Louise Gosselin
Appellant

v.

The Attorney General of Quebec
Respondent

and

The Attorney General for Ontario,
the Attorney General for New Brunswick,
the Attorney General of British Columbia,
the Attorney General for Alberta,
Rights and Democracy (also known as International
Centre for Human Rights and Democratic Development),
Commission des droits de la personne et des droits de la jeunesse,
the National Association of Women and the Law (NAWL),
the Charter Committee on Poverty Issues (CCPI) and
the Canadian Association of Statutory Human Rights Agencies (CASHRA)
Interveners

Indexed as: Gosselin *v.* Quebec (Attorney General)

[2002] 4 S.C.R. 429, 2002 SCC 84
File No.: 27418.

19 December 2002

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

On appeal from the Court of Appeal for Québec

The judgment of McLachlin C.J. and Gonthier, Iacobucci, Major and Binnie JJ. was delivered by

THE CHIEF JUSTICE —

I. Introduction

1 Louise Gosselin was born in 1959. She has led a difficult life, complicated by a struggle with psychological problems and drug and alcohol addictions. From time to time she has tried to work, attempting jobs such as cook,

waitress, salesperson, and nurse's assistant, among many. But work would wear her down or cause her stress, and she would quit. For most of her adult life, Ms. Gosselin has received social assistance.

2 In 1984, the Quebec government altered its existing social assistance scheme in an effort to encourage young people to get job training and join the labour force. Under the scheme, which has since been repealed, the base amount payable to welfare recipients under 30 was lower than the base amount payable to those 30 and over. The new feature was that, to receive an amount comparable to that received by older people, recipients under 30 had to participate in a designated work activity or education program.

3 Ms. Gosselin contends that the lower base amount payable to people under 30 violates: (1) s. 15(1) of the *Canadian Charter of Rights and Freedoms* ("*Canadian Charter*"), which guarantees equal treatment without discrimination based on grounds including age; (2) s. 7 of the *Canadian Charter*, which prevents the government from depriving individuals of liberty and security except in accordance with the principles of fundamental justice; and (3) s. 45 of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 ("*Quebec Charter*"). She further argues that neither of the alleged *Canadian Charter*violations can be demonstrably justified under s. 1.

4 On this basis, Ms. Gosselin asks this Court to order the Quebec government to pay the difference between the lower and the higher base amounts to all the people who: (1) lived in Quebec and were between the ages of 18 and 30 at any time from 1985 to 1989; (2) received the lower base amount payable to those under 30; and (3) did not participate in the government programs, for whatever reason. On her submissions, this would mean ordering the government to pay almost $389 million in benefits plus the interest accrued since 1985. Ms. Gosselin claims this remedy on behalf of over 75 000 unnamed class members, none of whom came forward in support of her claim.

5 In my view, the evidence fails to support Ms. Gosselin's claim on any of the asserted grounds. Accordingly, I would dismiss the appeal.

II. Facts and Decisions

6 In 1984, in the face of alarming and growing unemployment among young adults, the Quebec legislature made substantial amendments to the *Social Aid Act*, R.S.Q., c. A-16, creating a new scheme — the scheme at issue in this litigation. Section 29(*a*) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, made under the Act continued to cap the base amount of welfare payable to those under 30 at roughly one third of the base amount payable to those 30 and over. However, the 1984 scheme for the first time made it possible for people under 30 to increase their welfare payments, over and above the basic entitlement, to the same (or nearly the same) level as those in the 30-and-over group.

7 The new scheme was based on the philosophy that the most effective way to encourage and enable young people to join the workforce was to make increased benefits conditional on participation in one of three programs: On-the-job Training, Community Work, or Remedial Education. Participating in either On-the-job Training or Community Work boosted the welfare payment to a person under 30 up to the base amount for those 30 and over; participating in Remedial Education brought an under-30 within $100 of the 30-and-over base amount. The 30-and-over base amount still represented only 55 percent of the poverty level for a single person. For example, in 1987, non-participating under-30s were entitled to $170 per month, compared to $466 per month for welfare recipients 30 and over. According to Statistics Canada, the poverty level for a single person living in a large metropolitan area was $914 per month in 1987. Long-term dependence on welfare was neither socially desirable nor, realistically speaking, economically feasible. The Quebec scheme was designed to encourage under-30s to get training or basic education, helping them to find permanent employment and avoid developing a habit of relying on social assistance during these formative years.

8 The government initially made available 30 000 places in the three training programs. The record indicates that the percentage of eligible under-30s who actually participated in the programs averaged around one-third, but it does not explain this participation rate. Although Ms. Gosselin filed a class action on behalf of over 75 000 individuals, she provided no direct evidence of any other young person's experience with the government programs. She alone provided first-hand evidence and testimony as a class member in this case, and she in fact participated in each of the Community Work, Remedial Education and On-the-job Training Programs at various times. She ended up dropping out of virtually every program she started, apparently because of her own personal problems and

personality traits. The testimony from one social worker, particularly as his clinic was attached to a psychiatric hospital and therefore received a disproportionate number of welfare recipients who also had serious psychological problems, does not give us a better or more accurate picture of the situation of the other class members, or of the relationship between Ms. Gosselin's personal difficulties and the structure of the welfare program.

9 Ms. Gosselin challenged the 1984 social assistance scheme on behalf of all welfare recipients under 30 subject to the differential regime from 1985 to 1989 (when, for reasons unrelated to this litigation, it was replaced by legislation that does not make age-based distinctions). As indicated above, she argued that Quebec's social assistance scheme violates s. 7 and s. 15(1) of the *Canadian Charter*, and s. 45 of the *Quebec Charter*. She asks the Court to declare s. 29(*a*) of the Regulation — which provided a lesser base welfare entitlement to people under 30 — to have been invalid from 1987 (when it lost the protection of the notwithstanding clause) to 1989, and to order the government of Quebec to reimburse all affected welfare recipients for the difference between what they actually received and what they would have received had they been 30 years of age or over, for a total of roughly $389 million, plus interest.

10 The trial judge, Reeves J., held that the claim was not supported by the evidence and that the distinction made by Quebec's social assistance regime was not discriminatory under s. 15(1) of the *Canadian Charter* because it was based on genuine considerations that corresponded to relevant characteristics of the under-30 age group, including the importance of providing under-30s with incentives to get training and work experience in the face of widespread youth unemployment: reflex, [1992] R.J.Q. 1647. He dismissed Ms. Gosselin's s. 7 claim, holding that s. 7's protection of security of the person does not extend to economic security and does not create a constitutional right to be free from poverty. He also rejected the claim under s. 45 of the *Quebec Charter* on the ground that s. 45 does not create an entitlement to a particular level of state assistance.

11 All three judges of the Quebec Court of Appeal agreed that s. 7 of the *Canadian Charter* was not engaged in this case:1999 CanLII 13818 (QC CA), [1999] R.J.Q. 1033. Mailhot J.A. found this case indistinguishable from *Law v.*

Canada (Minister of Employment and Immigration), 1999 CanLII 675 (SCC), [1999] 1 S.C.R. 497, and dismissed the s. 15(1) claim accordingly. Baudouin J.A. found that Quebec's social assistance scheme breached s. 15(1), but he found the breach justified in a free and democratic society under s. 1 of the *Canadian Charter*. Robert J.A. would have found that the social assistance scheme breached s. 15(1) of the *Canadian Charter* and was not saved by s. 1, but he would have dismissed the claim for damages as inappropriate. On s. 45 of the *Quebec Charter*, only Robert J.A. found a breach, for which he held damages unavailable.

III. Issues

12 This case raises the important question of how to determine when the differential provision of government benefits crosses the line that divides appropriate tailoring in light of different groups' circumstances, and discrimination. To what extent does the *Canadian Charter* restrict a government's discretion to extend different kinds of help, and different levels of financial assistance, to different groups of welfare recipients? How much evidence is required to compel a government to retroactively reimburse tens of thousands of people for alleged shortfalls in their welfare payments, arising from a conditional benefits scheme? These issues have implications for the range of options available to governments throughout Canada in tailoring welfare programs to address the particular needs and circumstances of individuals requiring social assistance.

13 The specific legal issues are found in the stated constitutional questions:

1. Did s. 29(*a*) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, adopted under the *Social Aid Act*, R.S.Q., c. A-16, infringes. 15(1) of the *Canadian Charter of Rights and Freedoms* on the ground that it established a discriminatory distinction based on age with respect to individuals, capable of working, aged 18 to 30 years?

2. If so, is the infringement justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

3. Did s. 29(*a*) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, adopted under the *Social Aid Act*, R.S.Q., c. A-16, infringes. 7 of the *Canadian Charter of Rights and Freedoms* on the ground that it deprived

those to whom it applied of their right to security of the person contrary to the principles of fundamental justice?

4. If so, is the infringement justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

14 A further issue is whether s. 29(*a*) of the Regulation violates s. 45 of the *Quebec Charter*, and if so, whether a remedy is available.

15 A preliminary issue arises in connection with s. 33 of the *Canadian Charter* — the "notwithstanding clause". By virtue of *An Act respecting the Constitution Act, 1982*, R.S.Q., c. L-4.2, the Quebec legislature withdrew all Quebec laws from the *Canadian Charter* regime for five years from their inception. This means that the Act is immune from *Canadian Charter* scrutiny from June 23, 1982 to June 23, 1987, and the programs part of the scheme is immune from April 4, 1984 to April 4, 1989 (see *An Act to amend the Social Aid Act*, S.Q. 1984, c. 5, ss. 4 and 5). It could be argued, therefore, that the scheme is protected from *Canadian Charter* scrutiny on s. 7 or s. 15(1) grounds for the whole period except for the four months from April 4, 1989 to August 1, 1989. This raises the further question of whether evidence on the legislation's impact outside the four-month period subject to *Canadian Charter* scrutiny can be used to generate conclusions about compliance with the *Canadian Charter* within the four-month period. In view of my conclusion that the program is constitutional in any event, I need not resolve these issues.

IV. Analysis

A. *Does the Social Assistance Scheme Violate Section 15(1) of the Canadian Charter?*

1. The Section 15 Test

16 Section 15(1) of the *Canadian Charter* provides that "[e]very 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."

17 To establish a violation of s. 15(1), the claimant must establish on a civil standard of proof that: (1) the law imposes differential treatment between the

claimant and others, in purpose or effect; (2) one or more enumerated or analogous grounds are the basis for the differential treatment; and (3) the law in question has a purpose or effect that is discriminatory in the sense that it denies human dignity or treats people as less worthy on one of the enumerated or analogous grounds. In this case, the first two elements are clear, and the analysis focuses on whether the scheme was discriminatory.

18 My colleague Bastarache J. and I agree that *Law* remains the governing standard. We agree that the s. 15(1) test involves a contextual inquiry to determine whether a challenged distinction, viewed from the perspective of a reasonable person in the claimant's circumstances, violates that person's dignity and fails to respect her as a full and equal member of society. We agree that a distinction made on an enumerated or analogous ground violates essential human dignity to the extent that it reflects or promotes the view that the individuals affected are less deserving of concern, respect, and consideration than others: *Law*, *supra*, at para. 42; *Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 S.C.R. 143, at p. 171, *per* McIntyre J. We agree that a claimant bears the burden under s. 15(1) of showing on a civil standard of proof that a challenged distinction is discriminatory, in the sense that it harms her dignity and fails to respect her as a full and equal member of society. We agree that, if a claimant meets this burden, the burden shifts to the government to justify the distinction under s. 1.

19 Where we disagree is on whether the claimant in this particular case has met her burden of proof. We both examine the contextual factors enunciated in *Law*, but we reach different conclusions with respect to the adequacy of the factual record, the nature of the inferences we can draw from that record, and the deference owed to the findings of the trial judge. Whatever sympathy Ms. Gosselin's economic circumstances might provoke, I simply cannot find that she has met her burden of proof in showing that the Quebec government discriminated against her based on her age. In my respectful view, she has not demonstrated that the government treated her as less worthy than older welfare recipients, simply because it conditioned increased payments on her participation in programs designed specifically to integrate her into the workforce and to promote her long-term self-sufficiency.

20 We must approach the question of whether the scheme was discriminatory in light of the purpose of the s. 15 equality guarantee. That purpose

is to ensure that governments respect the innate and equal dignity of every individual without discrimination on the basis of the listed or analogous grounds: *Law*, *supra*, at para. 51. The aspect of human dignity targeted by s. 15(1) is the right of each person to participate fully in society and to be treated as an equal member, regardless of irrelevant personal characteristics, or characteristics attributed to the individual based on his or her membership in a particular group without regard to the individual's actual circumstances. As Iacobucci J. put it in *Law* (at para. 51):

> [T]he purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

21 Discrimination occurs when people are marginalized or treated as less worthy on the basis of irrelevant personal characteristics, without regard to their actual circumstances. The enumerated and analogous grounds of s. 15 serve as "legislative markers of suspect grounds associated with stereotypical, discriminatory decision making"; differential treatment based on these grounds invites judicial scrutiny: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC), [1999] 2 S.C.R. 203, at para. 7, *per* McLachlin and Bastarache JJ. However, not every adverse distinction made on the basis of an enumerated or analogous ground constitutes discrimination: see *Corbiere*. Some group-based distinctions may be appropriate or indeed promote substantive equality, as envisaged in s. 15(2): see *Lovelace v. Ontario*, 2000 SCC 37 (CanLII), [2000] 1 S.C.R. 950, 2000 SCC 37.

22 Section 15(1) seeks to ensure that all are treated as equally worthy of full participation in Canadian society, regardless of irrelevant personal characteristics or membership in groups defined by the enumerated and analogous grounds: see D. Greschner, "The Purpose of Canadian Equality Rights" (2002), 6 *Rev. Const. Stud.* 291. The focus is not on whether or not the claimant is subject to a formal distinction, but on whether the claimant has in substance been treated as less worthy than others, whether or not a formal distinction exists: *Andrews*, *supra*, at pp. 164-69, *per* McIntyre J.; *Law*, *supra*, at para. 25; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (SCC), [1999] 3 S.C.R. 3.

23 Section 15's purpose of protecting equal membership and full participation in Canadian society runs like a leitmotif through our s. 15 jurisprudence. *Corbiere* addressed the participation of off-reserve Aboriginal band members in band governance. *Eaton* and *Eldridge* spoke of the harms of excluding disabled individuals from the larger society: *Eaton v. Brant County Board of Education*, 1997 CanLII 366 (SCC), [1997] 1 S.C.R. 241; *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 S.C.R. 624. *Vriend* dealt with a legislature's exclusion of the ground of sexual orientation from a human rights statute protecting individuals from discrimination based on a range of other grounds: *Vriend v. Alberta*, 1998 CanLII 816 (SCC), [1998] 1 S.C.R. 493. *Granovsky* resonated with the language of belonging: "Exclusion and marginalization are generally not created by the individual with disabilities but are created by the economic and social environment and, unfortunately, by the state itself": *Granovsky v. Canada (Minister of Employment and Immigration)*,2000 SCC 28 (CanLII), [2000] 1 S.C.R. 703, 2000 SCC 28, at para. 30.

24 To determine whether a distinction made on an enumerated or analogous ground is discriminatory, we must examine its context. As Binnie J. stated in*Granovsky*, *supra*, at para. 59, citing U.S. Supreme Court Marshall J.'s partial dissent in *Cleburne v. Cleburne Living Centre, Inc.*, 473 U.S. 432 (1985): "[a] sign that says 'men only' looks very different on a bathroom door than a courthouse door". In each case, we must ask whether the distinction, viewed in context, treats the subject as less worthy, less imbued with human dignity, on the basis of an enumerated or analogous ground.

25 The need for a contextual inquiry to establish whether a distinction conflicts with s. 15(1)'s purpose is the central lesson of *Law*. The issue, as my colleagues and I all agree, is whether "a reasonable person in circumstances similar to those of the claimant would find that the legislation which imposes differential treatment has the effect of demeaning his or her dignity" having regard to the individual's or group's traits, history, and circumstances: *Law*, at para. 60, followed in*Lovelace*, *supra*, at para. 55. As an aid to determining whether a distinction has a discriminatory purpose or effect under part (3) of this test, *Law* proposes an investigation of four contextual factors relating to the challenged distinction: (1) pre-existing disadvantage; (2) correspondence between the ground of distinction and the actual needs and circumstances of the affected

group; (3) the ameliorative purpose or effect of the impugned measure for a more disadvantaged group; and (4) the nature and scope of the interests affected.

26 Both the purpose of the scheme and its effect must be considered in making this evaluation. I agree with Bastarache J. that the effects of the scheme are critical. However, under *Law*, the context of a given legislative scheme also includes its purpose. Simply put, it makes sense to consider what the legislator intended in determining whether the scheme denies human dignity. Intent, like the other contextual factors, is not determinative. Our case law has established that even a well-intentioned or facially neutral scheme can have the effect of discriminating: *BCGSEU*, *supra*. The scheme here is not facially neutral: we are dealing with an explicit distinction. The purpose of the distinction, in the context of the overall legislative scheme, 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.

27 I emphasize that a beneficent purpose will not shield an otherwise discriminatory distinction from judicial scrutiny under s. 15(1). Legislative purpose is relevant only insofar as it relates to whether or not a reasonable person in the claimant's position would feel that a challenged distinction harmed her dignity. As a matter of common sense, if a law is 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. This does not mean that one must uncritically accept the legislature's stated purpose at face value: a reasonable person in the claimant's position would not accept the exclusion of women from the workplace based merely on the legislature's assertion that this is for women's "own good". However, where the legislature is responding to certain concerns, and where those concerns appear to be well founded, it is legitimate to consider the legislature's purpose as part of the overall contextual evaluation of a challenged distinction from the claimant's perspective, as called for in *Law*. This is reflected in the questions Iacobucci J. asked in *Law*: "Do the impugned CPP provisions, in purpose or effect, violate essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice?"; "Does the law, in purpose or effect, perpetuate the view that people under 45 are less capable or less worthy of recognition or value as human beings or as members of Canadian society?" (para. 99 (emphasis added)).

2. Applying the Test

28 The Regulation at issue made a distinction on the basis of an enumerated ground, age. People under 30 were subject to a different welfare regime than people 30 and over. The question is whether this distinction in purpose or effect resulted in substantive inequality contrary to s. 15(1)'s purpose of ensuring that governments treat all individuals as equally worthy of concern, respect, and consideration. More precisely, the question is whether a reasonable person in Ms. Gosselin's position would, having regard to all the circumstances and the context of the legislation, conclude that the Regulation in purpose or effect treated welfare recipients under 30 as less worthy of respect than those 30 and over, marginalizing them on the basis of their youth.

