, it follows from that assumption of separate functions that the legitimacy of review is weakest when the exercise of judicial power threatens to cross the boundaries that distinguish the branches of government.

The Supreme Court has been aware, from the beginning, of boundaries on its power of review under the Charter. Yet it has also been determined not to renego on its promise that the Charter’s rights would receive a “generous rather than a legalistic” interpretation, and one which would secure for individuals the full benefit of the Charter’s protection.9 Respecting those boundaries without shortchanging the Charter’s entitlements has not been an easy goal for the Court to achieve. In this, the Motor Vehicle Reference is instructive.10 Unless qualified, the Court’s substantive interpretation of section 7 could grant individuals unlimited protection from government interference with their liberty and security interests. That view of the guarantee ignored the intent of its framers and brought the cautionary tale of the American due process clause to the forefront. Having provoked fears that section 7 could be invoked against all manner of legislative policy, Lamer J. explained why the Motor Vehicle Reference stayed within the institutional boundaries of review.

He recognized that to preserve the legitimacy of review it was necessary to constrain the scope of section 7. To pre-empt critics of the decision, he declared that the Motor Vehicle Reference did not invite the courts to “decide upon the

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10 Supra, note 2.
appropriateness of policies underlying legislative enactments,” because the scope of the guarantee would be limited to matters pertaining to the administration of justice. Justice Lamer derived this constraint from the relationship between section 7 and sections 8 to 14, which convinced him that the administration of justice was the concern of the Charter’s “Legal Rights.” It made sense to him that section 7 should be given a similar interpretation. As a result, the Motor Vehicle Reference held that the fundamental justice clause qualifies the otherwise unlimited substantive scope of life, liberty and security of the person. This reading of the guarantee served important institutional purposes. By confining the scope of section 7 to the justice system, it allowed Lamer J. to forge a distinction between the judicial domain and the realm of general public policy.

As he explained, granting section 7 a substantive interpretation did not cross institutional boundaries because the guarantee’s principles “do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system.” In this, he was confident that the inherent domain principle would provide “meaningful content for the section 7 guarantee all the while avoiding adjudication of policy matters.” Moreover, by characterizing sections 8 to 14 as instances or illustrations of section 7’s more general guarantee of fundamental justice, all of which he described as “essential elements of a system for the administration of justice,” he reinforced the claim that section 7 was concerned with justice, not policy.

Justice Lamer’s concurring reasons in the Prostitution Reference further entrenched the Motor Vehicle’s distinction between matters of justice, which fell within the “acceptable sphere of judicial activity,” and policy issues, which did not. Specifically, he discouraged the lower courts from recognizing social and economic entitlements by warning that “[t]he courts must not, because of the nature of the institution, be involved in the realm of pure public policy.” That, he acknowledged, is the “exclusive” role of the elected representatives, and added that to expand the scope of section 7 too widely would infringe upon that role. The Motor Vehicle Reference may have given section 7 a substantive interpretation, but it was one that was limited to the administration of justice and did not include economic rights or other

11 Id., at 496.
12 Id., at 503.
13 Id.
14 Id., at 503.
15 Id., at 504.
17 Id.
entitlements which fell within the realm of “general public policy dealing with broader social, political and moral issues.”

This conception of the guarantee was predicated on the assumption that, as long as judicial power of review was bounded by the inherent domain criterion, the legitimacy of review would not be at risk. That, in brief, was how the Court fashioned a compromise between the Charter’s aspirations for the protection of rights and the inevitability of limits on review. In Gosselin, however, Arbour J. re-examined those assumptions and proposed a transformative interpretation of section 7. In her view, the Court developed an “habitual” interpretation of the guarantee after the Motor Vehicle Reference, which constructed a “firewall” against positive rights under section 7. For the purpose of this section, the point is that the Motor Vehicle’s interpretation of the guarantee was rooted in respect for the institutional boundaries between courts and legislatures. Whether to preserve such firewalls and boundaries or to remove them from the definition of section 7 depends, as a result, on the force of institutional considerations.

More generally, Gosselin raised the question whether it is appropriate for the Court to impose positive obligations on governments in areas of democratic governance such as welfare policy. The Charter primarily protects negative entitlements, which deny governments the authority to infringe its rights and freedoms. There, the conventional remedy for an unjustifiable violation is negative, rather than positive in nature; that is to say, unconstitutional statutory provisions and actions by the state are ordinarily invalidated. Accordingly, the Court has recognized, on at least some occasions, that it would be unwise to read positive obligations into the Charter’s guarantees. For instance, R. v. Prosper rejected the suggestion that governments are required, under section 10(b)’s right to counsel guarantee, to provide duty counsel to those arrested or detained. In doing so, Lamer C.J. held that “it would be a very big step for this Court to interpret the Charter in a manner which imposes a positive constitutional obligation on governments.” Any such decision “would almost certainly interfere with governments’ allocation of limited resources by requiring them to expend public funds on the provision of a service.”

\[18\] Id., at 1177.
\[19\] Gosselin, supra, note 4, at para. 309.
\[20\] The Charter protects a small number of affirmative entitlements, such as minority language rights under ss. 16 to 23, and the right to an interpreter in criminal proceedings, which is provided for by s. 14.
\[22\] Id., at 267 (emphasis in original).
\[23\] Id.
In other cases, however, the Court has imposed positive obligations without hesitation. Under section 15 alone, a partial list of key decisions includes Schacter v. Canada; Eldridge v. British Columbia (Attorney General); Vriend v. Alberta and, more recently in the B.C. Court of Appeal, Auton (Guardian ad Litem of) v. British Columbia (Attorney General). Elsewhere the Court has recognized a right of access to government property under section 2(b) and otherwise imposed positive obligations on governments in the Provincial Judges Case; G.(J.) v. New Brunswick (Minister of Health and Community Services), and Dunmore v. Ontario (Attorney General). Its decisions in Schacter, Eldridge, Auton, the Provincial Judges Case, and G.(J.) placed burdens on government finances. In Vriend, the Court did not obligate Alberta to add sexual orientation to the grounds of discrimination prohibited by its human rights legislation, but judicially amended the statute instead. Subsequently, Dunmore v. Ontario imposed a positive obligation on the province, but granted Ontario a period of grace in which to decide how it would comply with the Court’s directive. Finally, though it did not arise under the Charter, the Québec Secession Reference speaks to the question of positive obligations and institutional boundaries. There, the Court relied on unwritten principles to create a duty to engage in negotiations to amend the Constitution. After inventing this duty to negotiate, the Court declined to define its content, in deference to the institutional boundaries which separate law and politics.