29 To answer this question, we must consider the four factors set out in *Law*. None of these factors is a prerequisite for finding discrimination, and not all factors will apply in every case. The list of factors is neither absolute nor exhaustive. In addition, the factors may overlap, since they are all designed to illuminate the relevant contextual considerations surrounding a challenged distinction. Nonetheless, the four factors provide a useful guide to evaluating an allegation of discrimination, and I will examine each of them in turn.

(a) *Pre-existing Disadvantage*

30 A key marker of discrimination and denial of human dignity under s. 15(1) is whether the affected individual or group has suffered from "pre-existing disadvantage, vulnerability, stereotyping, or prejudice": *Law*, at para. 63. Historic patterns of discrimination against people in a group often indicate the presence of stereotypical or prejudicial views that have marginalized its members and prevented them from participating fully in society. This, in turn, raises the strong possibility that current differential treatment of the group may be motivated by or may perpetuate the same discriminatory views. The contextual factor of pre-existing disadvantage invites us to scrutinize group-based distinctions carefully to ensure that they are not based, either intentionally or unconsciously, on these kinds of unfounded generalizations and stereotypes.

31 Many of the enumerated grounds correspond to historically disadvantaged groups. For example, it is clear that members of particular racial or religious groups should not be excluded from receiving public benefits on account of their race or religion. However, unlike race, religion, or gender, age is not strongly associated with discrimination and arbitrary denial of privilege. This does not mean that examples of age discrimination do not exist. But age-based distinctions are a common and necessary way of ordering our society. They do not automatically evoke a context of pre-existing disadvantage suggesting discrimination and marginalization under this first contextual factor, in the way that other enumerated or analogous grounds might.

32 To expand on the earlier example, a sign on a courthouse door proclaiming "Men Only" evokes an entire history of discrimination against a historically disadvantaged class; a sign on a barroom door that reads "No Minors" fails to similarly offend. The fact that "[e]ach individual of any age has personally experienced all earlier ages and expects to experience the later ages" (P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 52-54) operates against the arbitrary marginalization of people in a particular age group. Again, this does not mean that age is a "lesser" ground for s. 15 purposes. However, pre-existing disadvantage and historic patterns of discrimination against a particular group do form part of the contextual evaluation of whether a distinction is discriminatory, as called for in *Law*. Concerns about age-based discrimination typically relate to discrimination against people of advanced age who are presumed to lack abilities that they may in fact possess. Young people do not have a similar history of being undervalued. This is by no means dispositive of the discrimination issue, but it may be relevant, as it was in *Law*.

33 Both as a general matter, and based on the evidence and our understanding of society, young adults as a class simply do not seem especially vulnerable or undervalued. There is no reason to believe that individuals between ages 18 and 30 in Quebec are or were particularly susceptible to negative preconceptions. No evidence was adduced to this effect, and I am unable to take judicial notice of such a counter-intuitive proposition. Indeed, the opposite conclusion seems more plausible, particularly as the programs participation component of the social assistance scheme was premised on a view of the greater long-term employability of under-30s, as compared to their older counterparts. Neither the nature of the distinction at issue nor the evidence suggests that the affected group of young adults constitutes a group that historically has suffered disadvantage, or that is at a particular risk of experiencing

adverse differential treatment based on the attribution of presumed negative characteristics: see *Lovelace*, *supra*, at para. 69.

34 With regard to this contextual factor, Ms. Gosselin is in the same position as Mrs. Law. In *Law*, Iacobucci J. stated (at para. 95):

> Relatively speaking, adults under the age of 45 have not been consistently and routinely subjected to the sorts of discrimination faced by some of Canada's discrete and insular minorities. For this reason, it will be more difficult as a practical matter for this Court to reason, from facts of which the Court may appropriately take judicial notice, that the legislative distinction at issue violates the human dignity of the appellant.

If anything, people under 30 appear to be advantaged over older people in finding employment. As Iacobucci J. also stated in *Law*, with respect to adults under 45 (at para. 101):

> It seems to me that the increasing difficulty with which one can find and maintain employment as one grows older is a matter of which a court may appropriately take judicial notice. Indeed, this Court has often recognized age as a factor in the context of labor force attachment and detachment. For example, writing for the majority in *McKinney*, [1990 CanLII 60 (SCC), [1990] 3 S.C.R. 229], LaForest J. stated as follows, at p. 299:
>
> > Barring specific skills, it is generally known that persons over 45 have more difficulty finding work than others. They do not have the flexibility of the young, a disadvantage often accentuated by the fact that the latter are frequently more recently trained in the more modern skills.

Iacobucci J. went on to note that "[s]imilar thoughts were expressed in *Machtinger v. HOJ Industries Ltd.*, 1992 CanLII 102 (SCC), [1992] 1 S.C.R. 986, at pp. 998-99, *per* Iacobucci J., and at pp. 1008-9, *per* McLachlin J., [. . . and] *Moge v. Moge*, 1992 CanLII 25 (SCC), [1992] 3 S.C.R. 813, at pp. 881-83,*per* McLachlin J."

35 Given the lack of pre-existing disadvantage experienced by young adults, Ms. Gosselin attempts to shift the focus from age to welfare, arguing that allwelfare recipients suffer from stereotyping and vulnerability. However, this argument does not assist her claim. The ground of discrimination upon which she founds her claim is age. The question with respect to this contextual factor is therefore whether the targeted age-group, comprising young adults aged 18 to 30, has suffered from historic disadvantage as a result of stereotyping on the basis of age. Re-defining the group as welfare recipients aged 18 to 30 does not help us

answer that question, in particular because the 30-and-over group that Ms. Gosselin asks us to use as a basis of comparison also consists entirely of welfare recipients.

36 I conclude that the appellant has not established that people aged 18 to 30 have suffered historical disadvantage on the basis of their age. There is nothing to suggest that people in this age group have historically been marginalized and treated as less worthy than older people.

(b) *Relationship Between Grounds and the Claimant Group's Characteristics or Circumstances*

37 The second contextual factor we must consider in determining whether the distinction is discriminatory in the sense of denying human dignity and equal worth is the relationship between the ground of distinction (age) and the actual characteristics and circumstances of the claimant's group: *Law*, at para. 70. A law that is closely tailored to the reality of the affected group is unlikely to discriminate within the meaning of s. 15(1). By contrast, a law that imposes restrictions or denies benefits on account of presumed or unjustly attributed characteristics is likely to deny essential human worth and to be discriminatory. Both purpose and effect are relevant here, insofar as they would affect the perception of a reasonable person in the claimant's position: see *Law*, at para. 96.

38 I turn first to purpose in order to evaluate whether or not the rationale for the challenged distinction corresponded to the actual circumstances of under-30s subject to differential welfare scheme. The evidence indicates that the purpose of the challenged distinction, far from being stereotypical or arbitrary, corresponded to the actual needs and circumstances of individuals under 30. In the late 1960s and early 1970s, the unemployment rate among young Quebecers was relatively low, as jobs were readily available. However, circumstances changed dramatically in the course of the ensuing years. First, North America experienced a deep recession in the early 1980s, which hit Quebec hard and drove unemployment from a traditional rate hovering around 8 percent to a peak of 14.4 percent of the active population in 1982, and among the young from 6 percent (1966) to 23 percent. At the same time, the federal government tightened eligibility requirements for federal unemployment insurance benefits, and the number of young people entering the job market for the first time surged. These three events

caused an unprecedented increase in the number of people capable of working who nevertheless ended up on the welfare rolls.

39 The situation of young adults was particularly dire. The unemployment rate among young adults was far higher than among the general population. People under 30, capable of working and without any dependants, made up a greater proportion of welfare recipients than ever before. Moreover, this group accounted for the largest — and steadily growing — proportion of new entrants into the welfare system: by 1983 fully two-thirds of new welfare recipients were under 30, and half were under the age of 23. In addition to coming onto the welfare rolls in ever greater numbers, younger individuals did so for increasingly lengthy periods of time. In 1975, 60 percent of welfare recipients under 30 not incapable of working left the welfare rolls within six months. By 1983, only 30 percent did so.

40 Behind these statistics lay a complex picture. The "new economy" emerging in the 1980s offered diminishing prospects for unskilled or under-educated workers. At the same time, a disturbing trend persisted of young Quebecers dropping out of school and trying to join the workforce. The majority of unemployed youths in the early 1980s were school drop-outs. Unemployed youths were, on average, significantly less educated than the general population, and the unemployment rate among young people with fewer than eight years of education stood at 40 percent to 60 percent. Lack of skills and basic education were among the chief causes of youth unemployment.

41 The government's short-term purpose in the scheme at issue was to get recipients under 30 into work and training programs that would make up for the lower base amount they received while teaching them valuable skills. The differential regime of welfare payments was tailored to help the burgeoning ranks of unemployed youths obtain the skills and basic education they needed to get permanent jobs. The mechanism was straightforward. In order to increase their welfare benefits, people under 30 would be required to participate in On-the-job Training, Community Work or Remedial Education Programs. Participating in the training and community service programs would bring welfare benefits up to the basic level payable to the 30-and-over group, and in the education program to about $100 less.

42 The government's longer-term purpose was to provide young welfare recipients with precisely the kind of remedial education and skills training they lacked and needed in order eventually to integrate into the workforce and become self-sufficient. This policy reflects the practical wisdom of the old Chinese proverb: "Give a man a fish and you feed him for a day. Teach him how to fish and you feed him for a lifetime." This was not a denial of young people's dignity; it was an affirmation of their potential.

43 Simply handing over a bigger welfare cheque would have done nothing to help welfare recipients under 30 escape from unemployment and its potentially devastating social and psychological consequences above and beyond the short-term loss of income. Moreover, opposition to the incentive program entirely overlooks the cost to young people of being on welfare during the formative years of their working lives. For young people without significant educational qualifications, skills, or experience, entering into the labour market presents considerable difficulties. A young person who relies on welfare during this crucial initial period is denied those formative experiences which, for those who successfully undertake the transition into the productive workforce, lay the foundation for economic self-sufficiency and autonomy, not to mention self-esteem. The longer a young person stays on welfare, the more difficult it becomes to integrate into the workforce at a later time. In this way, reliance on welfare can contribute to a vicious circle of inability to find work, despair, and increasingly dismal prospects.

44 Instead of turning a blind eye to these problems, the government sought to tackle them at their roots, designing social assistance measures that might help welfare recipients achieve long-term autonomy. Because federal rules in effect at the time prohibited making participation in the programs mandatory, the province's only real leverage in promoting these programs lay in making participation a prerequisite for increases in welfare. Even if one does not agree with the reasoning of the legislature or with its priorities, one cannot argue based on this record that the legislature's purpose 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. Logic and common sense support the legislature's decision to structure its social assistance programs to give young people, who have a greater potential for long-term insertion into the workforce than older people, the incentive to participate in programs specifically designed to

provide them with training and experience. As indicated above, the government's purpose is a relevant contextual factor in the s. 15(1) analysis insofar as it relates to how a reasonable person in the claimant's circumstances would have perceived the incentive-based welfare regime. In this case, far from ignoring the actual circumstances of under-30s, the scheme at issue was designed to address their needs and abilities. A reasonable person in the claimant's circumstances would have taken this into account.

45 Turning to effect, Ms. Gosselin argues that the regime set up under the Regulation in fact failed to address the needs and circumstances of welfare recipients under 30 because the ability to "top up" the basic entitlement by participating in programs was more theoretical than real. She argues that, notwithstanding the legislature's intentions, the practical consequence of the Regulation was to abandon young welfare recipients, leaving them to survive on a grossly inadequate sum of money. In this way the program did not correspond to their actual needs, she argues, and amounted to discriminatory marginalization of the affected group.

46 The main difficulty with this argument is that the trial judge, after a lengthy trial and careful scrutiny of the record, found that Ms. Gosselin had failed to establish actual adverse effect. Reeves J. cautioned against generalizing from Ms. Gosselin's experience, and against over-reliance on opinion statements by experts in this regard, given the absence of any evidence to support the experts' claims about the material situation of individuals in the under-30 age group. He concluded: [TRANSLATION] "It is therefore highly doubtful that the representative plaintiff, acting on behalf of some 75 000 individuals, has discharged her burden of proof concerning whether the law had adverse effects on them" (p. 1664).

47 I can find no basis upon which this Court can set aside this finding. There is no indication in the record that any welfare recipient under 30 wanting to participate in one of the programs was refused enrollment. Louise Gosselin, who in fact participated in each of the three programs, was the only witness to provide first-hand testimony about the programs at trial. There is no evidence that anyone who tried to access the programs was turned away, or that the programs were designed in such a way as to systematically exclude under-30s from participating. In fact, these programs were initially available only to people under 30 (and, in the case of the Remedial Education Program, to heads of single-parent

households 30 and over); they were opened up to all welfare recipients in 1989. As the trial judge emphasized, the record contains no first-hand evidence supporting Ms. Gosselin's claim about the difficulties with the programs, and no indication that Ms. Gosselin can be considered representative of the under-30 class. It is, in my respectful opinion, utterly implausible to ask this Court to find the Quebec government guilty of discrimination under the *Canadian Charter* and order it to pay hundreds of millions of taxpayer dollars to tens of thousands of unidentified people, based on the testimony of a single affected individual. Nor does Ms. Gosselin present sufficient evidence that her own situation was a result of discrimination in violation of s. 15(1). The trial judge did not find evidence indicating a violation, and my review of the record does not reveal any error in this regard.

48 It is unnecessary to engage in the exercise of surmising how many program places would have been required had every eligible welfare recipient under 30 chosen to participate. In fact, contrary to her allegation, Ms. Gosselin's own experience clearly establishes that participation was a real possibility. For most of the relevant period, Ms. Gosselin's benefits were increased as a result of program participation. On those occasions when Ms. Gosselin dropped out of programs, the record indicates that this was due to personal problems, which included psychological and substance abuse components, rather than to flaws in the programs themselves. Ms. Gosselin's experience suggests that even individuals with serious problems were capable of supplementing their income under the impugned regime.

49 Ms. Gosselin also objects to the fact that the Remedial Education Program yielded less of an increase in benefits than the other programs, leaving participants in that program with a lower basic entitlement than the older group. However, this seems to amount to little more than an incentive for young individuals to prefer some programs (On-the-job Training or Community Work) over another (Remedial Education). In addition, it is worth noting that the government provided books and other materials to Remedial Education participants free of charge. The decision to structure the programs in this particular fashion may be good or bad policy, but it does not establish a breach of the claimant's essential human dignity, or a lack of correlation between the provision and the affected group's actual circumstances.

50 My colleague Bastarache J. relies on the conclusion of Robert J.A., dissenting, that, based on the expert evidence, there were not enough places available in the programs to meet the needs of all welfare recipients under 30. This evidence was before the trial judge, who rejected it as insufficient and specifically cautioned against over-reliance on the experts' opinions. With respect, I am of the view that it is not open to this Court to revisit the trial judge's conclusion absent demonstrated error. Furthermore, my colleague appears to accept in the course of his s. 7 analysis that Ms. Gosselin's problems cannot be attributed solely to the age-based distinction she challenges under s. 15. He states, "[i]n this case, the threat to the appellant's right to security of the person [i.e., her poverty] was brought upon her by the vagaries of a weak economy, not by the legislature's decision not to accord her more financial assistance or to require her to participate in several programs in order for her to receive more assistance" (para. 217). And again: "[The appellant] has not demonstrated that the legislation, by excluding her, has reduced her security any more than it would have already been, given market conditions" (para. 222); "nor did the underinclusive nature of the Regulation substantially prevent or inhibit the appellant from protecting her own security" (para. 223).

51 My colleague Bastarache J. also relies on the claim that only a very small percentage of welfare recipients under 30 actually received the base amount allocated to those 30 and over, because the majority of participants tended to opt for the lower-paying Remedial Education Program (Robert J.A. cites a figure of 11.2 percent, apparently from an economist's 1988 report). The first point is, again, that the trial judge did not find Ms. Gosselin's statistical and expert evidence convincing, particularly given the absence of first-hand testimony from actual class members. But there are other problems. There is no evidence about why only about one-third of eligible welfare recipients participated in the programs. Nor is there evidence about the actual income of under-30s who did not participate; clearly "aid received" is not necessarily equivalent to "total income".

52 For these reasons, the appellant has not shown that the impugned Regulation effectively excluded her or others like her from the protection against extreme poverty afforded by the social security scheme. Rather, the effect was to cause young people to attend training and education programs as a condition of receiving the full "basic needs" level of social assistance. I do not believe that making payments conditional in this way violated the dignity or human worth of persons under 30 years of age. The condition was not imposed as a result of negative stereotypes. The condition did not effectively consign the appellant or

others like her to extreme poverty. Finally, the condition did not force the appellant to do something that demeaned her dignity or human worth.

53 The long-term effects of the Regulation are also relevant in considering how a reasonable person in the claimant's position would have viewed the government program. The argument is that it imposed short-term pain. But the government thought that in the long run the program would benefit recipients under 30 by encouraging them to get training and find employment. We do not know whether it did so; the fact that the scheme was subsequently revamped may suggest the contrary. The point is simply this: Ms. Gosselin has not established, on the record before us, that the scheme did not correspond to the needs and situation of welfare recipients under 30 in the short or the long term, or that a reasonable person in her circumstances would have perceived that the government's efforts to equip her with training rather than simply giving her a monthly stipend denied her human dignity or treated her as less than a "full perso[n]" (Bastarache J., at para. 258).

54 It may well be that some under-30s fell through the cracks of the system and suffered poverty. However, absent concrete evidence, it is difficult to infer from this that the program failed to correspond to the actual needs of under-30s. I find no basis to interfere with the trial judge's conclusion that the record here simply does not support the contention of adverse effect on younger welfare recipients. This makes it difficult to conclude that the effect of the program did not correspond to the actual situation of welfare recipients under 30.

55 I add two comments. Perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required to find that a challenged provision does not violate the *Canadian Charter*. The situation of those who, for whatever reason, may have been incapable of participating in the programs attracts sympathy. Yet the inability of a given social program to meet the needs of each and every individual does not permit us to conclude that the program failed to correspond to the actual needs and circumstances of the affected group. As Iacobucci J. noted in *Law*, *supra*, at para. 105, we should not demand "that legislation must always correspond perfectly with social reality in order to comply with s. 15(1) of the *Charter*". Crafting a social assistance plan to meet the needs of young adults is a complex problem, for which there is no perfect solution. No matter what measures the government adopts, there will always be some individuals for whom a different set of measures might have

been preferable. The fact that some people may fall through a program's cracks does not show that the law fails to consider the overall needs and circumstances of the group of individuals affected, or that distinctions contained in the law amount to discrimination in the substantive sense intended by s. 15(1).