It is difficult to exclude positive rights and obligations from the Charter because the distinction between the two is not persuasive. From an entitlement perspective, it matters little whether the claim imposes a negative constraint or positive requirement on the state. What does matter is its substance and, institutional considerations aside, claims which require the state to take action can be as compelling as those which prohibit it from doing so. Not only that, it can also be difficult to characterize an entitlement. For example, section 11(b) protects a defendant’s negative right not to be denied a trial within a reasonable time and, at the same time, imposes an obligation on the state to provide such a trial. The same guarantee also demonstrates that it is unsound to assume that enforcing negative entitlements is without institutional consequences. In R. v. Askov criminal proceedings were stayed because the accused was denied his right to a trial within a reasonable time. Across the system, that one precedent

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24 Supra, note 3.
25 See, e.g., Canada (Attorney General) v. Committee for the Commonwealth of Canada, [1991]; and Ramsden v. Peterborough (City of) (recognizing a right of access to government property, for expressive purposes, under s. 2(b) of the Charter).
26 Supra, note 3.
had enormous impact on fiscal policy: thousands of charges were stayed in Ontario alone, and to avoid further chaos in law enforcement, the government was forced to inject significant sums of money into the justice system.

The institutional fallout from the enforcement of Askov’s negative entitlement does not suggest that similar considerations can be ignored in cases involving positive rights or obligations. The lesson of Askov is that the Court ignores the question of institutional boundaries at its own peril. Yet it continues, undeterred, to gloss over considerations which might otherwise preclude a “just outcome.” In Eldridge v. British Columbia, the Court held that the Charter does apply to hospitals, and that section 15 guarantees the right to sign language interpretation in health care services.\(^{29}\) Acknowledging that the choice and funding of such services is a government prerogative would have required the Court to dismiss the rights of the deaf, and that it was not prepared to do. Though the imposition of a positive obligation was unprecedented, La Forest J. proceeded as though the case was straightforward. He characterized the institutional concerns arising from a positive obligation to provide the service as inconsequential: because the estimated cost of providing sign language interpretation was only $150,000, the refusal to spend “such a relatively insignificant sum” could not constitute a minimum impairment of equality rights.\(^{30}\) Likewise, he rejected the suggestion that sign language interpretation could not meaningfully be distinguished from other unfunded services, as “purely speculative.”\(^{31}\) The province had presented no evidence that “this type of accommodation, if extended to other government services, [would] unduly strain the fiscal resources of the state.”\(^{32}\)

In this, La Forest J. accepted that at some point, the constitutionalization of positive obligations could strain the fiscal resources of the state. Short of a “strain,” however, he assumed that the Court is entitled to set constitutional standards on questions of democratic policy. According to Eldridge, then, decisions affecting the allocation of resources are subject to the Charter, except when the fiscal integrity of the state is at stake. This line of reasoning is problematic, though, because it treats the consequences of imposing positive obligations as an isolated phenomenon, which is limited in significance to the circumstances of a particular case. An approach that assumes the consequences are discrete allows the Court to minimize their importance. As a result, the cumulative or systemic impact of such obligations can be avoided, and might never be addressed.

\(^{29}\) Eldridge, supra, note 3.

\(^{30}\) Id., at 686-87.

\(^{31}\) Id.

\(^{32}\) Id., at 689.
Subsequent decisions in *G.(J.) v. New Brunswick* and *Auton v. British Columbia* confirm that the imposition of positive obligations is not an isolated phenomenon, and that the momentum in their favour builds with every decision.\(^{33}\) In *G.(J.*) the Court imposed an unprecedented and potentially far-reaching obligation to provide state-funded counsel in child custody proceedings. Against the decision in *R. v. Prosper*, Lamer C.J. emphasized that the entitlement would only crystallize in specific circumstances and that the budgetary implications of the Court’s decision were minimal.\(^{34}\) And, as the more recent B.C. Court of Appeal decision in *Auton* demonstrates, the claim in *Eldridge* was not unique.\(^{35}\) In imposing an obligation to fund special treatment for children suffering from autism, the B.C. Court of Appeal declared, albeit equivocally, that “the principle that government moneys should be allocated only by the legislature, while strong, does not always prevail when the issue is compliance with the Constitution.”\(^{36}\) It was a short step from that proposition to the conclusion that the resource implications of funding treatment for autism were not “so extraordinary” as to defeat the claim.\(^{37}\) When the Court finds the claim compelling, institutional boundaries and the cost implications of imposing positive obligations do not matter.

Even without placing a burden on resources, positive rights have implications for the boundaries of review. In *Dunmore v. Ontario*, the Court imposed an obligation on Ontario to guarantee the meaningful exercise of associational freedom within the private sector group of agricultural workers. Justice Bastarache dismissed an unprecedented extension of judicial authority into the legislative domain with the remark that, “[i]f ... this Court is imposing ‘positive’ obligations on the state, that is only because such imposition is justified in the circumstances.”\(^{38}\) In *Gosselin*, Arbour J. relied heavily on *Dunmore* as authority for the proposition that state action is not required to establish a breach of the Charter’s positive rights. It was sufficient, in her view, that Québec failed to take positive steps to guarantee the applicant’s security of the person. Though *Dunmore* did not have resource implications, it provided strong authority for the *Gosselin* dissent, which did.