56 Second, we cannot infer disparity between the purpose and effect of the scheme and the situation of those affected, from the mere failure of the government to prove that the assumptions upon which it proceeded were correct. Bastarache J. argues that the distinction between people under 30 and older people lacks a "rational basis" because it is "[b]ased on the unverifiable presumption that people under 30 had better chances of employment and lower needs" (para. 248). This seems to place on the legislator the duty to verify all its assumptions empirically, even where these assumptions are reasonably grounded in everyday experience and common sense. With respect, this standard is too high. Again, this is primarily a disagreement as to evidence, not as to fundamental approach. The legislator is entitled to proceed on informed general assumptions without running afoul of s. 15, *Law*, at para. 106, provided these assumptions are not based on arbitrary and demeaning stereotypes. The idea that younger people may have an easier time finding employment than older people is not such a stereotype. Indeed, it was relied on in *Law* to justify providing younger widows and widowers with a lesser survivor's benefit.

57 A final objection is that the selection of 30 years of age as a cut-off failed to correspond to the actual situation of young adults requiring social assistance. However, all age-based legislative distinctions have an element of this literal kind of "arbitrariness". That does not invalidate them. Provided that the age chosen is reasonably related to the legislative goal, the fact that some might prefer a different age — perhaps 29 for some, 31 for others — does not indicate a lack of sufficient correlation between the distinction and actual needs and circumstances. Here, moreover, there is no evidence that a different cut-off age would have been preferable to the one selected.

58 I conclude that the record in this case does not establish lack of correlation in purpose or effect between the ground of age and the needs and circumstances of welfare recipients under 30 in Quebec.

(c) *The Ameliorative Purpose or Effect of the Impugned Law Upon a More Disadvantaged Person or Group in Society*

59 A third factor to be considered in determining whether the group-based devaluation of human worth targeted by s. 15 is established, is whether the challenged distinction was designed to improve the situation of a more disadvantaged group. In *Law*, the Court took into account that the lower pensions for younger widows and widowers were linked to higher pensions for needier, less advantaged, widows and widowers: *Law*, at para. 103.

60 Here there is no link between creating an incentive scheme for young people involving lower benefits coupled with a program participation requirement, and providing more benefits for older or more disadvantaged people. From this perspective, this contextual factor is neutral. More broadly, the distinction in benefits can be argued to reflect the different situations of recipients under 30 and recipients 30 and over. It is true that younger people require as much to live as older people. However, we may take judicial notice of the increased difficulty older people may encounter in finding employment, as this Court did in *Law*. At the same time, the benefits of training and entry into the workforce are greater for younger people than for older people: younger people have a longer career span ahead of them once they join the labour force, and, for them, dependence on welfare risks establishing a chronic pattern at an early age.

61 Viewed thus, the differential treatment of older and younger welfare recipients does not indicate that older recipients were more valued or respected than younger recipients. Older welfare recipients were, if not more disadvantaged (as in *Law*), "differently disadvantaged". Their different positions with respect to long-term employability as compared to younger people provided a reasonable basis for the legislature to tailor its programs to their different situations and needs. The provision of different initial amounts of monetary support to each of the two groups does not indicate that one group's dignity was prized above the other's. Those 30 and over and under-30s were not "similarly situated" in ways relevant to determining the appropriate level of social assistance in the form of unconditional welfare payments.

62 More generally, as discussed above, the Regulation was aimed at ameliorating the situation of welfare recipients under 30. A reasonable person in

Ms. Gosselin's position would take this into account in determining whether the scheme treated under-30s as less worthy of respect and consideration than those 30 and over.

(d) *Nature and Scope of the Interests Affected by the Impugned Law*

63 This factor directs us to consider the impact of the impugned law — how "severe and localized the . . . consequences [are] on the affected group":*Egan v. Canada*, 1995 CanLII 98 (SCC), [1995] 2 S.C.R. 513, at para. 63, quoted in *Law*, *supra*, at para. 74.

64 The trial judge, as noted, was unable to conclude that the evidence established actual adverse effects on welfare recipients under 30. The legislature thought it was helping under-30 welfare recipients; while we can surmise that the lower amount caused under-30s greater financial anxiety in the short term than a larger payment would have, we do not know how this actually played out in the context of the program participation scheme, or whether those 30 and over, who were only receiving 55 percent of the poverty level, experienced similar anxiety. The complainant argues that the lesser amount harmed under-30s and denied their essential human dignity by marginalizing them and preventing them from participating fully in society. But again, there is no evidence to support this claim. For those under 30 who were unable, for whatever reason, to increase their base entitlement, the lower base amount might have represented a significant adverse impact, depending on the availability of other resources, like family assistance. But even if we are prepared to accept that some young people must have been pushed well below the poverty line, we do not know how many, nor for how long. In this situation, it is difficult to gauge the nature and scope of the interests affected by the Regulation. We return once more to the central difficulty faced by the trial judge: despite Ms. Gosselin's claim to speak on behalf of 75 000 young people, she simply did not give the court sufficient evidence to support her allegation that the lower base amount was discriminatory, either against her or against the class as a whole.

65 Assessing the severity of the consequences also requires us to consider the positive impact of the legislation on welfare recipients under 30. The evidence shows that the regime set up under the *Social Aid Act* sought to promote the self-

sufficiency and autonomy of young welfare recipients through their integration into the productive workforce, and to combat the pernicious side effects of unemployment and welfare dependency. 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. These are the stuff and substance of essential human dignity: see *Law*, *supra*, at para. 53. I respectfully disagree with the suggestion that the incentive provisions somehow indicated disdain for young people or a belief that they could be made productive only through coercion. On the contrary, the program's structure reflected faith in the usefulness of education and the importance of encouraging young people to develop their skills and employability, rather than being consigned to dependence and unemployment. In my view, the interest promoted by the differential treatment at issue in this case is intimately and inextricably linked to the essential human dignity that animates the equality guarantee set out at s. 15(1) of the *Canadian Charter*.

66 We must decide this case on the evidence before us, not on hypotheticals, or on what we think the evidence ought to show. My assessment of the evidence leads me to conclude that, notwithstanding its possible short-term negative impact on the economic circumstances of some welfare recipients under 30 as compared to those 30 and over, the thrust of the program was to improve the situation of people in this group, and to enhance their dignity and capacity for long-term self-reliance. The nature and scope of the interests affected point not to discrimination but to concern for the situation of welfare recipients under 30. Absent more persuasive evidence to the contrary, I cannot conclude that a reasonable person in the claimant's position would have experienced this scheme as discriminatory, based on the contextual factors and the concern for dignity emphasized in *Law*.

(e) *Summary of Contextual Factors Analysis*

67 The question is whether a reasonable welfare recipient under age 30 who takes into account the contextual factors relevant to the claim would conclude that the lower base amount provided to people under 30 treated her, in purpose or effect, as less worthy and less deserving of respect, consideration and opportunity than people 30 and over. On the evidence before us, the answer to this question must be no.

68 Looking at the four contextual factors set out in *Law*, I cannot conclude that the denial of human dignity fundamental to a finding of discrimination is established. This is not a case where the complainant group suffered from pre-existing disadvantage and stigmatization. Lack of correspondence between the program and the actual circumstances of recipients under 30 is not established, in either purpose or effect. The "ameliorative purpose" factor is neutral with respect to discrimination. Finally, the findings of the trial judge and the evidence do not support the view that the overall impact on the affected individuals undermined their human dignity and their right to be recognized as fully participating members of society, notwithstanding their membership in the class affected by the distinction.

69 A reasonable welfare recipient under 30 might have concluded that the program was harsh, perhaps even misguided. (As noted, it eventually was repealed.) But she would not reasonably have concluded that it treated younger people as less worthy or less deserving of respect in a way that had the purpose or effect of marginalizing or denigrating younger people in our society. If anything, she would have concluded that the program treated young people as more able than older people to benefit from training and education, more able to get and retain a job, and more able to adapt to their situations and become fully participating and contributing members of society.

70 Far from relying on false stereotypes, the program was calibrated to address the particular needs and circumstances of young adults requiring social assistance, considered from both short-term and long-term perspectives. I do not suggest that stereotypical thinking must always be present for a finding that s. 15is breached. However, its absence is a factor to be considered. The age-based distinction was made for an ameliorative, non-discriminatory purpose, and its social and economic thrust and impact were directed to enhancing the position of young people in society by placing them in a better position to find employment and live fuller, more independent lives. Nor, on the findings of the trial judge, is it established that the program's effect was to undermine the worth of its members in comparison with older people.

71 The most compelling way to put the claimant's case is this. We are asked to infer from the apparent lack of widespread participation in programs that some recipients under 30 must at some time have been reduced to utter poverty. From this we are further asked to infer that at least some of these people's

human dignity and ability to participate as fully equal members of society were compromised.

72 The inferences that this argument asks us to draw are problematic. The trial judge, as discussed, was unable to find evidence of actual adverse impact on under-30s as a group. Moreover, the argument rests on a standard of perfection in social programs. As this Court noted in *Law*, that is not the standard to be applied. Some people will always fall through the cracks of social programs. That does not establish denial of human dignity and breach of s. 15. What is required is demonstration that the program as a whole and in the context of *Law*'s four factors in purpose or effect denied human dignity to the affected class, penalizing or marginalizing them simply for being who they were. In this case, that has not been shown.

73 In many respects, the case before us is strikingly similar to *Law*. The provision there drew an age-based distinction in a survivor's entitlement to pension benefits, allocating no benefit to survivors who were under 35 years of age at the time of the contributor's death, in the absence of specific circumstances provided for in the legislation. The provision here draws an age-based distinction in an unemployed individual's entitlement to welfare benefits, allocating a reduced monetary benefit coupled with a program participation incentive to unemployed individuals who are under 30 years of age at the time of receipt, in the absence of specific circumstances provided for in the Regulation. The appellant in *Law* argued that the distinction, however well intentioned, was based on a faulty assumption that younger people can more easily obtain employment than older people. The appellant here argues that the distinction, however well intentioned, is based on a faulty assumption that younger people can more easily obtain employment than older people. The appellant in *Law* emphasized short-term differences, while the respondent emphasized long-term needs. The appellant here emphasizes short-term differences, while the respondent emphasizes long-term needs. The Court held in *Law* that while the law contained a facial age-based distinction that treated younger people adversely, "the differential treatment does not reflect or promote the notion that they are less capable or less deserving of concern, respect, and consideration, when the dual perspectives of long-term security and the greater opportunity of youth are considered" (para. 102). Similarly here, the aim of the legislation in averting long-term dependency on welfare and promoting insertion into the labour force, coupled with the provision of job training and remedial education programs, leads to the conclusion that the

differential treatment does not reflect or promote the notion that young people are less capable or less deserving of concern, respect, and consideration. The Court found in *Law* that the legislation's failure to correspond perfectly to the circumstances of each and every individual member of the affected group did not "affect the ultimate conclusion that the legislation is consonant with the human dignity and freedom of the appellant" (para. 106). Likewise here, the legislation's arguable failure to correspond perfectly to Ms. Gosselin's personal circumstances, the only circumstances described in the record, does not affect the ultimate conclusion that the legislation is consonant with her human dignity and freedom, and with the human dignity and freedom of under-30s generally.

74 I conclude that the impugned law did not violate the essential human dignity of welfare recipients under 30. We must base our decision on the record before us, not on personal beliefs or hypotheticals. On the facts before us, the law did not discriminate against Ms. Gosselin, either individually or as a member of the group of 18- to 30-year-olds in Quebec. The differential welfare scheme did not breach s. 15(1) of the *Canadian Charter*.

B. *Does the Social Assistance Scheme Violate Section 7 of the Canadian Charter?*

75 Section 7 states that "[e]veryone has the right to life, liberty and security of the person" and "the right not to be deprived" of these "except in accordance with the principles of fundamental justice". The appellant argues that the s. 7 right to security of the person includes the right to receive a particular level of social assistance from the state adequate to meet basic needs. She argues that the state deprived her of this right by providing inadequate welfare benefits, in a way that violated the principles of fundamental justice. There are three elements to this claim: (1) that the legislation affects an interest protected by the right to life, liberty and security of the person within the meaning of s. 7; (2) that providing inadequate benefits constitutes a "deprivation" by the state; and (3) that, if deprivation of a right protected by s. 7 is established, this was not in accordance with the principles of fundamental justice. The factual record is insufficient to support this claim. Nevertheless, I will examine these three elements.

76 The first inquiry is whether the right here contended for — the right to a level of social assistance sufficient to meet basic needs — falls within s. 7. This requires us to consider the content of the right to life, liberty and security of the person, and the nature of the interests protected by s. 7.

77 As emphasized by my colleague Bastarache J., the dominant strand of jurisprudence on s. 7 sees its purpose as guarding against certain kinds of deprivation of life, liberty and security of the person, namely, those "that occur as a result of an individual's interaction with the justice system and its administration": *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC), [1999] 3 S.C.R. 46, at para. 65. "[T]he justice system and its administration" refers to "the state's conduct in the course of enforcing and securing compliance with the law" (*G. (J.)*, at para. 65). This view limits the potential scope of "life, liberty and security of the person" by asking whom or what s. 7 protects against. Under this narrow interpretation, s. 7 does not protect against all measures that might in some way impinge on life, liberty or security, but only against those that can be attributed to state action implicating the administration of justice: see *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, 1990 CanLII 105 (SCC), [1990] 1 S.C.R. 1123 (the "*Prostitution Reference*"), at pp. 1173-74, *per* Lamer J. (as he then was), writing for himself; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*,1995 CanLII 115 (SCC), [1995] 1 S.C.R. 315, at paras. 21-23, *per* Lamer C.J., again writing for himself alone; and *G. (J.)*, *supra*, for the majority. This approach was affirmed in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII), [2000] 2 S.C.R. 307, 2000 SCC 44, *per*Bastarache J. for the majority.

78 This Court has indicated in its s. 7 decisions that the administration of justice does not refer exclusively to processes operating in the criminal law, as Lamer C.J. observed in *G. (J.)*, *supra*. Rather, our decisions recognize that the administration of justice can be implicated in a variety of circumstances: see*Blencoe*, *supra* (human rights process); *B. (R.)*, *supra* (parental rights in relation to state-imposed medical treatment); *G. (J.)*, *supra* (parental rights in the custody process); *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, 1997 CanLII 336 (SCC), [1997] 3 S.C.R. 925 (liberty to refuse state-imposed addiction treatment). Bastarache J. argues that s. 7 applies only in an adjudicative context. With respect, I believe that this conclusion may be premature. An adjudicative context might be sufficient, but we have not yet determined that one is necessary in order for s. 7 to be implicated.

79 In my view, it is both unnecessary and undesirable to attempt to state an exhaustive definition of the administration of justice at this stage, delimiting all circumstances in which the administration of justice might conceivably be implicated. The meaning of the administration of justice, and more broadly the

meaning of s. 7, should be allowed to develop incrementally, as heretofore unforeseen issues arise for consideration. The issue here is not whether the administration of justice is implicated — plainly it is not — but whether the Court ought to apply s. 7 despite this fact.

80 Can s. 7 apply to protect rights or interests wholly unconnected to the administration of justice? The question remains unanswered. In *R. v.Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30, at p. 56, Dickson C.J., for himself and Lamer J. entertained (without deciding on) the possibility that the right to security of the person extends "to protect either interests central to personal autonomy, such as a right to privacy". Similarly, in *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, at p. 1003, Dickson C.J., for the majority, left open the question of whether s. 7 could operate to protect "economic rights fundamental to human . . . survival". Some cases, while on their facts involving the administration of justice, have described the rights protected by s. 7 without explicitly linking them to the administration of justice: *B.(R.*), *supra*; *G. (D.F.)*, *supra*.

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 todeprive people of these. Such a deprivation does not exist in the case at bar.

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": see *Reference re Provincial Electoral Boundaries (Sask.)*, 1991 CanLII 61 (SCC), [1991] 2 S.C.R. 158, at p. 180, *per* McLachlin J. It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases. In this connection, LeBel J.'s words in *Blencoe*, *supra*, at para. 188 are apposite:

> We must remember though that s. 7 expresses some of the basic values of the *Charter*. It is certainly true that we must avoid collapsing the contents of the *Charter* and perhaps of Canadian law into a flexible and complex provision like s. 7. But its importance is such for the definition of substantive and procedural guarantees in Canadian law that it would be dangerous to freeze the development of this part of the law. The full impact ofs. 7 will remain difficult to foresee and assess for a long while yet. Our Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*.

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.

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.

84 In view of my conclusions under s. 15(1) and s. 7 of the *Canadian Charter*, the issue of justification under s. 1 does not arise. Nor does the issue of*Canadian Charter* remedies arise.

C. *Does the Social Assistance Scheme Violate Section 45 of the Quebec Charter?*

85 Section 45 of the *Quebec Charter* provides that every person in need has a right to "measures of financial assistance and to social measures provided for by law, susceptible of ensuring such person an acceptable standard of living".

86 Ms. Gosselin argues that s. 45 creates a right to an acceptable standard of living and that Quebec's social assistance scheme breached that right. On this issue, she substantially echoes the position of Robert J.A., dissenting, in the Quebec Court of Appeal. She further argues that a remedy for this alleged breach

ought to be available under s. 49 of the *Quebec Charter*, a proposition that Robert J.A. rejected.

87 There can be no doubt that s. 45 purports to create a right. However, determining the scope and content of that right presents something of a challenge, as s. 45 is ambiguous, admitting of two possible interpretations. According to the first interpretation, by providing a right to "measures provided for by law, susceptible of ensuring . . . an acceptable standard of living", s. 45 requires courts to review social assistance measures adopted by the legislature to determine whether or not they succeed in ensuring an acceptable standard of living. This is the approach urged upon us by the appellant.

88 A second interpretation reads s. 45 as creating a far more limited right. On this view, s. 45 requires the government to provide social assistance measures, but it places the adequacy of the particular measures adopted beyond the reach of judicial review. The phrase "susceptible of ensuring . . . an acceptable standard of living" serves to identify the measures that are the subject matter of the entitlement, i.e. to specify the kind of measures the state is obliged to provide, but it cannot ground a review of their adequacy. In my view, several considerations militate in favour of this second interpretation, as I indicate below.

89 Attention to the other provisions of Chapter IV of the *Quebec Charter*, entitled "Economic and Social Rights", helps to put s. 45 in context, and sheds considerable light on the interpretive issue. Some of the provisions in Chapter IV deal with rights as between individuals, and do not directly implicate the state at all. For example, s. 39 provides that "[e]very child has a right to the protection, security and attention that his parents or the persons acting in their stead are capable of providing". However, most of Chapter IV's provisions do implicate the state, including s. 45. Of these provisions implicating the state, all but two deal with "positive rights". That is, the rights described correspond to obligations for the state to do, or to provide, something. These include s. 40 (right to free public education); s. 41 (right to religious or moral education); and s. 44 (right to information).