The decision in *Vriend v. Alberta* also raised concerns about the legitimacy and boundaries of review. There, the Court was not content to impose a positive

\(^{33}\) Supra, note 3.

\(^{34}\) Id., at 93 (stating that the right to a fair trial outweighed the “relatively modest sums” at issue in the appeal, and that the province’s policy not to provide funding would only result in an unconstitutional hearing “in rare cases”).

\(^{35}\) Supra, note 3.

\(^{36}\) Id., at 437.

\(^{37}\) Id.

\(^{38}\) Dunmore, supra, note 3, at para. 29.
obligation on Alberta to protect its gay community from discrimination. It went one step further and added sexual orientation to the human rights legislation by judicial amendment. Perhaps in anticipation of a negative reaction, Iacobucci J. lamented that “hardly a day goes by without some comment or criticism to the effect that under the Charter the courts arewrongfully usurping the role of the legislatures.” In his view, such criticism “misunderstands what took place and what was intended” when Canada adopted the Charter. Following Lamer J.’s lead in the Motor Vehicle Reference, Iacobucci J. reminded critics that the courts only assumed new powers of review through “the deliberate choice of our provincial and federal legislatures.” It was “the Canadian people through their elected representatives,” not the courts, that chose judicial review “as part of a redefinition of our democracy.” From his perspective it was unfair for the public to complain about the Charter, after the fact.

Some criticisms of the Court and its interpretation of the Charter may be fair, and some may not. In either case the judges have little choice but to confront the question of institutional boundaries. Ignoring, dismissing, minimizing or deflecting this aspect of review does not advance its legitimacy. Instead, that legitimacy depends on the Court’s willingness to respect institutional boundaries, and that is why its decision in Gosselin v. Québec is so striking. Though the boundaries between courts and legislatures were at the forefront in this case, no member of the Court gave the question serious consideration. Justice Bastarache, alone, voiced some concerns in denying a remedy for the violation of section 15, as well as in rejecting the section 7 claim on its merits.

III. HUMAN DIGNITY METHODOLOGY AND THE REASONABLE WELFARE RECIPIENT

Louise Gosselin brought an action on behalf of all welfare recipients under age 30 who were subject to the differential in benefits between the years 1985 and 1989. She sought an order requiring the province of Québec to pay the 75,000 unnamed members of the class an amount in the order of $389 million, along with the interest that had accrued since 1985. Though he found a breach of section 15

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40  Id.
41  Id., at 563.
42  Id., at 564.
43  Gosselin, supra, note 4, at para. 4.
44  Id., at para. 297.
which could not be justified under section 1, he denied a remedy in damages, in part, for institutional reasons.\(^{45}\) The cost, he acknowledged, would have a “significant impact on the government’s fiscal situation, and potentially on the general economy of the province of Québec.”\(^{46}\)

Meanwhile, and though the claim openly challenged the boundaries of review, the Chief Justice’s majority opinion disregarded the issue. She had little difficulty rejecting the challenge, but not because she found it inappropriate for the Court to decide how welfare benefits should be distributed. Chief Justice McLachlin was determined, instead, to explain why Gosselin’s section 15 claim was without merit. Though the scheme treated individuals unequally on the basis of their age, she held that it did not violate equality because the claimant failed the standard of the reasonable welfare recipient.

The majority opinion explained that Gosselin could not complain about a program that was designed to enhance rather than to detract from her human dignity. Far from marginalizing their circumstances, the age distinction was a dignity enhancing measure for those in the claimant’s age group. The Chief Justice declared that the participation incentive “worked towards the realization of goals that go to the heart of the equality guarantee: self-determination, personal autonomy, self-respect, feelings of self-worth, and empowerment.”\(^{47}\) These are “the stuff and substance,” as she put it, of “essential human dignity.”\(^{48}\) Under this logic, treating those under 30 differently was “intimately and inextricably linked to the essential human dignity that animates the equality guarantee.”\(^{49}\)

As a result, the Chief Justice concluded that a reasonable person in Gosselin’s circumstances would not have “experienced” the program as discriminatory.\(^{50}\) To the contrary, the purpose of Québec’s age distinction “is a factor that a reasonable person in the position of the complainant would take into account in determining whether the legislator was treating him or her as less worthy and less deserving of concern, respect and consideration than others.”\(^{51}\) The Chief Justice reiterated the point by adding that, “if a law is

\(^{45}\) Id.

\(^{46}\) Id.

\(^{47}\) Id., at para. 65. From Bastarache J.’s perspective, “[t]he fact that people on social assistance are in a precarious, vulnerable position, adds weight to the argument that differentiation that affects them negatively may pose a greater threat to their human dignity”; id., at para. 238. Accordingly, it was no answer to “inferior differential treatment” that “the government claims that the detrimental provisions are ‘for their own good’”; id., at para. 250.

\(^{48}\) Id.

\(^{49}\) Id.

\(^{50}\) Id., at para. 66.

\(^{51}\) Id., at para. 27 (emphasis added).
designed to promote the claimant’s long-term autonomy and self-sufficiency, a reasonable person in the claimant’s position would be less likely to view it as an assault on her inherent human dignity."  

She also addressed the effects of the program in considering “how a reasonable person in the claimant’s position would have viewed the government program.”  