90 Most of the provisions creating positive rights contain limiting language sharply curtailing the scope of the right. For example, the right to free

public education provided at s. 40 is stated in the following terms: "[e]very person has a right, to the extent and according to the standards provided for by law, to free public education" (emphasis added). It would be misleading to characterize that right as creating a free-standing entitlement to free public education, in light of this limitation. Rather, the language of the provision suggests that the particulars of the regime enacted by the legislature in order to provide free education are beyond judicial review of their sufficiency.

91 This same structure applies to other key provisions in Chapter IV. For example:

> **41.** Parents or the persons acting in their stead have a right to require that, in the public educational establishments, their children receive a religious or moral education in conformity with their convictions, within the framework of the curricula provided for by law.
>
> **42.** Parents or the persons acting in their stead have a right to choose private educational establishments for their children, provided such establishments comply with the standards prescribed or approved by virtue of the law.
>
> **44.** Every person has a right to information to the extent provided by law.
>
> **46.** Every person who works has a right, in accordance with the law, to fair and reasonable conditions of employment which have proper regard for his health, safety and physical well-being.

92 In all these cases, the rights provided are limited in such a way as to put the specific legislative measures or framework adopted by the legislature beyond the reach of judicial review. These provisions require the state to take steps to make the Chapter IV rights effective, but they do not allow for the judicial assessment of the adequacy of those steps. Indeed, the only provision creating a positive right that does not display this feature is s. 48, which states that "[e]very aged person and every handicapped person has a right to protection against any form of exploitation". However, this provision seems distinguishable in that, unlike the other rights discussed above, the right contemplated does not *a priori* require the adoption of a special regime for its fulfilment.

93 Was s. 45 intended to make the adequacy of a social assistance regime's specific provisions subject to judicial review, unlike the neighbouring provisions canvassed above? Had the legislature intended such an exceptional result, it seems to me that it would have given effect to this intention unequivocally, using precise language. There are examples of legal documents purporting to do just that. For example, Article 11(1) of the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, recognizes "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions". Article 22 of the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), provides that "[e]veryone, as a member of society, has the right to social security" and is "entitled to realization . . . of the economic, social and cultural rights indispensable for his dignity and the free development of his personality". Article 25(1) provides that:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

In contrast to these provisions, which unambiguously and directly define the rights to which individuals are entitled (even though they may not be actionable), s. 45of the *Quebec Charter* is highly equivocal. Indeed, s. 45 features two layers of equivocation. Rather than speaking of a right to an acceptable standard of living,s. 45 refers to a right to measures. Moreover, the right is not to measures that ensure an acceptable standard of living, but to measures that are susceptible of ensuring an acceptable standard of living. In my view, the choice of the term "susceptible" underscores the idea that the measures adopted must be oriented toward the goal of ensuring an acceptable standard of living, but are not required to achieve success. In other words, s. 45 requires only that the government be able to point to measures of the appropriate kind, without having to defend the wisdom of its enactments. This interpretation is also consistent with the respective institutional competence of courts and legislatures when it comes to enacting and fine-tuning basic social policy.

94 For these reasons, I am unable to accept the view that s. 45 invites courts to review the adequacy of Quebec's social assistance regime. The *Social Aid Act* provides the kind of "measures provided for by law" that satisfy s. 45. I conclude that there was no breach of s. 45 of the *Quebec Charter* in this case.

95 Notwithstanding my conclusion that there is no breach of s. 45, I wish to make a brief comment on the issue of remedies. I agree with much that my colleague Bastarache J. says on the question of remedies. In particular, I agree that a breach of s. 45 cannot give rise to a declaration of invalidity, since such a remedy is available only under s. 52 of the *Quebec Charter*, which applies exclusively to s. 1 to s. 38. I further agree that s. 49 finds no application to a case such as this. However, I must respectfully disagree with Bastarache J. that it follows from the foregoing considerations that determining whether s. 45 has been breached is superfluous.

96 While it is true that courts lack the power to strike down laws that are inconsistent with the social and economic rights provided in Chapter IV of the*Quebec Charter*, it does not follow from this that courts are excused from considering claims based upon these rights. Individuals claiming their rights have been violated under the *Charter* are entitled to have those claims adjudicated, in appropriate cases. The *Quebec Charter* is a legal document, purporting to create social and economic rights. These may be symbolic, in that they cannot ground the invalidation of other laws or an action in damages. But there is a remedy for breaches of the social and economic rights set out in Chapter IV of the *Quebec Charter*: where these rights are violated, a court of competent jurisdiction can declare that this is so.

V. Conclusion

97 I would dismiss the appeal. I conclude that Quebec's social assistance scheme, as it stood from 1987 to 1989, did not violate s. 7 or s. 15(1) of the*Canadian Charter*, or s. 45 of the *Quebec Charter*. Accordingly, I would answer the constitutional questions as follows:

1. Did s. 29(*a*) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, adopted under the *Social Aid Act*, R.S.Q., c. A-16, infringes. 15(1) of the *Canadian Charter of Rights and Freedoms* on the ground that it established a discriminatory distinction based on age with respect to individuals, capable of working, aged 18 to 30 years?

No.

2. If so, is the infringement justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

In view of the answer to Question 1, it is not necessary to answer this question.

3. Did s. 29(*a*) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, adopted under the *Social Aid Act*, R.S.Q., c. A-16, infringes. 7 of the *Canadian Charter of Rights and Freedoms* on the ground that it deprived those to whom it applied of their right to security of the person contrary to the principles of fundamental justice?

No.

4. If so, is the infringement justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

In view of the answer to Question 3, it is not necessary to answer this question.

The following are the reasons delivered by

L'HEUREUX-DUBÉ J. (dissenting) —

I. Introduction

98 This appeal raises the question of the constitutionality of s. 29(*a*) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1 (since repealed). In my opinion, s. 29(*a*) does violate ss. 15 and 7 of the *Canadian Charter of Rights and Freedoms* (the "*Canadian Charter*") without justification, as well as s. 45 of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 ("*Quebec Charter*"). Accordingly, I would allow the appeal.

99 In reaching these conclusions, I agree with my colleagues Bastarache and LeBel JJ., in the result, as to the violation of s. 15, and with my colleague Arbour J.'s reasons as to the violation of s. 7 of the *Charter*. As to s. 45 of the *Quebec Charter*, I am basically in agreement with the dissenting opinion of Robert J.A. (now Chief Justice) of the Quebec Court of Appeal (1999 CanLII 13818 (QC CA), [1999] R.J.Q. 1033), and therefore disagree with the opinion of LeBel J. on this issue.

100 Since I have some reservations and comments on each of the above analyses I set out the following remarks.

II. Analysis

A. *Section 15*

101 The present facts provide this Court with an opportunity to revisit the fundamental objectives of, and reaffirm its commitment to, the *Canadian Charter*'s equality guarantee.

102 The purpose of a s. 15 inquiry is to determine whether the claimant has received substantive equality or equal benefit before and under the law. Equality is denied when the claimant suffers the pernicious effects of a distinction drawn on the basis of an irrelevant characteristic. Such a distinction may be drawn on an enumerated or analogous ground and appear on the face of the law. Alternatively, the distinction may be facially neutral and the negative effects may uniquely be visited upon individuals who possess a personal characteristic that corresponds to the enumerated or analogous grounds. In either case, discrimination is the result.

103 The *Canadian Charter*'s structure dictates that even a finding that the claimant has been denied substantive equality is not the final step of the inquiry; it is possible for the infringement of s. 15 to be justified under s. 1. It is important to remember that the s. 15 inquiry precedes, and must always be kept distinct from, the s. 1 analysis. The evaluation of a s. 15 claim must always remain focussed on the particular claimant and his or her experience of the law.

104 The above comments should be uncontroversial, grounded as they are in this Court's equality jurisprudence. Yet it appears necessary to recall what the purposes of s. 15 are, and what they are not. Presumptively excluding from s. 15's protection groups which clearly fall within an enumerated category does not serve the purposes of the equality guarantee. Abstract discussion about the nature of particular grounds does not serve the purposes of s. 15. Blurring the division between the rights provisions and s. 1 of the *Canadian Charter*, by incorporating the perspective of the legislature in a s. 15 analysis, is at odds with this Court's approach to equality and surely does not serve the purposes of s. 15.

105 A majority of this Court has held that the objective of s. 15 is to affirm the dignity of individuals and groups by protecting them from unfair governmental action, which differentiates on the basis of characteristics that can be changed, if at all, only at great personal cost: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC), [1999] 2 S.C.R. 203, at para. 13. The characteristics which fall within the scope of s. 15's protective ambit have been expressly enumerated by the legislature, or found to be analogous grounds by the judiciary: *Andrews v. Law Society of British Columbia*,1989 CanLII 2 (SCC), [1989] 1 S.C.R. 143; *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), [1999] 1 S.C.R. 497.

106 This Court has previously been divided over the question of whether certain characteristics should be recognized as analogous grounds. See, e.g.,*Miron v. Trudel*, 1995 CanLII 97 (SCC), [1995] 2 S.C.R. 418, on the question of whether marital status constitutes an analogous ground. In the present case, we are in the unusual circumstance of disagreeing about whether to respect s. 15's express wording. Those who would "typically" exclude youth from protection under the ground of age ignore both the plain language of the *Canadian Charter*, and the method that this Court has adopted for s. 15 inquiries.

107 Under the *Law* test, the presence of a distinction made on the basis of an analogous ground is essentially a threshold question that leads to the heart of the inquiry, the question of whether the distinction infringes human dignity and contradicts the purposes of s. 15. It would appear that some are reluctant to accept that an explicit legislative distinction drawn on the basis of an enumerated ground satisfies the threshold requirement that permits courts to proceed to a detailed contextual analysis under the third stage of the *Law* inquiry.

108 Age is an enumerated ground. This Court has concluded that once recognized, an analogous ground remains a permanent marker of suspect distinction in all contexts: *Corbiere*, *supra*. It would seem to follow that grounds explicitly enumerated in s. 15 were similarly permanent markers. Admittedly, the Constitution ousts the protection afforded by this ground in specific contexts. See *Constitution Act, 1867*, ss. 23, 29 and 99, and the discussion in P. W. Hogg,*Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 52-47. However, the *Canadian Charter* could have contained a general provision which excluded those below a certain age threshold from protection against discrimination, as provincial human rights codes have done. See, e.g.,

Ontario *Human Rights Code*,R.S.O. 1990, c. H.19, s. 10(1) "age". The *Canadian Charter* contains no such provision.

109 Any attempt to read the limited range of provincial human rights codes' age protections into s. 15 must fail. Provincial human rights codes in the employment context expressly exclude those 65 and over from protection on the grounds of age: Ontario *Human Rights Code*, ss. 5(1) and 10(1) "age". This Court has declined to follow this example in its s. 15 jurisprudence. It has held that those the age of 65 and over fall within the scope of s. 15's protection, although government action that discriminates on this basis may be saved under s. 1: *McKinney v. University of Guelph*, 1990 CanLII 60 (SCC), [1990] 3 S.C.R. 229; *Harrison v. University of British Columbia*, 1990 CanLII 61 (SCC), [1990] 3 S.C.R. 451; *Stoffman v. Vancouver General Hospital*,1990 CanLII 62 (SCC), [1990] 3 S.C.R. 483; and *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, 1991 CanLII 12 (SCC), [1991] 2 S.C.R. 22. This Court's jurisprudence on age discrimination has respected the express wording of s. 15, even in the face of contrary tendencies in quasi-constitutional statutes. I see no principled reason to depart from this history of fidelity to the *Canadian Charter*'s text and aspirations.

110 Moreover, any attempt to presumptively exclude youth from s. 15 protection, for the reason that age is a unique ground, misplaces the focus of a s. 15 inquiry. The proper focus of analysis is on the effects of discrimination, and not on the categorizing of grounds. In *Egan v. Canada*, 1995 CanLII 98 (SCC), [1995] 2 S.C.R. 513, at paras. 48 and 53, I wrote:

> We must remember that the grounds in s. 15, enumerated and analogous, are instruments for finding discrimination. They are a means to an end. By focussing almost entirely on the nature, content and context of the disputed ground, however, we have begun to approach it as an end, in and of itself. . . .
>
> We will never address the problem of discrimination completely, or ferret it out in all its forms, if we continue to focus on abstract categories and generalizations rather than on specific effects. [Emphasis deleted.]

111 I recently restated this position in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94 (CanLII), [2001] 3 S.C.R. 1016, 2001 SCC 94, at para. 166. I remain convinced that a discrimination claim should be evaluated primarily in terms of an impugned distinction's effects, as they would have been experienced

by a reasonable person in the claimant's position. The point of departure should not lie in abstract generalizations about the nature of grounds.

112 Since courts engaged in a s. 15 analysis should focus on the effects of an impugned distinction, they should also refrain from relying on the viewpoint of the legislature. At the s. 15 stage, courts should not be concerned with whether the legislature was well-intentioned. This Court has long recognized that an intention to discriminate is not a necessary condition for a finding of discrimination: *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*,1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*,1987 CanLII 109 (SCC), [1987] 1 S.C.R. 1114; *Brooks v. Canada Safeway Ltd.*, 1989 CanLII 96 (SCC), [1989] 1 S.C.R. 1219; and *Andrews*, *supra*, at pp. 173-74. By necessary implication, the fact that a legislature intends to assist the group or individual adversely affected by the impugned distinction also does not preclude a court from finding discrimination. Nor is it determinative, where a distinction produces prejudicial effects, that a legislature intends to provide an incentive for the affected individuals to alter their conduct or to change themselves in ways that the legislature believes would ultimately be beneficial for them:*Lavoie v. Canada*, 2002 SCC 23 (CanLII), [2002] 1 S.C.R. 769, 2002 SCC 23, at paras. 5, *per* McLachlin C.J. and L'Heureux-Dubé J., dissenting, and 51,*per* Bastarache J.

113 Of course, benign legislative intent may aid in saving a discriminatory distinction at s. 1, but that is a separate inquiry. In the earliest moments of its*Canadian Charter* jurisprudence, this Court insisted that the analysis of the right at issue should be kept separate from the inquiry into an impugned distinction's justification: *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103; *Andrews*, *supra*, at p. 182. As we enter the third decade of the *Canadian Charter*'s existence, I see no reason to depart from this fundamental division. Moreover, I am unable to imagine how a departure could result in anything but a weakening of the equality guarantee.

The *Law* Test

114 This Court has repeatedly affirmed the importance of protecting individuals and groups from the negative effects of discrimination, as these are defined from the perspective of the reasonable person in the claimant's position. The *Law* test is one such affirmation. I turn now to the question of how

that test should be interpreted to ensure that human dignity remains the fundamental reference point for any evaluation of a s. 15 claim.

115 It is undisputed that s. 29(*a*) draws a distinction on an enumerated ground. All that remains under the *Law* test is to determine whether the impugned provision denies human dignity in purpose or effect. I begin by setting out two broad principles which should animate any application of *Law*: (1) discrimination need not involve stereotypes, and (2) the reasonable claimant is the perspective from which to evaluate a s. 15 claim.

(a) *Discrimination Without Stereotypes*

116 In addressing the question of stereotypes, it is worth quoting in full the unanimous Court in *Law*'s consolidation of various interpretive approaches tos. 15 (at para. 51):

> It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and <u>where the differential treatment reflects the stereotypical application of presumed group or personal characteristic, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society</u>. [Emphasis added.]

This passage presents the application of stereotypical characteristics, and the "effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition" as <u>alternative</u> bases for finding discrimination. The presence of a stereotype is therefore not a necessary condition for a finding of discrimination and support for this proposition can be found throughout this Court's equality jurisprudence.

117 In *Andrews*, McIntyre J. rejected the Court of Appeal's attempt to "define discrimination under s. 15(1) as an unjustifiable or unreasonable distinction" (p. 181), and reasoned that such a definition would undermine the division between s. 15 and s. 1 (p. 182). A distinction that is stereotypical is necessarily unjustifiable or unreasonable. Consequently, the presence of a stereotype is not determinative of a finding of a discrimination.

118 One may object that McIntyre J.'s assertion only demonstrates that the presence of a stereotype is not sufficient grounds for a finding of discrimination. However, both *Andrews* itself and this Court's subsequent jurisprudence on adverse effect discrimination make clear that the presence of stereotypes is also not a necessary condition for a finding of discrimination.

119 The distinction drawn in *Andrews* was discriminatory because it was irrelevant and singled out a group that was understood to fall within the ambit ofs. 15's concern. McIntyre J. held (at p. 183):

> A rule which bars an entire class of persons from certain forms of employment, solely on the grounds of a lack of citizenship status and without consideration of educational and professional qualifications or the other attributes or merits of individuals in the group, would, in my view, infringe s. 15 equality rights.

McIntyre J. reached his conclusion without considering the question of stereotypes, and this Court's jurisprudence demonstrates that stereotypes need not be present for a finding of adverse effect discrimination.

120 A distinction that results in adverse effect discrimination need not, of course, include an intention to discriminate. In this Court's definitive statement on indirect discrimination, McLachlin J. (as she then was) held that adverse effects are "unwitting, accidental" (*British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (SCC), [1999] 3 S.C.R. 3, at para. 49). A neutral distinction, or one that "unwittingly" yields negative effects, is by definition not premised on a negative stereotype. Such distinctions yield, without justification, disproportionately negative impacts on groups recognized as being within the scope of an equality provision's protection. In *BCGSEU*, McLachlin J. held (at para. 33):

> The standard itself is discriminatory precisely because it treats some individuals differently from others, on the basis of a prohibited ground: see generally *Toronto-Dominion Bank*, *supra*, at paras. 140-41, *per* Roberston J.A. As this Court held in *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), [1999] 1 S.C.R. 497, at para. 66, if a rule has a substantively discriminatory effect on a prohibited ground, it should be characterized as such regardless of whether the claimant is a member of a majority or minority group.

In *BCGSEU*, the facially neutral standard was discriminatory because it had the effect of disproportionately excluding women. As in *Andrews*, *supra*, an analysis of stereotypes was simply not necessary for the disposition of the case. Prejudicial effects giving rise to a s. 15 claim may result when a legislature simply fails to turn its mind to the particular needs and abilities of individuals or groups so as to provide equal benefit under the law to all members of society: *BCGSEU*, at para. 33; *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 S.C.R. 624.

(b) *Dignity Through the Eyes of the Reasonable Claimant*

121 If a stereotype is not a necessary or sufficient condition for a finding of discrimination, there must be other relevant indicators. *Law* listed four contextual factors to which a claimant can refer to demonstrate that a distinction has the effect of demeaning his or her dignity. Before considering these, it would be helpful to revisit *Law*'s understanding of human dignity. I reproduce in full a particularly illuminating passage (at para. 53):

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?

122 This passage serves as a reminder that discrimination can arise in circumstances other than in the presence of stereotypes, and removes an ambiguity in the previously cited discussion of equality (see above, at para. 116). On one

reading, the phrase "or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition", taken together with the phrase "stereotypical application of presumed group or personal characteristic" (see above, at para. 116), may be understood to suggest that discrimination only arises where there has been a message sent to the community at large that is demeaning to the claimant. By contrast, the present passage unequivocally reveals that dignity can be infringed even if the "message" is conveyed only to the claimant.

123 The passage makes clear that if individual interests including physical and psychological integrity are infringed, a harm to dignity results. Such infringements undermine the individual's self-respect and self-worth. They communicate to the individual that he or she is not a full member of Canadian society. Moreover, this passage proposes a reasonableness standard when it discusses what the claimant "legitimately feels when confronted with a particular law". In these descriptions of human dignity, one can hear echoes of my position in the 1995 trilogy. In *Egan*, *supra*, I held (at para. 56) that the examination of whether a distinction is discriminatory

> should be undertaken from a subjective-objective perspective: i.e. from the point of view of the reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the group of which the rights claimant is a member.

This Court has recently expressed its continuing support for this "reasonable claimant" standard in *Lovelace v. Ontario*, 2000 SCC 37 (CanLII), [2000] 1 S.C.R. 950, 2000 SCC 37, at para. 55. See also *Corbiere*, *supra*, at para. 65; *Granovsky v. Canada (Minister of Employment and Immigration)*,2000 SCC 28 (CanLII), [2000] 1 S.C.R. 703, 2000 SCC 28, at para. 81; *Winko v. British Columbia (Forensic Psychiatric Institute)*,1999 CanLII 694 (SCC), [1999] 2 S.C.R. 625, at para. 75.

124 These preliminary remarks about *Law* serve as reminders that stereotypes are not needed to find a distinction to be discriminatory, and that the reasonable claimant is the perspective from, and the standard by which to evaluate a discrimination claim. With these remarks in mind, it is now time to turn to a consideration of the *Law* factors.

(c) *Putting Effects First in Law*

125 The four factors in *Law* are: (1) pre-existing disadvantage, (2) relationship between grounds and the claimant's characteristics or circumstances, (3) ameliorative purposes or effects, and (4) the nature of the interest affected.

126 Although this Court made clear in *Law* that it is not necessary that all four factors be present for there to be a finding that a claimant's human dignity has been infringed, and indeed that the presence or absence of no factor is determinative, subsequent applications of the *Law* test have typically attempted to either refute or establish every factor. See e.g., *Corbiere*, *supra*, and *Lovelace*, *supra*.

127 In addition, although the Court in *Law* held that "the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory will be, where it exists, pre-existing disadvantage, vulnerability, stereotyping, or prejudice experienced by the individual or group" (para. 63), it insisted that "although a distinction drawn on such a basis is an important *indicium* of discrimination, it is not determinative" (para. 65). Therefore, although pre-existing disadvantage is the factor the presence of which will most likely weigh in favour of a finding that human dignity is infringed, its absence does not inexorably lead to the conclusion that dignity has not been infringed.

128 Courts applying *Law* must keep these reservations in mind. Since not all the factors must be shown to exist, and since pre-existing disadvantage is a compelling, but not necessary condition, it is conceivable that the sole presence of another factor may be sufficient to establish an infringement of dignity. Moreover, given that the effects of an impugned distinction should be the focal point of a discrimination analysis, and that stereotypes are not necessary for a finding of discrimination, the severe impairment of an extremely important interest may be sufficient to ground a claim of discrimination. I foresaw this possibility in*Egan*, *supra*, when I wrote (at para. 65):

> [T]he more fundamental the interest affected or the more serious the consequences of the distinction, the more likely that the impugned distinction will have a discriminatory impact even with respect to groups that occupy a position of advantage in society.

It may be that particularly severe negative effects, as assessed under the fourth contextual factor in the third step of the *Law* test, may alone qualify a distinction as discriminatory. It is at least conceivable that negative effects severe enough would signal to a reasonable person possessing any personal characteristics, with membership in any classificatory group, that he or she is being less valued as a member of society. Therefore, even if we accept for the moment that youth are generally an advantaged group, if a distinction were to severely harm the fundamental interests of youth and only youth, that distinction would be found to be discriminatory.

129 These are the facts that are before this Court.

130 As a result of s. 29(*a*), adults under 30 were uniquely exposed by the legislative scheme to the threat of living beneath what the government itself considered to be a subsistence level of income. Of those eligible to participate in the programs, 88.8 percent were unable to increase their benefits to the level payable to those 30 and over. Ms. Gosselin was exposed to the risk of severe poverty as a sole consequence of being under 30 years of age. Ms. Gosselin's psychological and physical integrity were breached. There is little question that living with the constant threat of poverty is psychologically harmful. There is no dispute that Ms. Gosselin lived at times below the government's own standard of bare subsistence. In 1987, the monthly cost of proper nourishment was $152. The guaranteed monthly payment to young adults was $170. I cannot imagine how it can be maintained that Ms. Gosselin's physical integrity was not breached.

131 The sole remaining question is whether a reasonable person in Ms. Gosselin's position, apprised of all the circumstances, would perceive that her dignity had been threatened. The reasonable claimant would have been informed of the legislature's intention to help young people enter the marketplace. She would have been informed that those 30 and over have more difficulty changing careers, and that those under 30 run serious social and personal risks if they do not enter the job market in a timely manner. She would have been told that the long-term goal of the legislative scheme was to affirm her dignity.

132 The reasonable claimant would also likely have been a member of the 88.8 percent who were eligible for the programs and whose income did not rise to the levels available to all adults 30 years of age and over. Even if she wished to

participate in training programs, she would have found that there were intervals between the completion of one program and the starting of another, during which the amount of her social assistance benefit would have plunged. The reasonable claimant would have made daily life choices in the face of an imminent and severe threat of poverty. The reasonable claimant would likely have suffered malnourishment. She might have turned to prostitution and crime to make ends meet. The reasonable claimant would have perceived that as a result of her deep poverty, she had been excluded from full participation in Canadian society. She would have perceived that her right to dignity was infringed as a sole consequence of being under 30 years of age, a factor over which, at any given moment, she had no control. While individuals may be able to strive to overcome the detriment imposed by merit-based distinctions, Ms. Gosselin was powerless to alter the single personal characteristic that the government's scheme made determinative for her level of benefits.

133 The reasonable claimant would have suffered, as Ms. Gosselin manifestly did suffer, from discrimination as a result of the impugned legislative distinction. I see no other conclusion but that Ms. Gosselin would have reasonably felt that she was being less valued as a member of society than people 30 and over and that she was being treated as less deserving of respect.

(d) *Law's Other Factors*

134 Since I have concluded that finding an individual or group to have suffered a severe harm to a fundamental interest, as a result of a legislative distinction drawn on either an enumerated or analogous ground, is sufficient for a court to conclude that the distinction was discriminatory, it is unnecessary to discuss the remaining *Law* factors. I will, however, do so briefly.

135 In respect of the second factor, there should be a strong presumption that a legislative scheme which causes individuals to suffer severe threats to their physical and psychological integrity as a result of their possessing a characteristic which cannot be changed does not adequately take into account the needs, capacity or circumstances of the individual or group in question. In the present circumstances, the impugned legislation sought to alleviate young adults' experience of poverty by providing them with training. However, the reason that young adults experienced poverty was not a lack of training, but rather a lack of available employment. In any case, a legislative scheme that exposes the members

of an enumerated or analogous category, and only those members, to severe poverty*prima facie* does not take into consideration the needs of that category's members.

136 In respect of the third factor, I would like to address an apparent confusion. *Law* states at para. 72:

> An ameliorative purpose or effect which accords with the purpose of s. 15(1) of the *Charter* will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation.

This passage makes clear that the ameliorative purpose must be for the benefit of a group less advantaged than the one targeted by the impugned distinction. The relevant ameliorative purpose under the third factor is not defined with reference to the group that suffers the disadvantage imposed by the impugned distinction.

137 I stipulated above that youth do not suffer pre-existing disadvantage for the purpose of showing that in circumstances such as the present, a severe negative effect under the fourth factor would be sufficient to establish an infringement of dignity. I did not concede the point, nor do I believe that it should be conceded. The motivation behind the present legislative scheme was precisely to help a young adult population that was in disadvantaged circumstances. If 23 percent of young adults were unemployed by comparison with 14 percent of the general active population, and if an unprecedented number of young people were entering the job market at a time when federal social assistance programs were faltering, I fail to see how young adults did not suffer from a pre-existing disadvantage.

138 It may be argued that in the long view of history, young people have not suffered disadvantage, and therefore, for the purposes of an equality analysis, a court need not consider young people to suffer from pre-existing disadvantage. This is, however, inconsistent with a basic premise of discrimination law. In*Brooks*, *supra*, this Court held that a disadvantage need not be shared by all members of a group for there to be a finding of discrimination, if it can be shown thatonly members of that group suffered the disadvantage. This

Court held that a distinction drawn on the basis of pregnancy could be found to discriminate against women, since although not all women would become pregnant, only women could. The same conclusion was reached in *Egan*, *supra*, where it did not matter whether the particular claimants would have made net gains by being included in the governmental pension regime at issue. What mattered was that where there was a disadvantage, it fell solely on the basis of sexual orientation.

139 A unique constellation of circumstances caused a crisis of unemployment, at the historical moment in question, which threatened human dignity in ways that were particularly grievous for young adults. Only youth would suffer from the long-term harms to self-esteem that attend not participating in the workforce at a young age. The reasoning in *Brooks*, *supra*, applied to the present circumstances should lead to the conclusion that while not all members of the class "young adults throughout time" suffered the particular threats to self-esteem that attend youth unemployment, only members of that class, or only "young adults at the relevant time", did. Application of the reasoning in *Brooks* should lead to the conclusion that young adults suffered from a pre-existing disadvantage.

140 The breach of s. 15 was not justified under s. 1 and I concur entirely with my colleague Bastarache J.'s s. 1 analysis on this point.

B. *Section 7*

141 I concur in my colleague Arbour J.'s thorough analysis of s. 7 of the *Canadian Charter* and for the reasons she expresses, I agree that s. 29(*a*) of the Regulation does violate s. 7. I would, however, like to offer a clarification. It is true that the legislature is in the best position to make the allocative choices necessary to implement a policy of social assistance. For a wide variety of reasons, courts are not in the best position to make such choices, and this is why this Court has historically shown judicial deference to governments in these matters. See, e.g., *Mahe v. Alberta*, 1990 CanLII 133 (SCC), [1990] 1 S.C.R. 342;*Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, 1993 CanLII 119 (SCC), [1993] 1 S.C.R. 839; and *Eldridge*, *supra*.

142 However, although governments should in general make policy implementation choices, other actors may aid in determining whether social programs are necessary. In the present case, the government stated what it considered to be a minimal level of assistance but a claimant can also establish with adequate evidence what a minimal level of assistance would be. An analogy with the jurisprudence on minority language rights instruction may be helpful. In such cases, plaintiffs are able to establish whether "numbers warrant" the provision of minority language instruction even though legislatures and executives are generally given deference with respect to the operational choices that result in facilities being provided. See e.g., *Mahe*, *supra*. The same logic should apply in cases such as the present one.

143 As regards s. 1, I do not share my colleague Arbour J.'s contextual analysis in all its refinements (paras. 349-58), and prefer the approach to legislative context offered by Gonthier J. in *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 (CanLII), [2002] 3 S.C.R. 519, 2002 SCC 68. The latter wrote (at para. 98):

> The role of this Court, when faced with competing social or political philosophies and justifications dependent on them, is therefore to define theparameters within which the acceptable reconciliation of competing values lies. [Emphasis in original.]

Nonetheless, substantially for the reasons Arbour J. expressed as well as those of Robert J.A.'s dissent in the Quebec Court of Appeal, I agree that the present violation of s. 7 was not justified.

C. *Section 7 and Section 15*

144 In another context, s. 15 concerns informed my analysis of s. 7. This was appropriate because the provisions of the *Canadian Charter* are to be understood as mutually reinforcing (see, e.g., *R. v. Lyons*, 1987 CanLII 25 (SCC), [1987] 2 S.C.R. 309, at p. 326; *R. v. Tran*, 1994 CanLII 56 (SCC), [1994] 2 S.C.R. 951, at p. 976). In addition, the equality provision is of foundational importance in the *Canadian Charter*. As McIntyre J. wrote in *Andrews*, *supra*, at p. 185:

> The section 15(1) guarantee is the broadest of all guarantees. It applies to and supports all other rights guaranteed by the *Charter*.

Consequently, in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC), [1999] 3 S.C.R. 46, I brought the lens of the equality guarantee to the appellant's s. 7 claim to state-funded counsel in hearings where the Minister of Health and Community Services sought an extension of a custody order. I found that the claim could only be adequately addressed in light of the appellant's status as a single mother. I wrote (at para. 113):

> This case raises issues of gender equality because women, and especially single mothers, are disproportionately and particularly affected by child protection proceedings. . . .

145 Conversely, in the present and similar fact situations, judicial interpretations of s. 15 can be informed by s. 7. To explain why, I revisit my reasons in*Egan*. I wrote (at para. 63):

> [T]he nature, quantum and context of an economic prejudice or denial of such a benefit are important factors in determining whether the distinction from which the differing economic consequences flow is one which is discriminatory. If all other things are equal, the more severe and localized the economic consequences on the affected group, the more likely that the distinction responsible for these consequences is discriminatory within the meaning of s. 15 of the *Charter*.

If, as in the present case, a harm is visited uniquely upon members of an analogous or enumerated group and is severe enough to give rise to a s. 7 claim, then there will be *prima facie* grounds for a s. 15 claim. This conclusion must follow from the above s. 15 analysis, which places individuals' experience of discrimination at the centre of judicial attention.

D. *Section 45 of the Quebec Charter*

146 I subscribe entirely to the exhaustive analysis of s. 45 of the *Quebec Charter* undertaken by Robert J.A. in his dissenting opinion in the Quebec Court of Appeal. For the reasons he expresses, I conclude as he does as to a violation of s. 45 of the *Quebec Charter* in the present case.

147 As Robert J.A. states (at p. 1092): [TRANSLATION] "Section 45 of the Quebec Charter thus bears a very close resemblance to article 11 of the*International Covenant on Economic, Social and Cultural Rights*", which, as the Court of Appeal notes, para. 10 of the *Report on the Fifth Session* of the United Nations Committee on Economic, Social and Cultural Rights further specifies as containing: "a minimum core obligation to ensure the satisfaction of, at the very

least, minimum essential levels [of subsistence needs and the provision of basic services]" (*ibid*., at p. 1093).

148 I am also in agreement that the *Quebec Charter* [TRANSLATION] "was intended to establish a domestic law regime that reflects Canada's international commitments" (p. 1099) and that (at p. 1101)

> [TRANSLATION] the quasi-constitutional right guaranteed by section 45 to social and economic measures susceptible of ensuring an acceptable standard of living includes, at the very least, the right of every person in need to receive what Canadian society objectively considers sufficient means to provide the basic necessities of life.

III. Conclusion

149 In the result, I agree with the result reached by each of my colleagues Bastarache, Arbour and LeBel JJ. and would allow the appeal with costs throughout.

The following are the reasons delivered by

BASTARACHE J. (dissenting) —

I. Introduction

150 This case involves the constitutional review of a provision that existed in the regulations under Quebec's *Social Aid Act*, R.S.Q., c. A-16, between 1984 and 1989. That provision fixed the maximum benefits to be received by single adults under the age of 30 at a level approximately one third that of those 30 years of age and over.

151 The appellant has offered this Court a number of constitutional issues to consider. She claims, on behalf of herself and all single recipients of welfare in the province of Quebec who were under the age of 30 at some point between 1985 and 1989, that the benefits provision violates the right not to be deprived of

security of the person under s. 7 of the *Canadian Charter of Rights and Freedoms* ("*Canadian Charter*" or "*Charter*"), the right to equal treatment before and under the law, protected by s. 15 of the *Canadian Charter*, as well as the right to be provided with a decent level of support, guaranteed by s. 45 of the Quebec*Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 ("*Quebec Charter*").

152 In making her claim, the appellant is seeking a declaration from this Court that the provision was constitutionally invalid pursuant to s. 52 of the*Constitution Act, 1982* and s. 45 of the *Quebec Charter*, as well as damages in the amount of $388,563,316 for benefits denied to the members of the appellant's group, pursuant to s. 24(1) of the *Canadian Charter* and the joint operation of ss. 45 and 49 of the *Quebec Charter*, from March 1985 to July 31, 1989.

153 In the end, I conclude that s. 29(*a*) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, violated the appellant's s. 15 right to equal benefit of the law, and that such discrimination was not justified under s. 1.

II. Legislative History

154 At issue in this case is the differential treatment of social assistance recipients under 30 years of age. This differential treatment is prescribed by s. 29(*a*) of the *Regulation respecting social aid*. To properly determine whether s. 29(*a*) is discriminatory, it is necessary to look at the section in its historical context as well as the context of its governing legislation and regulations.

155 The *Social Aid Act* of 1984 grew out of reforms to Quebec social policy that dated back to the late 1960s. The first *Social Aid Act* in Quebec was brought into force in 1970. Prior to that time, Quebec social policy focussed, through a variety of legislative Acts, on the needs of those citizens who were unable to work. The guiding principle for this combination of Acts was that the more incapable one was of working, the greater one's benefits would be. Even at that time, however, some benefits were provided to able-bodied persons. Under this regime, distinctions were made and benefits were based on whether or not one lived with one's parents, and whether one was under 30 years of age. For instance, under the pre-1970 law, a person under 30 who lived with his or her parents would

receive $30 a month, while a person who lived on his or her own would receive $55. For those 30 and over, the benefits also varied based on whether they lived in a rural or urban setting. A person 30 and over living alone in the city would be eligible for a $65 benefit, while one living with a parent would receive only $55.

156 The reforms of 1969-1970 sought to change the foundational principles of Quebec social policy, moving from a regime based on degree of incapacity to one based on need. Despite this emphasis on need, the distinction between those under 30 and those 30 and over was maintained and incorporated into the new legislation. Whereas the benefits of those 30 and over varied depending on whether or not they lived with their parents (from $75 to $106), those under 30 received only the $75 amount. In other words, those under 30 were deemed to be living with their parents, regardless of their actual circumstances.

157 Over the course of the next decade, the benefits for those 30 or over grew at a much faster rate than those for single persons under 30. Apart from several slight adjustments, the under-30 benefits remained stable, while the reforms of 1974 increased the benefits for those 30 and over by 45 percent. Other amendments made in 1975 indexed benefits for those 30 and over to the rate of inflation. By the time the under-30 benefits were indexed, in 1979, they had fallen to 36 percent of those of a similarly situated person 30 and over. In 1969, they had represented 84 percent of the full amount.