There, the Chief Justice held that a reasonable person in her circumstances would not have perceived that the government’s efforts to equip her with training, rather than simply give her a monthly stipend, denied her human dignity. In the circumstances, a reasonable welfare recipient might have found the program harsh, but she “would not reasonably have concluded that it treated younger people as less worthy or less deserving of respect.” As a result, it did not violate the “essential human dignity” of welfare recipients under 30.

Freighting the prima facie question of breach with misconceived debates about whose perception of human dignity is reasonable subtracts from, rather than adds to, any plausible interpretation of the entitlement. It is the government’s justification of different treatment, not the claim of a right to equal treatment, that must be reasonable. Thus, by applying the standard of a reasonable welfare recipient, Gosselin demonstrates how far the jurisprudence has wandered from any coherent conception of equality. How an individual reacts to unequal treatment is irrelevant to the question whether the government has infringed section 15 and must justify its action under section 1. By dismissing the claims of those whose response to different treatment is unreasonable, the Chief Justice’s human rights methodology introduced an element of fault or blame into the constitutional analysis. Instead of asking whether the government’s program violated Gosselin’s right not to be treated unequally because of her age, the Chief Justice inferred that the applicant and others were at fault for not understanding that, despite treating them differently and less well, the scheme had their best interests in mind.

52 Id. (emphasis added).
53 Id., at para. 53 (emphasis added).
54 Id. (emphasis added).
55 Id., at para. 69 (emphasis added). In commenting on the significance of an age-based distinction, she explained that such distinctions are “a common and necessary way of ordering society.” Treating of those under age 30 unequally did not suggest discrimination, because “young adults as a class simply do not seem especially vulnerable or undervalued”; id., at paras. 31 and 33. As Bastarache J. noted, however, the welfare scheme created a distinction which was based on a personal characteristic, age, that is one of s. 15’s prohibited grounds of discrimination. While agreeing that the distinction does not create a “presumption of discrimination,” he nonetheless maintained that Québec’s age-based criterion revealed “a strong suggestion that the provision in question is discriminatory for the purposes of s. 15”; id., at para 228.
56 Id., at para. 74.
Not only did the majority opinion’s focus on section 15 further distort the Court’s definition of equality, it transformed the section 1 and institutional considerations at stake into an irrelevance. Functionally, the Chief Justice’s elaborate human dignity methodology served as a substitute for the justification of limits that is required by section 1. As a result, Gosselin buried concerns about the judicial management of welfare policy in the language of human dignity and the reasonable welfare recipient. Specifically, a section 1 analysis was incorporated into the “contextual inquiries” that are an essential part of the Law test. To determine whether a distinction is discriminatory, Law requires courts to consider the relationship between the different treatment and those who are affected by it.\(^\text{57}\) The question in Gosselin was whether age, as a ground of distinction, was related to the characteristics and circumstances of those under age 30.\(^\text{58}\) In concrete terms, this part of the contextual inquiry asked whether it was reasonable for Québec to treat those individuals unequally by subjecting them to this distinction. If it was not evident before, the majority opinion in Gosselin made it clear that this part of the Law test ignores the Charter’s distinction between breach and justification.

The first branch of the Oakes test, which requires a sufficiently substantial and pressing objective to warrant the breach, was swept into the section 15 analysis through the Chief Justice’s concerted defence of the purpose and effects of the program. Repeatedly, she spoke of its laudatory purpose, before stating that it would be impossible to conclude that the program “lacked sufficient foundation in reality and common sense to fall within the bounds of permissible discretion in establishing and fine-tuning a complex social assistance scheme.”\(^\text{59}\) This is without a doubt the language of justification.

It then remained to build a modified version of the proportionality test into this branch of the contextual inquiry under section 15. In commencing that analysis, the Chief Justice noted that a law that is “closely tailored to the reality of the affected group” is unlikely to discriminate within the meaning of section 15(1).\(^\text{60}\) She continued to invoke section 1 concepts, stating that the Charter does not require perfect correspondence between a benefit program and the circumstances of those affected.\(^\text{61}\) Without hesitation, the Chief Justice then went on to apply section 1’s rational connection test. Accordingly, she found

\(^{57}\) One aspect of Law’s contextual inquiry examines the relationship between the ground upon which the claim is based and the nature of the differential treatment. See Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497, at 537.

\(^{58}\) Gosselin, supra, note 4, at para. 37.

\(^{59}\) Gosselin, id., at para. 44. See generally paras. 38-44 (discussing and approving the merits of the incentive-based program).

\(^{60}\) Id., at para. 37.

\(^{61}\) Id., at para. 55.
that as long as the age chosen is “reasonably related to the legislative goal,” the fact that a different age might have been chosen “does not indicate a lack of sufficient correlation between the distinction and those affected by it.”\textsuperscript{62} The majority opinion’s blurring of breach and justification is further revealed in the conclusion that the legislature’s assumptions were “reasonably grounded in everyday experience and common sense.”\textsuperscript{63} Moreover, and though the soundness of its assumptions should not enter the question of breach, the Chief Justice worried that a violation of section 15 might be inferred “from the mere failure of the government to prove that the assumptions upon which it proceeded were correct,” or that the legislator might have the “duty,” under section 15, to “verify all its assumptions empirically.”\textsuperscript{64}

The Court’s unflinching application of a reasonableness standard has troubling implications for section 15’s guarantee of equality. The Chief Justice’s approach narrowed the scope of the right, and embraced a standard that was explicitly rejected in \textit{Andrews v. Law Society of British Columbia}.\textsuperscript{65} There, the Supreme Court concluded that it was unsound, in principle, for the question of breach under section 15 to be governed by a concept of reasonableness. As McIntyre J. explained, that view of the right would exaggerate the importance of the entitlement analysis at the expense of section 1’s requirement that violations of equality be justified by the government. Under the approach proposed by appellate Judge McLachlin, who was then a member of the B.C. Court of Appeal, “virtually no role would be left for section 1.”\textsuperscript{66} To preserve the structural integrity of the Charter, \textit{Andrews} held that “the right guaranteeing sections” must be kept “analytically separate from section 1.”\textsuperscript{67} Against that admonition, the majority opinion in \textit{Gosselin} transparently conducted a reasonable limits analysis under section 15.

By transforming the issue of reasonable limits into a question of entitlement, the majority opinion ignored the institutional dynamics of the claim. In doing so, it created the impression that the challenge failed on a point of evidence, and not because there might be limits on the judiciary’s authority to supervise the allocation of resources dedicated to welfare benefits.\textsuperscript{68} In this, the majority opinion reveals a worrying disregard of the boundaries that both limit and

\begin{footnotesize}
\begin{enumerate}
\item Id., at para. 57 (emphasis added).
\item Id., at para. 56 (emphasis added).
\item Id. (emphasis added).
\item [1989] 1 S.C.R. 143.
\item Id., at 182.
\item Id., at 178.
\item \textit{Gosselin, supra}, note 4, at para. 19 (emphasizing that the Chief Justice and Bastarache J. only disagreed on the evidentiary question whether the claimant has met her burden of proof to establish a breach).
\end{enumerate}
\end{footnotesize}
secure the legitimacy of review. Nor did the Chief Justice’s treatment of the section 7 issue compensate for her inattention to the question of institutional function under section 15. In answer to Arbour J.’s passionate re-interpretation of section 7, she was content to provide a checklist of the doctrinal obstacles that would have to be addressed, before dismissing the claim on evidentiary grounds. In her view, it sufficed to declare that the “frail platform provided by the facts of the case” could not sustain a “positive state obligation of citizen support.”

IV. RIGHTS OF PERFORMANCE UNDER SECTION 7 OF THE CHARTER

To call it radical would not overstate Arbour J.’s interpretation of section 7: her version of the guarantee would allow individuals to claim positive entitlements, including, in Gosselin’s case, the right to minimum welfare benefits. In proposing this conception of entitlement, she faced formidable obstacles in the jurisprudence. Yet Arbour J. maintained that the Court had “consistently chosen” to leave open the possibility of a right to basic means of subsistence under section 7. She also claimed that, far from resisting it, the language and structure of the Charter compelled that conclusion. Still, she acknowledged the need to “deconstruct the various firewalls” that precluded the Court from reaching an “inevitable and just” outcome in Gosselin’s case.

Since the Motor Vehicle Reference, it has been accepted that the purpose of section 7 is to protect the rights of individuals in the justice system. Under that view, the entitlements to life, liberty and security of the person, which are set out in the provision’s first clause, are guaranteed, but only against deprivations which violate principles of fundamental justice. Those principles, which fall in the inherent domain of the judiciary, relate to the administration of justice, and not to policies which belong, as a matter of prerogative, to the democratic branches of government. The Court arrived at this interpretation of section 7 by reading its two clauses together to derive a single right, which is further constrained by the requirements of a deprivation by the state and a link to the justice system.

In Gosselin, however, the claimant asked the Court to recognize a substantive entitlement that directly challenged legislative policy and, in doing

69 Id., at para. 83.
70 Id., at para. 309.
71 Id.
72 Section 7 states that “[e]veryone 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.” Supra, note 1.
so, fell entirely outside the justice system. That claim could not succeed under the existing interpretation of the guarantee. To overcome that obstacle, Arbour J. explained why it was unsound, in her view, to exclude rights of performance from the scope of section 7. To establish free-standing rights under the guarantee’s first clause, it was necessary for her to resurrect the two-rights theory. This freed the right from its anchor in the fundamental justice clause, and in a process of law. By doing so, she eliminated the principles of fundamental justice from her definition of breach, and also found it unnecessary for the claimant to establish a deprivation by the state. Reading those constraints out of the guarantee removed the obstacles to her theory of positive rights. As a result of this analysis, her conception of section 7 would impose positive obligations which could vest and be enforced in the absence of any action by the state. By re-imagining the guarantee this way, she reached the conclusion that Québec’s failure to provide minimum benefits infringed Gosselin’s security of the person.

In advancing her interpretation of section 7, Arbour J. reasoned from logic: the overlooked logic of the text; the logic she drew from the case law; and the logic of reading this provision of the Charter to include a positive dimension and rights of performance. Yet there was an omission in Arbour J.’s attempt to re-invent section 7 of the Charter. Though her conception of entitlement might be persuasive in substantive terms, it failed to consider the question of boundaries. As the discussion above explained, that question must be confronted in any attempt to define the scope of section 7.

Even as a matter of logic, Arbour J.’s analysis struggled to establish a right to minimum subsistence. Under the prevailing view that section 7 protects a single right, the entitlements of life, liberty and security of the person lack substantive content or status apart from the fundamental justice clause. Her response to that was to proclaim, boldly and to the contrary, that the guarantee’s first clause should be read as “providing for a completely independent and self-standing right, one which can be violated even absent a breach of fundamental justice.”73 Against “a general impression that section 7 is reduced to the right contained in the second clause,”74 she insisted that “the section’s first clause affords some additional protection, over and above that afforded in the second clause.”75

To minimize the authority of the jurisprudence, Arbour J. invoked the plain words of the text. According to her, the Court “habitually read out of the English version of section 7 the conjunction and, with it, the entire first

73 Id., at para. 341.
74 Id., at para. 339.
75 Id., at para. 340.
clause.”

Though section 7 had “habitually been read” a certain way, an unauthoritative interpretation could not override the plain words of the guarantee. For her, the conclusion that the first clause must afford protection beyond that guaranteed by the principles of fundamental justice was a “purely textual matter.” Moreover, the jurisprudence did not preclude this interpretation of section 7, because the Court had never determinatively resolved the status of “self-standing” rights in the first clause. Instead, it became preoccupied with the criminal justice system following Motor Vehicle Reference, and section 7’s first clause, together with the two-rights theory, began to slip into “relative obscurity.” As a result, the right to life, liberty and security of the person, apart from any connection with the administration of justice, had neither been confirmed nor rejected by the Court. It was as if an accident of interpretation had placed those entitlements in limbo throughout section 7’s evolution.