158 In the early 1980s, the Quebec government, responding to a deep and long-lasting crisis in the North American economy, once again considered reforming its *Social Aid Act*. Between 1981 and 1983, unemployment in Quebec had skyrocketed from traditional levels of around 8 percent to approximately 14 percent. Among young people, the levels of unemployment were even more pronounced. Youth unemployment in 1982 was 23 percent. The difference between youth unemployment and the rate for the general population had never been higher. During this period, the government was also concerned by a change in the composition of social assistance recipients. Between 1975 and 1983, the number of people under 30 on social assistance rose six-fold, to 85 000. This resulted in the proportion of social assistance recipients under 30 rising from 3 to 12 percent. The government was also witnessing an increase in the percentage of able-bodied recipients; it went from 41 percent in 1974 to 75 percent in 1983. At

the same time, the government was seeing an increase in the number of recipients with a relatively high level of education.

159 In response to this grim picture, the government chose to focus on providing young people with the skills and education required for them to get jobs. At the centre of this new approach were three new programs designed to provide people on social assistance with work experience and education. These programs were, quite practically, entitled Remedial Education, Community Work and On-the-job Training. Under s. 29(*a*) of the new Regulation, social assistance beneficiaries under 30 would continue to receive a lower level of support (as of 1987 they received $170 per month) than their older counterparts (who were receiving $466 per month), but could have their benefits raised by participating in one of these programs.

160 The Remedial Education Program was designed to help social assistance recipients return to school to get their high school diploma. For admission to the program, one had to be a recipient of social assistance who had been out of school for more than nine months and who had been financially independent of his or her parents for at least six months. There is evidence that the illiterate were also excluded. While participating in a Remedial Education Program, the beneficiary would receive an increase of $196 per month in his or her social assistance benefits; the participant under 30 years of age was therefore left with $100 less than the base amount for the social assistance beneficiary 30 and over.

161 The On-the-job Training Program was designed to provide social assistance recipients with real job experience. A participant would be paired with a private or public organization and work for it on a full-time basis. During that time, he or she would receive specialized training. In order to qualify for this program, the potential participant must have been out of school for at least 12 months. Holders of CEGEP or university degrees were excluded from the program. This placement would last one year. During the time that they participated, social assistance beneficiaries would receive an increase of $296 in their benefits, $100 of which was paid by their employer. This increase would leave a person under 30 with the same amount of benefits per month as the base amount for a person 30 and over.

162 In the Community Work Program, social assistance beneficiaries were paired with community organizations or governmental agencies in order to complete simple tasks. The goal of this program was to provide more rudimentary work-related skills, such as learning to show up on time, to dress properly for work, to file documents and to answer the telephone. Priority for admission to the program was given to those who had been on social assistance for at least one year. As in the case of the On-the-job Training Program, participants received a $296 increase in their benefits, $100 of which was paid by the community organization or government agency.

163 While all three of these programs were ostensibly designed for social assistance recipients under 30, at least one of the programs was in fact open to some persons 30 and over, who received the same increase in their benefits when they participated. Thus, a recipient under 30 would never receive the same amount as some similarly situated persons 30 and over, since the older person would receive the same extra benefit over and above the base benefit.

III. Factual Background

164 It was under this legislative and regulatory framework that the claimant and class representative in this case, Ms. Gosselin, received assistance between 1984 and her 30th birthday, in 1989. Louise Gosselin was born on July 9, 1959. Her life has not been an easy one. Much of her formative years was spent moving back and forth between her mother's home and various centres d'accueil and foster homes. Health problems, both physical and psychological, also constituted a burden. Despite her desire to finish school, her attempts always seemed to come up short.

165 On the job market, Ms. Gosselin's success was not any more marked. At various times she worked as a nurse's assistant and a waitress but, owing to physical or mental exhaustion, these jobs never lasted for long. Suicides were attempted, alcohol was abused, jobs were hard to come by, and depression ensued. Thus, from the time she was 18 Ms. Gosselin was, for the most part, reliant on social assistance — as was her mother, with whom she often lived.

166 In March of 1985, at the age of 25, Ms. Gosselin contacted her local CLSC (local community service centre) to find out how she might go about finding friends her own age. It was at that time that she was first informed of a program known as "Community Work". In May 1985, she applied and was accepted into the program, working for an organization called "Réveil des assistés sociaux". Through this program she became involved in various committees in which she learned about social assistance law and about the types of programs that were available to assist her. Her participation in the program helped her to meet people and to have more social interactions. However, the program only lasted one year. After she had completed it, she fell back onto the reduced amount and was forced to move back in with her mother. No one suggested another program to her.

167 Living with her mother at the age of 27 was not a comfortable situation; Ms. Gosselin hoped desperately that her luck would turn around. In October of 1986, she was forced, following a change in the building's by-laws, to move out of her mother's one-bedroom apartment. She lived in a variety of rooming houses, and maisons d'accueil, where she faced various types of harassment. At one point, she was able to get a job cleaning homes, but was unable to continue after she was overcome with the fear of being fired. She reluctantly moved back in with her mother.

168 In November of 1986, she was granted a medical certificate due to her mental state; this allowed her to collect the full benefit under the regulations. She moved out of her mother's apartment in December of that year. A few months later, by happenstance, her father's neighbour offered to arrange a placement for her at Revenu Travail-Quebec as part of the On-the-job Training Program. She worked there for three months, before switching placements to work at a pet store, where she had wanted to work because of her love of animals. Unfortunately, allergies quickly became a problem and she had to leave after only a couple of weeks.

169 At this point, she fell back onto the reduced benefit and was hospitalized at a psychiatric hospital for two months. Released from the hospital in January 1988, she was once again considered able-bodied and allocated the reduced benefit. She moved through several rooming homes, paying $170 per month for rent while receiving only $188 per month in benefits. In March of 1988, she got her own apartment, paying a rent of $235 per month. To pay for it, she cleaned homes, earning extra money. In order to make ends meet, she ate most of

her meals at her mother's house, but sometimes had to resort to soup kitchens. In May of 1988, she hurt her back and was granted a medical certificate.

170 In September of 1988, she enrolled in the Remedial Education Program and went back to school. While this raised her benefits to $100 less than the base amount, she was terrified that she would not succeed and would be forced back onto the reduced rate. After paying her rent and phone, she was left with only $150 per month, which she had to stretch scrupulously in order to buy food and bus tickets. Finally, in July of 1989, she turned 30 and was allocated the full social assistance benefit. When that benefit was added to the money she received for participating in the Remedial Education Program, her total monthly benefits rose to $739 per month.

IV. Relevant Statutory and Constitutional Provisions

171 *Social Aid Act*, R.S.Q., c. A-16, as amended by *An Act to amend the Social Aid Act*, S.Q. 1984, c. 5 (repealed by *An Act respecting income security*, S.Q. 1988, c. 51, s. 92)

5. . . .

Ordinary needs are food, clothing, household and personal requirements and any other costs relating to the habitation of a house or lodging.

All other needs are special needs.

6. Social aid shall meet the ordinary and special needs of any family or individual lacking means of subsistence.

. . .

11. The Minister may propose a recovery plan to a family or individual who is receiving or who applies for social aid.

The recovery plan may include, in particular, the participation of an individual or a member of a family in a program of work activities or a training program established by the Minister in view of developing the recipient's qualifications for an employment.

The criteria of eligibility to a program established under the second paragraph may take the recipient's age into account.

11.1 The Government, by regulation, shall designate to which work activities programs or training programs sections 11.2 to 11.4 apply.

11.2 In the case of an individual or a family having no dependent child, needs relating to a recipient's participation in a designated program are special needs to the extent determined by regulation for each program.

In all other cases, needs described in the first paragraph are special needs to the extent determined by the Minister for each recipient, but not in excess of the amount determined by regulation.

31. In addition to the other regulatory powers assigned to it by this act, the Gouvernement [*sic*], subject to the provisions of this act, may make regulations respecting:

. . .

(*e*) the extent to which the ordinary needs of a family or individual may be met through social aid and the methods whereby such needs must be proven and appraised; in determining what the aid shall be, account may be taken of the age or capacity for work of an individual or of the members of a family having no dependent children, having had no children who are deceased, or the fact that a family or individual is living with a relative or a child;

Regulation respecting social aid, R.R.Q. 1981, c. A-16, r. 1

(This is the text of the pertinent sections of the Regulation as it appeared on April 17, 1985.)

23. The ordinary needs of a household shall be determined in terms of its members, each month, according to the following scale:

Adults	*Dependent children*	*Ordinary needs*
1	0	357 $
1	1	488
1	2 and over	526
2	0	568
2	1	615
2	2 and over	651

However, the ordinary needs can be accorded only insofar as the costs a household incurs for lodging on a monthly basis within the meaning of section 27 are equal to or greater than 85 $ for a family and 65 $ for a single person. The ordinary needs are reduced by the amount by which these costs fall short of these amounts.

29. Aid for ordinary needs shall not exceed:

(*a*) 121 $ per month, in the case of an individual capable of working and less than 30 years of age;

(*b*) twice the monthly amount prescribed in subparagraph *a* for a family without dependent children, where both consorts are able-bodied and under 30 years of age.

In the case of a family without children receiving uninterrupted aid following an application made before 1 July 1984, subparagraph *b* of the first paragraph does not apply if the said family had a child who died before 1 July 1984.

For the month in which the application was made, the amounts prescribed in the first paragraph represent the ordinary needs of the household. The latter are apportioned in the manner indicated in section 10.

35.0.1 Sections 11.2 to 11.4 of the Act shall apply to the following programs established by the Minister under section 11 of the Act:

(*a*) On-the-job Training Program;

(*b*) Community Work Program.

Section 11.2 of the Act shall also apply to the Remedial Education Program.

35.0.2 In order to develop employability, an amount of 150 $ is granted to the single person or to the adult of a family without dependent children for a complete month during which he participates in a program subject to section 35.0.1.

In the case of a participant in the Remedial Education Program whose work load established by the school is less than 60 hours per month, an amount of 150 $ is deducted on the basis of the number of hours of work in relation to 60.

35.0.5 The amount provided in section 35.0.2 or determined by the Minister under section 35.0.3, except for child care expenses, is reduced on the basis of unauthorized hours of absence under programs subject to section 35.0.1 for the said month with respect to the required hours of participation.

In the case of the Remedial Education Program, the deduction is established according to unauthorized hours of absence from classes under this program with respect to the monthly number of class hours.

35.0.6 No reduction is made when the unauthorized hours of absence do not exceed 5 % of the hours of participation established for a participant during the month.

35.0.7 The aid shall also meet the cost required by a person attending a vocational training course that makes this person eligible for an allowance under the National Vocational Training Program Act (S.C., 1980-81-82-83, c. 109).

This cost is equal to the amount of the allowance paid, as reduced under subparagraph *f* of section 40.

For recipients covered by section 29, the cost is equal to the same amount less the difference between ordinary needs under section 23 and the amount prescribed in section 29.

However, it shall not exceed:

i. for a family, 40 $ plus 5 $ per dependent child, plus 50 $ in the case of a family including only one adult;

ii. for a single person, 25 $;

The maximum provided in the fourth paragraph shall not apply to the month in which courses begin if aid for ordinary needs has been granted for at least 3 consecutive months without this paragraph having been applied during the six preceding months.

Section 35.0.2 was amended, effective August 1, 1985, by O.C. 1542-85, 24 July 1985, (1985) 117 O.G. II 3690, s. 1 as follows:

35.0.2 To assist in developing aptitudes for work, an amount is granted as a special need to the single person or to a spouse in a family without dependent children, for a complete month of participation in a program subject to section 35.0.1.

This amount is equal to the amount obtained when 100 $ is subtracted from the difference between the amount paid subject to the first paragraph of section 23, taking into account section 31, to a single person under 30 years of age and the maximum amount paid under section 29, taking into account section 31, to a single person under 30 years of age.

In the case of a participant in the Remedial Education Program whose course schedule is under 60 hours per month, the amount is reduced to a prorata of the number of actual course hours with respect to 60.

The Regulation was amended, effective April 30, 1986, by *Regulation respecting social aid (Amendment)*, O.C. 555-86, 23 April 1986, (1986) 118 O.G. II 605, ss. 1, 3:

23. The ordinary needs of a household shall be determined in terms of its members, each month, according to the following scale:

Adults	*Dependent children*	*Ordinary needs*

1	0	448
1	1	609
1	2 and more	659
2	0	712
2	1	769
2	2 and more	815

However, the ordinary needs of a household living with a parent or a child are reduced by 85 $.

In all other cases, the ordinary needs are reduced by the amount by which the costs incurred by the household for lodging on a monthly basis within the meaning of section 27 are less than 85 $ for a family or less than 65 $ for a single person.

29. Aid for ordinary needs shall not exceed:

(*a*) 163 $ per month, in the case of an individual capable of working and less than 30 years of age;

(*b*) twice the monthly amount prescribed in subparagraph *a* for a family without dependent children, where both consorts are able-bodied and under 30 years of age.

The amounts provided for in the first paragraph are increased by 8 $ per adult except:

(*a*) when the household lives with a parent or child;

(*b*) when a single person lives with a foster family;

(*c*) when the household lives in housing administered by a municipal housing bureau constituted under the Act respecting the Sociétéd'habitation du Québec (R.S.Q., c. S-8).

In the case of a family without children receiving uninterrupted aid following an application made before 1 July 1984, subparagraph *b* of the first paragraph does not apply if the said family had a child who died before 1 July 1984.

For the month in which the application was made, the amounts prescribed in the first paragraph represent the ordinary needs of the household. The latter are apportioned in the manner indicated in section 10. [Emphasis added.]

Charter of Human Rights and Freedoms, R.S.Q., c. C-12

10. Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

45. Every person in need has a right, for himself and his family, to measures of financial assistance and to social measures provided for by law, susceptible of ensuring such person an acceptable standard of living.

49. Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.

In case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to punitive damages.

52. No provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the Charter.

53. If any doubt arises in the interpretation of a provision of the Act, it shall be resolved in keeping with the intent of the Charter.

Canadian Charter of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

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.

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.

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a

provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

. . .

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

Constitution Act, 1982

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Act respecting the Constitution Act, 1982, R.S.Q., c. L-4.2

1. Each of the Acts adopted before 17 April 1982 is replaced by the text of each of them as they existed at that date, after being amended by the addition, at the end and as a separate section, of the following:

"This Act shall operate notwithstanding the provisions of sections 2 and 7 to 15 of the Constitution Act, 1982 (Schedule B of the Canada Act, chapter 11 in the 1982 volume of the Acts of the Parliament of the United Kingdom)."

The text so amended of each of these Acts constitutes a separate Act.

No such Act is to be construed as new law except for the purposes of section 33 of the Constitution Act, 1982; for all other purposes, it has force of law as if it were a consolidation of the Act it replaces.

Every provision of such an Act shall have effect from the date the provision it replaces took effect or is to take effect.

Such an Act must be cited in the same manner as the Act it replaces.

V. Judicial History

A. *Quebec Superior Court*, reflex, [1992] R.J.Q. 1647

172 In his reasons of May 27, 1992, Reeves J. ruled in favour of the defendant government, holding that the legislation in question did not infringe any of the rights claimed by the plaintiff.

173 With regard to the claim under s. 7 of the *Canadian Charter*, Reeves J. characterized life, liberty and security of the person as rights that do not include purely economic interests. He founded this conclusion on the fact that the right to property was specifically excluded from the *Canadian Charter* at the time of its drafting. Moreover, he noted that s. 7, along with ss. 8 to 14 of the *Canadian Charter*, fell under the heading "Legal Rights", thus requiring a link to the administration of justice. Finally, he held that the term "security of the person" did not apply to the benefit of social assistance because such a right would require the state to take positive actions. Reeves J. held that s. 7 protects only negative rights, such as the right to be free of any state intrusion upon the security of one's person.

174 In analysing the discriminatory nature of the legislation under s. 15 of the *Canadian Charter*, Reeves J. emphasized the fact that not all differences in treatment will result in discrimination. He held that the essence of equality is a respect for differences, and that substantive equality did not necessarily signify uniformity of treatment — different people must sometimes be treated differently. He therefore concluded that the Act was not discriminatory because young adults generally have a better chance of integrating into the job market and need to be encouraged to do so. Moreover, he found that since participation in the employment programs would result, under the law, in an income for young adults equal to that of those 30 or over, equality could be achieved, and thus there was no discrimination.

175 On the s. 45 of the *Quebec Charter* issue, Reeves J. held that the term "provided for by law" limited the obligation that this section places on the government. As a result of this wording, he held that the government was free to limit the obligations that it undertook in providing financial and social assistance. More importantly, Reeves J. held that since s. 52 stipulates that "No provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38", it does not apply to s. 45. He therefore concluded that s. 45 could not confer the right to damages and serves only as a general statement of policy by the Quebec legislature.

B. *Quebec Court of Appeal*, 1999 CanLII 13818 (QC CA), [1999] R.J.Q. 1033

176 The claimant appealed the case to the Quebec Court of Appeal. In its decision of April 23, 1999, the Court of Appeal dismissed the appeal, Robert

J.A. dissenting. The court ruled in three separate judgments, each judge deciding differently with regards to the application of s. 15 of the *Canadian Charter*.

177 The three justices, Robert, Baudouin and Mailhot JJ.A., agreed that s. 7 was not violated. Their primary reason for reaching this conclusion was thats. 7 of the *Canadian Charter* was designed to protect legal rights. Here, they found that there was not a sufficient link between the appellant's claim and the justice system. They also rejected the appellant's argument that the government's institution of a social assistance program had somehow created a right to social assistance protected by the right to security of the person. In taking this position, Robert and Baudouin JJ.A., who both wrote on the issue, held that s. 7 of the*Canadian Charter* only applied to negative rights and not to the positive social rights being claimed by the appellant.

178 The three justices offered separate analysis of the s. 15 claim. Mailhot J.A. held that under the test set out by this Court in *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), [1999] 1 S.C.R. 497, the legislation did not constitute an infringement of s. 15. She held that, as in *Law*, the distinction that this legislation made on the basis of age, when viewed in the context of the legislation as a whole, is not an affront to human dignity.

179 Robert J.A. held that the legislation constituted a violation of s. 15 that was not demonstrably justified under s. 1. Having established that s. 29(*a*) of the Regulation created a distinction on the basis of the enumerated characteristic of age, Robert J.A. turned to the question of whether the legislation was substantively discriminatory under the terms of s. 15 of the *Canadian Charter*. In so doing, he examined the effects of the legislation and placed considerable weight on the evidence that 73 percent of all social assistance recipients under the age of 30 received only the reduced benefit. He found that there was enough evidence to show that the effect of the legislation was to deny to those under 30 an advantage of the law enjoyed by those 30 and over.