Far from being a radical shift, Arbour J. presented her conception of the guarantee as a return to the text. Reviving the conjunction between section 7’s two clauses meant that the provision guaranteed two rights after all, and confirmed that its first clause protects independent, substantive rights. This, in turn, eliminated the need for a link to the justice system, as well as the requirement of active interference by the state. Once those constraints were removed, the unrestricted language of life, liberty and security of the person easily accommodated positive rights. As Arbour J. observed, “there is no sense in which the actual language of section 7 limits its application to circumstances where there has been positive state interference.” And, under a conception of the guarantee that protects two rights, not one, section 7 is “bereft of any trace of language that might contain a requirement of positive state action before a breach may occur.”

Context provided further support for this interpretation of section 7. For instance, the right to life explained why positive rights should not be excluded from the guarantee. It would violate “basic standards of interpretation,” Arbour J. contended, for the Charter to protect a complex of rights and freedoms, and then deny substantive content to “the one right that is indispensable” to the enjoyment of the rest. Yet an interpretation that treated the right to life as a

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76 Id., at para. 337.
77 Id., at para. 343; see also paras. 337, 345, and 348.
78 Id.
79 Id., at para. 339.
80 Id.
81 Id., at para. 321.
82 Id., at para. 322.
83 Id., at para. 346.
negative entitlement, violated only when life is deprived, would impugn “the coherence of the whole Charter.”\(^{84}\) Because to deny that most fundamental entitlement “any real significance” would undercut every other Charter guarantee, it logically followed that section 7 must protect “something more than merely negative rights.”\(^{85}\) Madam Justice Arbour also found support for the recognition of positive rights in sections 8 to 14. Contrary to what may be assumed, she suggested that the context of the legal rights “favours the conclusion” that a positive duty to act can be imposed on the state under section 7.\(^{86}\) If other provisions entrench positive rights, as some do, then “one should also expect that section 7 rights would also contain a positive dimension.”\(^{87}\)

Though she had more difficulty with the doctrinal constraints on section 7, Arbour J. challenged the rigidity of the requirements that there be a link to the justice system and a deprivation by the state. Citing “recent cases,” “recent developments,” and “the more recent turn in the section 7 jurisprudence,” she claimed that a legalistic reliance on the “Legal Rights” subheading had been “supplanted” by a purposive and contextual approach.\(^{88}\) In her view, Blencoe v. British Columbia (Human Rights Commission)\(^ {89}\) and Winnipeg Child and Family Services v. K.L.W.\(^ {90}\) relaxed “any supposed requirement” that the claim relate to the administration of criminal justice.\(^ {91}\) She also cited G.J. v. New Brunswick, and warned against “the temptation to dilute the obvious significance” of the Court’s decision to impose a positive obligation to provide state-funded counsel in child custody proceedings.\(^ {92}\) There, however, Lamer C.J. had warned against granting security of the person a broad sweep. As he explained, “countless government initiatives” could be challenged on the ground that they infringe this right, “massively expanding the scope of judicial review” as a result and, in the process, “trivializing what it means for a right to be constitutionally protected.”\(^ {93}\) The security interest in Gosselin could not be linked to any process of law, and nor could the applicant point to any action by the state that interfered with her security of the person. Because either or both

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84 Id., at para. 347.
85 Id., at paras. 347 and 348.
86 Id., at para. 323.
87 Id. To the extent ss. 8 to 14 entrench positive rights, the entitlement arises when the state seeks to deprive an individual of his liberty, in a process of law. That, of course, is not the context of Gosselin’s claim or of Arbour J.’s theory of positive rights.
88 Id., at paras. 315 and 316.
91 Gosselin, supra, note 4, at para. 318.
92 G. (J.), supra, note 3; id., at para. 325.
93 G. (J.), id., at 77.
elements were present in the existing case law, the analogies Arbour J. drew
were not strong. Gosselin’s claim was unarguably without precedent.

_Dunmore v. Ontario_, which was discussed above, provided the strongest
support for her theory of positive rights under section 7. 94 In _Dunmore_,
Bastarache J. imposed a positive obligation on the province of Ontario to protect the meaningful exercise of associational
freedom, though the government had done nothing to infringe the section 2(d)
rights of agricultural workers. As Arbour J. stated in _Gosselin_, not including
agricultural workers in a comprehensive labour relations scheme violated their
freedom of association because section 2(d) protects a “positive right to
legislative inclusion.” 95 Through the convolution that “the state cannot shield
itself from Charter scrutiny under the pretext that underinclusive legislation
does not constitute active interference with a fundamental freedom,” _Dunmore_
confirmed for Arbour J. that the Charter protects positive rights. 96 Accordingly,
she held in _Gosselin_ that the government need not actively interfere with rights
to be in breach of the Charter. 97 Citing _Dunmore_ and the positive right to the
meaningful exercise of associational freedom, she held that the government’s
failure to provide minimum benefits in Gosselin’s case “substantially
impede[d]” the enjoyment of her section 7 rights. 98

Justice Bastarache strenuously resisted the suggestion that the claims in
_Dunmore_ and _Gosselin_ were analogous. In doing so, he acknowledged that
section 7 can extend to situations outside the traditional criminal context,
though only in exceptional circumstances. Still, he insisted on a link between
an individual’s security of the person and the justice system or its
administration. Moreover, he maintained that “[a]t the very least, a section 7
claim must arise from determinative state action _that in and of itself_ deprives
the applicant of one of section 7’s entitlements.” 99 In the absence of “this
threshold requirement,” he feared that “the legitimacy of the entire process of
Charter adjudication” would be brought into question. 100 If his attempt to
distinguish _Dunmore_’s positive obligation was unpersuasive, Bastarache J.’s
concerns about _Gosselin_’s rights of performance under section 7 are well-
found. 101

94 _Supra_, note 3.
95 _Gosselin, supra_, note 4, at para. 362 (per Arbour J.).
96 _Id._, at para. 361.
97 _Id._, at para. 360.
98 _Id._, at para. 370.
99 _Id._, at para. 213 (emphasis added).
100 _Id._, at para. 214.
101 It is unclear why s. 7’s “threshold requirement,” which he conceded might be described as
“overly formalistic,” should bind in _Gosselin_ when s. 2(d)’s did not in _Dunmore_; _id._
Lost in Arbour J.’s goal of returning to the text and overcoming doctrinal constraints was any recognition that section 7’s interpretation is based on respect for institutional boundaries. Her dissent eliminated limits on the scope of the guarantee, but showed little or no concern about the institutional implications of doing so. In a brief discussion which conceded that courts are “ill-equipped” to address matters of resource allocation, she stated that the state’s obligation to provide basic means of subsistence raises “altogether a different claim.”

Though she agreed that the Court could not allocate the resources that were needed to satisfy the right, she saw no problem in deciding whether the entitlement existed. She declared that “any concern over the justiciability of positive claims against the state has little bearing” in Gosselin’s case, because Québec had already established a basic level of welfare benefits.

Subsequently, in explaining why a fundamental justice analysis was not required on the facts of the case, Arbour J. indirectly addressed the question of boundaries. She observed that in Gosselin’s case, the source of the violation was the legislative process and the realm of public policy. According to the case law, however, the Court had “specifically divorced” legislative policy from the principles of fundamental justice, and their concern with the justice system. In her view it was appropriate, then, to proceed directly from a breach of security of the person to the question of reasonable limits under section 1. The principles of fundamental justice were irrelevant because Gosselin’s claim invoked “the inherent domain of the legislature and not that of the justice system.” In this way, she openly claimed a power of review that had been carefully disavowed, both in the Motor Vehicle Reference and in the subsequent case law. By dismissing the distinction between the judicial and legislative realms, she rejected the foundational assumption of the section 7 jurisprudence. It is significant, too, that her theory of positive rights relied on the unrestricted language of the guarantee’s first clause. As such, it neither contemplated nor identified limits on the scope of the right or the power of review under that section of the Charter. The implications of this are underscored by the section 1 analysis, which can only save a breach of section 7 in rare cases.

Madam Justice Arbour’s dissent disregards the question of boundaries on review. Nowhere did she place parameters on the free-standing rights her
interpretation of section 7 would protect. To the contrary, she indicated, quite
forthrightly, that her purpose was to breathe positive rights into the Charter.
Thus, she argued that if section 7 rights include a positive dimension, “such that
they are not merely rights of ‘non-interference’ but also what might be
described as rights of ‘performance,’ then they may be violable by mere
inaction or failure by the state to actively provide the conditions necessary for
their fulfilment.”¹⁰⁷ Later, she stated that “[c]onstitutional rights are not simply
a shield against state interference with liberty; they place a positive obligation
on the state to arbitrate competing demands from the liberty and rights of
others.”¹⁰⁸ In her view, the justificatory mechanism of section 1 “reflects the
existence of a positive right to Charter protection” which, in a section 7 context,
calls for the state “not only to abstain from interfering with life, liberty and
security of the state but also to actively secure that right in the face of
competing demands.”¹⁰⁹ Finally, she found that to those like Gosselin, “a purely
negative right to security of the person is essentially meaningless,” and that
“one can reasonably conclude that positive action is what is required in order to
breathe purpose and meaning into their section 7 guaranteed rights.”¹¹⁰

Yet the impossibility of defining section 7’s rights in a principled way is
what rendered a substantive interpretation of liberty and security of the person
problematic in the first place. The dilemma of interpretation was this. If the
Court defined those entitlements restrictively, it would have been criticized for
singling certain values out for favourable treatment. It could only avoid that
criticism by extending section 7’s reach to a broad range of liberty and security
interests. The problem there, however, was one of boundaries, and an inability
to legitimize a power of review that interfered on that scale with the functions
of the elected branches of government.¹¹¹ The Motor Vehicle Reference gave
section 7 a substantive interpretation, but Lamer J. contended it did not threaten
the legitimacy of Charter adjudication, because the administration of justice
criterion observed the institutional boundaries of review. There, the Court
resolved this dilemma by fashioning a compromise between the substantive
entitlement and the need to respect boundaries.

It is a fair point that the Motor Vehicle Reference’s distinction between the
inherent domain of the judiciary and the policy process is difficult to defend.
After the Court began to constitutionalize the substantive definition of mens

¹⁰⁷ Id., at para. 319 (emphasis added).
¹⁰⁸ Id., at para. 355.
¹⁰⁹ Id., at para. 356.
¹¹⁰ Id., at para. 377.
rea, the distinction between justice and policy became especially awkward. Though new strains of fundamental justice have been added over the years, the Court has been cautious about expanding the guarantee’s substantive content. By the same token, the administration of justice criterion and requirement of a deprivation place limits on the scope of the guarantee that may seem arbitrary or unprincipled.