180 He was also particularly concerned by the fact that there were not enough places available in the programs in order for every young person on social

assistance to have participated. Moreover, he found that, even when an individual did take part in one of the educational programs, there were periods, such as when they were on waiting lists, during which they only received the smaller amount. This weighed in favour of a finding of discrimination. He also noted that because the Remedial Education Program provided increased benefits amounting to $100 less than the base amount, only 11 percent of the young people in the group actually received the base amount allocated to all those 30 and over. He concluded that the legislation was discriminatory and harmful to the dignity of the appellant and members of her group; there was therefore a violation of s. 15 of the *Canadian Charter*.

181 While they agreed on the application of s. 15, Robert and Baudouin JJ.A. differed in their s. 1 analysis. Robert J.A. held that the provision was not demonstrably justifiable in a free and democratic society, while Baudouin J.A. found that the government had met its burden and upheld the law under s. 1.

182 In defining the objective of the legislation, Robert J.A. held that the differentiation served two objectives, [TRANSLATION] "(1) to avoid making the program too attractive, and (2) to encourage incitement to work and reintegration into the workplace" (p. 1073). Given the economic situation of the early 1980s, Robert J.A. found that these objectives, particularly that of encouraging integration into the workplace, were pressing and substantial.

183 Under the heading of minimal impairment, Robert J.A. found that the regime of conditional aid for young people did not limit the right as little as possible. For the most part, he based this finding on the fact that the option of participation in the employment programs was limited by the number of places made available, the lack of information offered to beneficiaries about these programs, and the various criteria which guaranteed that not all those who wished to participate would have that opportunity. The fact that the Remedial Education Program did not result in a complete supplementation of the lower level of assistance was another factor that led him to conclude that the regime was not minimally impairing.

184 For the legislation to have been upheld at this stage of the *Oakes* test (*R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103), Robert J.A. held that

the government would have had to have shown that the criteria for admission to the educational programs were flexible enough to allow anyone under the age of 30 to be admitted and that the government was acting in a reasonable manner in determining the conditions under which a young beneficiary would be able to receive an increase in assistance. In his view, it is reasonable to expect that the government should offer such flexibility given that young adults would otherwise receive assistance that was one third of that received by those 30 or over, well below a subsistence level. Robert J.A. therefore concluded that the distinction in benefits created by s. 29(*a*) of the Regulation could not be justified under s. 1 of the *Canadian Charter*.

185 Baudouin J.A. disagreed with Robert J.A.'s approach to the minimal impairment issue. He approached the analysis with considerable reticence, given the fact that, in his view, [TRANSLATION] "it is easy for the courts, several years after the alleged infringement, in an entirely different context and without the political, economic and social constraints of governments, to criticize their decisions and set themselves up as legislators" (p. 1045).

186 While he agreed that the educational programs put into place were not a success, he found that the failure of these programs could not be linked to the conditions that were placed on participation. In this case, he placed some responsibility on the members of the group for having chosen not to participate in the programs. Moreover, he disagreed with the importance that Robert J.A. gave to the fact that there were not enough spaces available for all those under 30 to have participated, holding that it would be absurd for the government to have been forced to open 75 000 places when not even the 30 000 available places were filled.

187 Thus, Baudouin J.A. concluded that the government had met its burden of showing that its programs were minimally impairing and that its deleterious effects were reasonably proportional to the salutary effects. In doing so, he emphasized that just because a program is not a success should not be enough for a court to conclude that the means were not proportional to the objective sought.

188 Because he was the only justice to find that there had been a *Canadian Charter* infringement that was not upheld by s. 1, Robert J.A. was the only one to deal with the issue of remedy. He held that the most appropriate remedy would be to declare both ss. 29(*a*) and 23 of the Regulation invalid, since it was clear that the government would not have adopted that regulation without s. 29(*a*). However, due to the consequences of such a declaration, he held that it should be suspended for a period.

189 Robert J.A. then rejected the appellant's claim for compensation for herself and the members of her class. In order for damages to be ordered following a s. 52 declaration of unconstitutionality, he held that there had to be some correlation between the remedy ordered under s. 52 and s. 24(1): *Schachter v. Canada*, 1992 CanLII 74 (SCC), [1992] 2 S.C.R. 679; *Guimond v. Quebec (Attorney General)*, 1996 CanLII 175 (SCC), [1996] 3 S.C.R. 347.

190 On the issue of s. 45 of the *Quebec Charter*'s application to this case, two separate sets of reasons were delivered by the Court of Appeal. Baudouin J.A., Mailhot J.A. concurring, held that s. 45 had not been infringed. In interpreting the wording of the section, Baudouin J.A. held that the legislature would not, through s. 45, have adopted an obligation as massive as that of providing social assistance, while setting out strict limitations for the other economic rights. He therefore held that s. 45, like the other sections in the economic rights chapter of the *Quebec Charter*, only provided Quebec residents with a right to be provided access to whatever social assistance might exist, without discrimination.

191 Upon examination of the context, as well as the language used in the adjoining sections, Robert J.A. held that s. 45 did in fact create a positive right to social assistance, and that it had been infringed. Whereas the other sections of the economic rights chapter of the *Quebec Charter* were drafted with explicit limitations, such as "to the extent provided by law" (emphasis added) in s. 44, in the case of s. 45 there is a specifically different phrasing that is not used in any other section. Robert J.A. held that these differences must mean something; he found that s. 45 did not contain an internal limitation.

192 Robert J.A. went on to hold that s. 45 had been infringed. Nevertheless, he found that no award for damages could be awarded

under s. 49because, in order to make such an order, there must be wrongful conduct by a party. He held that the fact that a provision is found to be unconstitutional does not amount to a finding of wrongful conduct on the part of the government.

193 The claimant appealed the Quebec Court of Appeal's decision to this Court.

VI. Issues

194 The following four constitutional questions were stated by the Chief Justice on November 1, 2000:

1. Did s. 29(*a*) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, adopted under the *Social Aid Act*, R.S.Q., c. A-16, infringes. 15(1) of the *Canadian Charter of Rights and Freedoms* on the ground that it established a discriminatory distinction based on age with respect to individuals, capable of working, aged 18 to 30 years?

2. If so, is the infringement justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

3. Did s. 29(*a*) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, adopted under the *Social Aid Act*, R.S.Q., c. A-16, infringes. 7 of the *Canadian Charter of Rights and Freedoms* on the ground that it deprived those to whom it applied of their right to security of the person contrary to the principles of fundamental justice?

4. If so, is the infringement justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*.

195 The appellant also makes a claim under s. 45 of the *Quebec Charter*.

VII. Analysis

A. *Procedural Issues*

196 The history of this case spans three decades. On July 29, 1986, the appellant filed a motion to authorize a class action suit pursuant to art. 1002 of the Quebec *Code of Civil Procedure*, R.S.Q., c. C-25. On December 11, 1986, Reeves J. of the Quebec Superior Court certified the group. He described the group as follows (at p. 1650):

> [TRANSLATION] Individuals capable of working, aged 18 to 30 years, who are currently receiving welfare benefits under s. 29(a) of theRegulation respecting social aid adopted under the Social Aid Act (R.S.Q., c. A-16, s. 31) and/or who received welfare benefits under s. 29(a) of the Regulation respecting social aid adopted under the Social Aid Act (R.S.Q., c. A-16, s. 31) during any period since April 17, 1985, and/or who become or will be recipients of welfare benefits under s. 29(a) of the Regulation respecting social aid adopted under the Social Aid Act (R.S.Q., c. A-16, s. 31) from this day until the date of judgment in the present matter.

The final date to exclude one's self from the class was February 8, 1987.

197 While the legislation in question existed in its disputed form between 1984 and 1989, the operation of Quebec's *Act Respecting the Constitution Act, 1982*, means that the *Social Aid Act* operated notwithstanding the *Canadian Charter* until June 23, 1987. The *Social Aid Act* was amended to make all benefits conditional on July 31, 1989. Thus, it is only between those dates that the *Canadian Charter* applied to the present case. On the other hand, the*Quebec Charter* applied for the entire period. Despite the divergence in applicable dates, I would agree with the holding of Reeves J. that the events that transpired over the entire period may be examined in order to determine the constitutionality of the legislation.

198 As a result of this case being brought by means of a class action, the respondent raised two preliminary procedural issues before this Court. First, the government argues that a class action is an inappropriate method for bringing a direct action of invalidity. It contends that, pursuant to the holding of Gonthier J. in*Guimond, supra*, an action for damages cannot be coupled with a declaratory action for invalidity and that Reeves J. should not have authorized the bringing of the class action because the facts alleged did not justify the conclusions sought. However, as Gonthier J. held in *Guimond*, the rule against coupling an action for as. 24(1) remedy with a direct action under s. 52 is only a general

rule. It was certainly within the discretion of Reeves J. to allow the class to be certified. Admittedly, obtaining a s. 24(1) order for damages pursuant to a declaration of invalidity is an unlikely outcome for any *Canadian Charter* complainant. However, rather than creating a bar to litigants who might be seeking one or the other type of remedy, this analysis is best dealt with when determining the appropriate remedy.

199 The second preliminary issue argued by the respondent is that the Superior Court was not a competent court to hear the constitutional arguments since the complainants could have, at any time after June 23, 1987, made an application to be heard by the Social Affairs Commission. In support of this, the respondent relies on the holding of this Court that an administrative body that is expressly empowered by legislative mandate to interpret or apply any law necessary to reach its findings has the power to apply the *Canadian Charter*: *Douglas/Kwantlen Faculty Assn. v. Douglas College*, 1990 CanLII 63 (SCC), [1990] 3 S.C.R. 570; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, 1991 CanLII 57 (SCC), [1991] 2 S.C.R. 5; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, 1991 CanLII 12 (SCC), [1991] 2 S.C.R. 22.

200 While the above cases stand for the proposition that an administrative body could have jurisdiction to determine constitutional questions, they did not determine that such bodies have exclusive jurisdiction over such matters. In the later case of *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 S.C.R. 929, McLachlin J. (as she then was) held that when an administrative body has been granted the authority to make orders under an Act or collective agreement, such body may constitute a court of competent jurisdiction for the purposes of s. 24(1) of the *Canadian Charter*. McLachlin J. noted that mandatory arbitration clauses in labour statutes may deprive the courts of concurrent jurisdiction. That case did not, however, deal with the question of whether a declaration of invalidity, such as the one being sought here, can be made by an administrative body. Indeed, La Forest J. held in *Cuddy Chicks*, *supra*, that such a body can only declare an impugned provision invalid for the purposes of the matter before it (p. 17).

201 In the context of this case, it would be inappropriate to decide what is the scope of the Social Affairs Commission's power to make orders pursuant to s. 24(1). Little, if any evidence has been advanced regarding the powers of the Commission, and the matter was not argued in any depth before this Court. Given

that the Superior Court was the only forum that the appellant could choose in order to obtain a general declaration of invalidity, and that prior to 1990 it was considered to be the only appropriate forum for a determination of any of the constitutional questions raised, I do not believe that it would be advisable to halt the process at this late date for procedural reasons.

B. *Canadian Charter of Rights and Freedoms*

202 The appellant advances arguments relating to both s. 7 and s. 15 of the *Charter*. When multiple *Charter* rights are advanced, there is always some question as to the proper manner in which to proceed. While it is generally sufficient to find that one of the rights is infringed and simply state that the other "need not be dealt with", this approach is sometimes unhelpful. Each case must be dealt with separately. In the recent case of *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94 (CanLII), [2001] 3 S.C.R. 1016, 2001 SCC 94, for instance, the complainant put forth claims based on both his s. 2(*d*) associational rights and his s. 15 equality rights. I held for the majority that the burdens imposed by ss. 2(*d*) and 15(1) differed in the sense that the latter focuses on the effects of underinclusion on human dignity, while the former is concerned with the ability to exercise the fundamental freedom of association (para. 28). In that case, at its core, the appellant's claim was concerned with his capacity to organize. I therefore began with a consideration of that right and, having found an unjustified*Charter* breach, did not have to proceed to a consideration of the s. 15(1) claim.

203 In this case, we are again faced with two *Charter* claims, based on rights that require different approaches. While s. 15 is concerned with the effect of over- or underinclusive legislation on the claimant's human dignity, s. 7 is concerned with the manner in which the state's actions interfere with a free-willed person's ability to enjoy his life, liberty and security interests. Any infringement of those rights by the state must be imposed in accordance with the principles of fundamental justice. Though both sets of rights are protected under the *Charter*, the two protect different interests. While it is important that the *Charter* be interpreted in a consistent fashion, the rights themselves must be interpreted in accordance with their individual terms. In a given situation, one right may be infringed while another is not. "*Charter* values" are an important concept that may help to inform a *Charter* right, but they cannot be invoked to modify the wording of the *Charter* itself.

204 In this case, the different nature of the two rights comes to the fore, and it is for this reason that, even though I have held that the legislation in dispute constitutes an unjustified infringement of s. 15, I have chosen to undertake an examination of s. 7 as well, in order to contrast the particular limits of the two rights.

(1) Section 7

205 Section 7 of the *Charter* provides 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." The appellant in this case argues that the statutory framework that reduced benefits for those under 30 infringed her right to security of the person, since it had the effect of leaving her and the members of her class in a position of abject poverty that threatened both their physical and psychological integrity. In order to establish a s. 7 breach, the claimant must first show that she was deprived of her right to life, liberty or security of the person, and then must establish that the state caused such deprivation in a manner that was not in accordance with the principles of fundamental justice.

206 The protection provided for by s. 7's right to life, liberty and security of the person is reflective of our country's traditional and long-held concern that persons should, in general, be free from the constraints of the state and be treated with dignity and respect. In *R. v. Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30, Dickson C.J. held that security of the person is implicated in the case of "state interference with bodily integrity and serious state-imposed psychological stress" (p. 56).

207 In *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC), [1999] 3 S.C.R. 46, at para. 60, Lamer C.J. held that, for a restriction of the right to security of the person to be made out:

> . . . the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.

208 In this case, the appellant has gone to great lengths to demonstrate that the negative effects of living on the reduced level of support were seriously harmful to the physical and psychological well-being of those affected. Certainly, those who, like the appellant, were living on a reduced benefit were not in a very "secure" position. The remaining question at this first stage of the s. 7 analysis is, however, whether this position of insecurity was brought about by the state.

209 The requirement that the violation of a person's rights under s. 7 must emanate from a particular state action can be found in the wording of the section itself. Section 7 does not grant a right to security of the person, full stop. Rather, the right is protected only insofar as the claimant is deprived of the right to security of the person by the state, in a manner that is contrary to the principles of fundamental justice. The nature of the required nexus between the right and a particular state action has evolved over time.

210 In *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, 1990 CanLII 105 (SCC), [1990] 1 S.C.R. 1123 ("*Prostitution Reference*"), Lamer J., as he then was, held that s. 7 was not necessarily limited to purely criminal or penal matters (p. 1175). Nonetheless, he did maintain that, given the context of the surrounding rights and the heading "Legal Rights" under which s. 7 is found, it was proper to conclude that "the restrictions on liberty and security of the person that s. 7 is concerned with are those that occur as a result of an individual's interaction with the justice system, and its administration" (p. 1173).

211 In *G. (J.)*, *supra*, Lamer C.J. again addressed the issue of whether s. 7 rights could be extended beyond the criminal law context, this time, with respect to the right to state-funded counsel for a parent at a custody hearing. In finding that such a right was contemplated by s. 7, he held that the subject matter of s. 7 was "the state's conduct in the course of enforcing and securing compliance with the law, where the state's conduct deprives an individual of his or her right to life, liberty, or security of the person" (para. 65). In *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII), [2000] 2 S.C.R. 307, 2000 SCC 44, I agreed with this statement of the law and concluded that s. 7 rights could be infringed in the context of an investigation under human rights legislation.

212 In *Winnipeg Child and Family Services v. K.L.W.*, 2000 SCC 48 (CanLII), [2000] 2 S.C.R. 519, 2000 SCC 48, the ambit of state action was expanded beyond the confines of a court room. In that case, a mother sought an injunction against the Child and Family Services agency's decision to apprehend her child without a warrant. While there was no judicial process at issue, she claimed that the action of the state in apprehending her child violated her s. 7 right to security of the person. L'Heureux-Dubé J. held that the claimant had been deprived of her right in accordance with the principles of fundamental justice, recognizing nevertheless that she had satisfied the first part of the s. 7 test. This can be explained by the fact that the seizure of the claimant's newborn child constituted a determinative government action.

213 Thus, in certain exceptional circumstances, this Court has found that s. 7 rights may include situations outside of the traditional criminal context — extending to other areas of judicial competence. In this case, however, there is no link between the harm to the appellant's security of the person and the judicial system or its administration. The appellant was not implicated in any judicial or administrative proceedings, or even in an investigation that would at some point lead to such a proceeding. At the very least, a s. 7 claim must arise as a result of a determinative state action that in and of itself deprives the claimant of the right to life, liberty or security of the person.

214 Some may find this threshold requirement to be overly formalistic. The appellant, for instance, argues that this Court has found that respect for human dignity underlies most if not all of the rights protected under the *Charter*. Undoubtedly, I agree that respect for the dignity of all human beings is an important, if not foundational, value in this or any society, and that the interpretation of the *Charter* may be aided by taking such values into account. However, this does not mean that the language of the *Charter* can be totally avoided by proceeding to a general examination of such values or that the court can through the process of judicial interpretation change the nature of the right. As held in *Blencoe*, *supra*, "[w]hile notions of dignity and reputation underlie many *Charter* rights, they are not stand-alone rights that trigger s. 7 in and of themselves" (para. 97). A purposive approach to *Charter* interpretation, while coloured by an overarching concern with human dignity, democracy and other such "*Charter* values", must first and foremost look to the purpose of the section in question. Without some link to the language of the *Charter*, the legitimacy of the entire process of *Charter* adjudication is brought into question.

215 In the *Charter*, s. 7 is grouped, along with ss. 8 to 14, under the heading "Legal Rights", in French, "*Garanties juridiques*". Given the wording of this heading, as well as the subject matter of ss. 8 to 14, it is apparent that s. 7 has, as its primary goal, the protection of one's right to life, liberty and security of the person against the coercive power of the state (P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 44-9; *Prostitution Reference*,*supra*, *per* Lamer J.). The judicial nature of the s. 7 rights is also evident from the fact that people may only be deprived of those rights in accordance with the principles of fundamental justice. As Lamer J. held in *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486, such principles are to be found "in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system" (p. 503). It is this strong relationship between the right and the role of the judiciary that leads me to the conclusion that some relationship to the judicial system or its administration must be engaged before s. 7 may be applied.