That said, it is unclear that Arbour J.’s attempt to free section 7 from the fundamental justice constraint is a step in the right direction. Protecting entitlements selectively through section 7’s concept of security of the person underscores the subjectivity inherent in any attempt to limit positive, substantive rights on the basis of their content. Though singling certain aspects of liberty or security out for constitutional protection underscores the subjectivity of review and reflects adversely on its legitimacy, an open-ended definition of the first clause is unworkable. Under the Gosselin dissent’s unrestricted interpretation, however, individuals would be entitled to challenge every interference with their liberty or security of the person and to claim that the state’s failure to secure those entitlements violated the Charter. Justice Arbour’s rights of performance would include, and potentially render justiciable, any form of inaction on the state’s part that substantially impedes security of the person. In this, her interpretation of section 7 contemplates a power of review that would dramatically exceed the Motor Vehicle’s initiative. Under her conception of the right, institutional boundaries would not only be crossed, but eliminated.

V. PUTTING JUDICIAL REVIEW IN ITS INSTITUTIONAL PLACE

Gosselin v. Québec bristles with issues that cannot be adequately examined within the constraints of this paper. One such issue, which has not been addressed in the discussion above, concerns the status of underinclusiveness as a breach of the Charter, apart from section 15. There, it is questionable whether the conception of underinclusion should be employed to incorporate positive rights and obligations into other guarantees, such as sections 2(d) or 7. Justice Arbour’s proposal to do so was especially problematic in the circumstances of Gosselin, where the infringement fell squarely within section 15 and should have been adjudicated, exclusively, under the equality guarantee.

The majority opinion’s definition of equality raises another point for discussion. The suggestion that a section 15 claim must be reasonable was followed by the Court in Law v. Canada, and the standard of the reasonable
claimant has been applied in other cases. In requiring the Court to determine whether it was reasonable for the human dignity of welfare recipients to be offended by their exclusion from benefits, Gosselin confirmed how tortuous and beside the point this methodology has become. At this point in time, however, the Court is committed to Law’s dogma of human dignity.

The majority opinion’s intransigent attachment to Law invites comparison with Arbour J.’s willingness to challenge the Motor Vehicle Reference and re-imagine the conceptual underpinnings of section 7. Whatever its substantive merits may be, the unresolved difficulty of her theory of positive rights in Gosselin is that it opened up the legitimacy issue which had, for the most part, been laid to rest by the Motor Vehicle and the doctrinal constraints it imposed on section 7. Unfortunately, Arbour J. chose to deflect, rather than confront, the questions of institutional boundaries that were inherent in her proposal for section 7. Yet for the reasons outlined above, that question must unavoidably inform any attempt to grant the guarantee a substantive interpretation.

Gosselin placed institutional considerations at issue in two ways. First, and whether under section 15 or 7, the claim invited the Court to constitutionalize welfare policy and impose a positive obligation on Québec to provide adequate or equal benefits. The majority opinion rejected the claim, however, without once acknowledging that the entitlement crossed the boundary which separates judicial and democratic functions. For the Court to ignore this element of the analysis is particularly disturbing in the circumstances of the case. Four judges wrote powerful dissents in support of the entitlement and none, in doing so, viewed the question of institutional relations as particularly important, much less as an obstacle to the claim. Nor does the unavailability of a remedy answer or explain this omission. Consequently, Gosselin sends a message that the question of institutional boundaries is not part of the analysis when the Court is deciding whether to impose a positive obligation, with resource implications, on a government.

Second, the Arbour dissent highlights the institutional questions which inescapably burden the definition of section 7. The question is unavoidable, in the case of this guarantee, because its entitlements are, in substantive terms, without limit. For that reason, any attempt to provide a substantive interpretation must address the issue of definitional limits. With all the criticism it has attracted, the Motor Vehicle Reference recognized the need for

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112 Law, supra, note 57, at 550; see Lovelace v. Ontario, [2000] 1 S.C.R. 950, at para. 55 (applying that standard to the circumstances of Métis communities excluded from participation in a program directing casino proceeds to other Aboriginal communities).

113 C. Bredt and A. Dodek, “Breaking the Law’s Grip on Equality: A New Paradigm for Section 15” article included in this volume (providing a critique of this methodology and offering a proposal for reform).
constraints on the scope of the guarantee. By contrast, Arbour J.’s dissent in
Gosselin did not. As a result, her theory of positive rights cannot be assessed
until the question of definitional limits is addressed.

More generally, Gosselin demonstrates how easy it is for the judges to
ignore or dismiss institutional questions which might require them to recognize
limits on the scope of Charter rights, as well as on their own powers of review.
Thus far, the Court has been content, in a variety of circumstances which
invited the judiciary to impose positive obligations, to minimize the
implications of extending their authority over the democratic branches of
government. For instance, the Motor Vehicle Reference only accepted
constraints on the scope of section 7 to justify an interpretation the guarantee
was never intended to have. In other settings, the Court has been quick to
downplay the consequences of expanding its role at the expense of the other
branches of government.

This paper does not explain precisely how the Court should answer the
question of institutional boundaries. That answer would be informed, initially,
by a set of assumptions about institutional functions; in turn, these assumptions
would have to confront fundamental issues about the role of the judiciary and
the limits on its authority which set boundaries on review. In more concrete
terms, the concept of boundaries could then generate principles or criteria
which would then apply on a case-to-case basis. Meantime, the limited purpose
of this paper has been to explain why it is imperative for the Court to include
the question of institutional boundaries in its analysis. Instead of focusing
exclusively on the substantive entitlement, it should consider all dimensions of
the constitutional question at stake, before deciding the outcome. Doing so
would not have changed the result in Gosselin, though it might have in some of
the Court’s other decisions. Regardless, lingering doubts about the legitimacy
of review will never be fully allayed, and nor should they be. It is inevitable,
nonetheless, that those doubts will be aggravated by decisions which disregard
or violate the institutional boundaries of review.
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