216 To suggest that this nexus is required is not to fossilize s. 7. This Court has already held, in *G. (J.)*, *supra*, *Blencoe*, *supra*, and *Suresh v. Canada(Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII), [2002] 1 S.C.R. 3, 2002 SCC 1, that this link to the judicial system does not mean that s. 7is limited to purely criminal or penal matters. In *K.L.W.*, *supra*, it was recognized that there need not be a link to a trial-like process. Individuals who find themselves subject to administrative processes may find that they have been deprived of their right to life, liberty or security of the person. The manner in which these various administrative processes will be reviewed has by no means been calcified. Nor has the interpretation of the "principles of fundamental justice" which apply to these processes. However, at the very least, in order for one to be deprived of a s. 7 right, some determinative state action, analogous to a judicial or administrative process, must be shown to exist. Only then may the process of interpreting the principles of fundamental justice or the analysis of government action be undertaken.

217 In this case, there has been no engagement with the judicial system or its administration, and thus, the protections of s. 7 are not available. As will be discussed below, I have concluded that s. 29(*a*) of the Regulation, by treating individuals differently on the basis of their age, constitutes an infringement of the appellant's equality rights. However, s. 7 does not have the same comparative characteristics as the s. 15 right. The appellant's situation must be viewed in more

absolute terms. In this case, the threat to the appellant's right to security of the person was brought upon her by the vagaries of a weak economy, not by the legislature's decision not to accord her more financial assistance or to require her to participate in several programs in order for her to receive more assistance.

218 The appellant and several of the interveners made forceful arguments regarding the distinction that is sometimes drawn between negative and positive rights, as well as that which is made between economic and civil rights, arguing that security of the person often requires the positive involvement of government in order for it to be realized. This is true. The right to be tried within a reasonable time, for instance, may require governments to spend more money in order to establish efficient judicial institutions. However, in order for s. 7 to be engaged, the threat to the person's right itself must emanate from the state.

219 In *G. (J.)*, *supra*, for instance, this Court held that the claimant had the right to be provided with legal aid to assist her during a child custody hearing. To the extent that that order required the government to spend money so as to ensure that the complainant was not deprived of her right to security of the person in a manner that was inconsistent with the principles of fundamental justice, such a right could be construed as "positive" and perhaps "economic". However, what was determinative in that case was that the claimant, pursuant to s. 7, was being directly deprived of her right to security of the person through the action of the state. It was the fact that the state was attempting to obtain custody of the claimant's children that threatened her security. It is such initial state action, one that directly affects and deprives a claimant of his or her right to life, liberty or security of the person that is required by the language of s. 7.

220 The appellant also directed our attention to the dissenting statements of Dickson C.J. in *Reference re Public Service Employee Relations Act(Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313, in which he noted that a conceptual approach in which freedoms are said to involve simply an absence of interference or constraint "may be too narrow since it fails to acknowledge situations where the absence of government intervention may in effect substantially impede the enjoyment of fundamental freedoms" (p. 361). The question of whether a fundamental freedom can be infringed through the lack of government action was canvassed most recently in the case of *Dunmore*, *supra*. In

that case, I held that legislation that is underinclusive may, in unique circumstances, substantially impact the exercise of a constitutional freedom (para. 22). I explained that in order to meet the requirement that there be some form of government action as prescribed by s. 32 of the *Canadian Charter*, the legislation must have been specifically designed to safeguard the exercise of the fundamental freedom in question. The affected group was required to show that it was substantially incapable of exercising the freedom sought without the protection of the legislation, and that its exclusion from the legislation substantially reinforced the inherent difficulty to exercise the freedom in question. While the existence of the *Social Aid Act*might constitute sufficient government action to engage s. 32, none of the other factors enumerated in *Dunmore* are present in this case.

221 In *Dunmore*, I found that the Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A, instantiated the freedom to organize and that without its protection agricultural workers were substantially incapable of exercising their freedom to associate. The legislation reinforced the already precarious position of agricultural workers in the world of labour relations. In undertaking the underinclusiveness analysis, a complainant must demonstrate that he or she is being deprived of the right itself and not simply the statutory benefit that is being provided to other groups. Here, the *Social Aid Act* seeks to remedy the situation of those persons who find themselves without work or other assistance by providing them with financial support and job training so that they can integrate to the active workforce. As in *Delisle v. Canada (Deputy Attorney General)*, 1999 CanLII 649 (SCC), [1999] 2 S.C.R. 989, and *Haig v. Canada*,1993 CanLII 58 (SCC), [1993] 2 S.C.R. 995, the exclusion of people under 30 from the full, unconditional benefit package does not render them substantially incapable of exercising their right to security of the person without government intervention. Leaving aside the possibilities that might exist on the open market, training programs are offered to assist in finding work and to provide additional benefits.

222 The appellant has failed to demonstrate that there exists an inherent difficulty for young people under 30 to protect their right to security of the person without government intervention. Nor has the existence of a higher base benefit for recipients 30 years of age and over been shown to reduce, on its own, or substantially, the potential of young people to exercise their right to security of the person. The fact that the remedial programs instituted by the reforms of 1984 might not have been designed in a manner that was overly favourable to the appellant does not help the appellant in meeting her burden. My concern here is

with the ability of the appellant's group to access the right itself, not to benefit better from the statutory scheme. The appellant has failed to show a substantial incapability of protecting her right to security. She has not demonstrated that the legislation, by excluding her, has reduced her security any more than it would have already been, given market conditions.

223 For these reasons, I would hold that s. 29(*a*) of the Regulation does not infringe s. 7 of the *Canadian Charter*. The threat to the appellant's security of the person was not related to the administration of justice, nor was it caused by any state action, nor did the underinclusive nature of the Regulation substantially prevent or inhibit the appellant from protecting her own security. Such a result should not be unexpected. As I noted in *Dunmore*, *supra*, total exclusion of a group from a statutory scheme protecting a certain right may in some limited circumstances engage that right to such an extent that it is in essence the substantive right that has been infringed as opposed to the equality right protected under s. 15(1) of the *Charter*. However, the underinclusiveness of legislation will normally be the province of s. 15(1), and so it is to the equality analysis that we must now turn.

(2) Section 15

224 Section 15(1) of the *Charter* protects every individual's right to the equal protection and benefit of the law, without discrimination based on, among other grounds, age. As this Court has enunciated on numerous occasions, a purposive approach to this right must take into consideration a concern for the individual human dignity of all those subject to the law. As noted in the s. 7 analysis, while a concern for and understanding of the basic values underlying the*Charter* are important in order to give proper consideration to a *Charter* claim, such principles cannot be allowed to override the language of the *Charter* itself.

225 Among the grounds of prohibited discrimination enumerated under s. 15(1), age is the one that tends to cause the most theoretical confusion. The source of such confusion in implementing the s. 15(1) guarantee of age equality is rooted in our understanding of substantive equality. In protecting substantive equality, this Court has recognized that like people should be treated alike and, reciprocally, different people must often be treated differently. Most of the grounds enumerated under s. 15(1) tend to be characteristics that our society has deemed to be "irrelevant" to one's abilities. The problem with age is that because we all, as

human beings trapped in the continuum of time, experience the process of aging, it is sometimes difficult to assess discriminative behaviour. Health allowing, we all have the opportunity to be young and foolish as well as old and crotchety. As Professor Hogg, *supra*, argues, "[a] minority defined by age is much less likely to suffer from the hostility, intolerance and prejudice of the majority than is a minority defined by race or religion or any other characteristic that the majority has never possessed and will never possess" (p. 52-54).

226 Moreover, whereas distinctions based on most other enumerated or analogous grounds may often be said to be using the characteristic as an illegitimate proxy for merit, distinctions based on age as a proxy for merit or ability are often made and viewed as legitimate. This acceptance of distinctions based on age is due to the fact that at different ages people are capable of different things. Ten-year-olds, in general, do not make good drivers. The same might be said for the majority of centenarians. It is in recognition of these developmental differences that several laws draw distinctions on the basis of age.

227 However, despite this apparent recognition that age is of a different sort than the other grounds enumerated in s. 15(1), the fact of the matter is that it was included as a prohibited ground of discrimination in the *Canadian Charter*. Recall that in *Law* Iacobucci J. referred to the remark in *Andrews* that it would be a rare case in which differential treatment based on one or more of the enumerated or analogous grounds would not be discriminatory: *Law*, *supra*, at para. 110. In contrast, some human rights laws do not include age as a ground of discrimination, or limit the ground to discrimination between the ages of 18 and 65:*Human Rights Code*, R.S.B.C. 1996, c. 210; *Quebec Charter*, s. 10. But the *Canadian Charter* does include age, without internal limitation. In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC), [1999] 2 S.C.R. 203, McLachlin J. and I held that the grounds of discrimination enumerated in s. 15(1) "function as legislative markers of suspect grounds associated with stereotypical, discriminatory decision making" (para. 7). Legislation that draws a distinction based on such a ground is suspect because it often leads to discrimination and denial of substantive equality. This is the case whether the distinction is based on race, gender or age. While distinctions based on age may often be justified, they are nonetheless equally suspect. While age is a ground that is experienced by all people, it is not necessarily experienced in the same way by all people at all times. Large cohorts may use age to discriminate against smaller, more vulnerable cohorts. A change in economic, historical or

political circumstances may mean that presumptions and stereotypes about a certain age group no longer hold true. Moreover, the fact remains that, while one's age is constantly changing, it is a personal characteristic that at any given moment one can do nothing to alter. Accordingly, age falls squarely within the concern of the equality provision that people not be penalized for characteristics they either cannot change or should not be asked to change.

228 The fact that the Regulation here makes a distinction based on a personal characteristic that is specifically enumerated under s. 15 should therefore raise serious concerns when considering whether such a distinction is in fact discriminatory. While not creating a presumption of discrimination, a distinction based on an enumerated ground reveals a strong suggestion that the provision in question is discriminatory for the purposes of s. 15. In recent years, this Court has stated that disrespect for human dignity lies at the heart of discrimination: *Egan v. Canada*, 1995 CanLII 98 (SCC), [1995] 2 S.C.R. 513, *per* L'Heureux-Dubé J.; *Miron v. Trudel*, 1995 CanLII 97 (SCC), [1995] 2 S.C.R. 418, *per* McLachlin J.; *Vriend v. Alberta*, 1998 CanLII 816 (SCC), [1998] 1 S.C.R. 493. However, it is worth repeating that the concept of "human dignity" has essentially been brought to the fore in an effort to capture the essence of what differential treatment based on one of the grounds in s. 15 captures.

229 The framework for undertaking a s. 15 analysis was put forth most recently by this Court in *Law*, *supra*. In that case, this Court affirmed that the s. 15 analysis is to take place through a three-stage process: Is there differential treatment between the claimant and others, in purpose or effect; is the differential treatment based on one or more of the grounds enumerated under s. 15(1) or a ground analogous to those contained therein; does the law in question have a purpose or effect that is discriminatory within the meaning of the equality guarantee? (*Law*, at para. 88). At each stage of this process, the claimant bears the civil burden of proof. This burden remains constant no matter how serious the claim or how many people are potentially involved.

230 It is evident, in this case, and the respondent does not appear to dispute this point, that s. 29(*a*) of the Regulation creates a distinction between single social assistance recipients under the age of 30 and those 30 and over. Single recipients under the age of 30 have their base benefits capped at a level one third of that of those 30 and over. While they may participate in certain programs in order to increase their benefits, those 30 and over do not have to do so. This results in the

differential treatment of the two groups. Thus, the fundamental question that needs to be dealt with in any depth here is whether the distinction outlined in s. 29(*a*) is indicative that the government treats social assistance recipients under 30 in a way that is respectful of their dignity as members of our society. Evidence regarding the actual impact of the distinction will also be considered, although I conclude that the regulatory regime is discriminatory on its face.

231 In *Law*, *supra*, Iacobucci J. held that this third inquiry is to be assessed as by a reasonable person in the claimant's circumstances, having regard to several "contextual factors". The factors suggested in *Law*, while not exhaustive, are (1) pre-existing disadvantage, stereotyping, prejudice or vulnerability, (2) correspondence between the distinction drawn and the needs, capacity or circumstances of the claimant or others, (3) any ameliorative purpose or effects of the impugned law upon a more disadvantaged group or person, and (4) the nature and scope of the interest affected by the impugned law. Iacobucci J. noted that the presence or absence of any of these contextual factors is not determinative.

232 Interestingly, *Law*, also involved a claim that a legislative provision, by offering lower pension benefits to younger people, constituted age discrimination under s. 15. In that case, the claimant argued that provisions of the Canada Pension Plan that gradually reduced the survivor's pension for able-bodied surviving spouses without dependant children by 1/120th of the full rate for each month that the claimant's age was less than 45 at the time of the contributor's death was discriminatory. The effect of the legislation was to make 35 years of age the threshold age for receiving survivor benefits for persons not having attained the retirement age of 65. Those over 45 at the time of their spouse's death would receive full benefits, those under 35 would receive no benefits until they were 65, and those between 35 and 45 would receive a graduated amount until they were 65. After examining the contextual factors enunciated above, Iacobucci J. held that this distinction, though based on the enumerated ground of age, was not substantively discriminatory.

233 The fact that a certain legislative provision which limited the benefits to those under a certain age was found to be constitutional in one case does not necessarily lead to the same conclusion here. In order to determine in this case whether the legislation is respectful of the self-worth and dignity of the appellant, the legislation has to be examined in the context of both its overriding purpose and effects, as well as the situation of the appellant.

234 As this Court held in *Law* and *Egan*, *supra*, the s. 15 analysis must be undertaken from the perspective of the appellant. As this Court has previously agreed, the focus of the inquiry is both subjective and objective (*Law*, at para. 59):

> . . . subjective in so far as the right to equal treatment is an individual right, asserted by a specific claimant with particular traits and circumstances; and objective in so far as it is possible to determine whether the individual claimant's equality rights have been infringed only by considering the larger context of the legislation in question, and society's past and present treatment of the claimant and of other persons or groups with similar characteristics or circumstances.

Thus, while it is not enough for the appellant to simply claim that her dignity was violated, a demonstration, following the subjective-objective method previously described, that there is a rational foundation for her experience of discrimination will be sufficient to ground the s. 15 claim (*Lavoie v. Canada*,2002 SCC 23 (CanLII), [2002] 1 S.C.R. 769, 2002 SCC 23, at para. 46). The factual basis upon which the court will come to a conclusion on this point is very different from the one that will be considered in the context of a s. 1 justification. The appellant in this case must demonstrate that the legislation treated recipients of social assistance under the age of 30 in a manner that would lead a reasonable person, similarly situated, to feel that he or she was considered less worthy of "recognition . . . as a member of Canadian society": *Law*, *supra*, at para. 88. There is no balancing of interests here. In order to demonstrate that her dignity is affected, the appellant may wish to deal with some of the factors enumerated in *Law*, such as the manner in which the legislation emphasizes a pre-existing disadvantage or stereotype suffered by the appellant's group, the importance or nature of the right that is being withheld from the appellant's group, as well as the degree of care that the government took in crafting the legislation so as to take into account the actual needs and situation of the group's members.

(i) Pre-existing Disadvantage or Stereotype

235 The first contextual factor that was considered in *Law* was that of pre-existing disadvantage or prejudice. In *Law*, Iacobucci J. took notice of the fact that young widows are generally better situated to prepare for retirement than are older widows; there is no pre-existing disadvantage in their case. The respondent argues the same thing here, noting that young people are generally not considered to be routinely subjected to the sort of discrimination faced by some of Canada's discrete and insular minorities, and that they are not disadvantaged. While, in general, such a rule of thumb may hold true, it is precisely because of the generality of this type of consideration that distinctions based on enumerated or analogous grounds are suspect. The purpose of undertaking a contextual

discrimination analysis is to try to determine whether the dignity of the claimant was actually threatened. In this case, we are not dealing with a general age distinction but with one applicable within a particular social group, welfare recipients. Within that group, the record makes clear that it was not, in fact, easier for persons under 30 to get jobs as opposed to their elders. The unemployment rate in 1982 had risen to 14 percent, with the rate among young people reaching 23 percent. As a percentage of the total population of people on social assistance, those under 30 years of age rose from 3 percent in 1975 to 12 percent in 1983. Thus, the stereotypical view upon which the distinction was based, that the young social welfare recipients suffer no special economic disadvantages, was not grounded in fact; it was based on old assumptions regarding the employability of young people. The creation of the assistance programs themselves demonstrates that the government itself was aware of this disadvantage.

236 The appellant argues that people on social assistance have always suffered disadvantage because they are victims of stereotypical assumptions regarding the reasons for being welfare recipients, and are therefore marginalized from society. In making such an argument, the appellant is not comparing social assistance recipients under 30 to those 30 and over, but instead, comparing the relative position of young social assistance recipients to members of society as a whole. This raises the question of determining what is the proper comparator.

237 In *Law*, no argument was made that widows, as a category, have been traditionally marginalized. It was recognized, however, that in determining whether a group has suffered previous disadvantage, the analysis need not necessarily adopt the comparator upon which the distinction is first made. The question to be examined here is not whether differential treatment has occurred, which has already been established, but whether the particular group affected has been traditionally marginalized, or has faced unfair stereotyping. In *Lovelace v. Ontario*, 2000 SCC 37 (CanLII), [2000] 1 S.C.R. 950, 2000 SCC 37, Iacobucci J. noted that the claimant group (non-registered natives) had faced considerable discrimination, but refused to enter into a "race to the bottom" (para. 69) by deciding who is more disadvantaged. The same approach, should, in my view, be adopted here. There is no compelling evidence that younger welfare recipients, as compared to all welfare recipients, have been traditionally marginalized by reason of their age. But that does not end the inquiry.

238 The concern, when determining whether the differential treatment of a group is discriminatory, must, according to this Court in *Law*, be governed by an overarching concern for human dignity. The 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. The fact that their status as beneficiaries of social assistance was not argued as constituting a new analogous ground should not be a matter of concern at this stage of the analysis, since it has already been determined at the second stage of the *Law* test that the differentiation has been made on the basis of an enumerated ground. The issue, at this stage, is to determine whether, in the context of this case, a differentiation based on an enumerated ground is threatening to the appellant's human dignity. If the vulnerability of the appellant's group as welfare recipients cannot be recognized at this stage, can we really be said to be undertaking a contextual analysis?

(ii) Correspondence Between Grounds Upon Which Claim Is Based and the Actual Needs, Capacity or Circumstances of the Claimant

239 It is at this stage of the analysis that the contrast between the competing characterizations of the legislation put forth by the appellant and the respondent is most apparent. The appellant claims that the government did not take into account the real circumstances of young adults in crafting its legislation. In arguing this point, she relies on the estimate that, in reality, only 11.2 percent of young adults were able to receive the full amount of assistance.

240 The respondent, on the other hand, argues that while, as in *Law*, this legislation treated younger adults differently because their prospects for supporting themselves in the future were greater than that of their elders, this regulation, unlike that in *Law*, was specifically designed to assist those under 30. In support of this contention, the respondent presents a considerable amount of evidence demonstrating that the institution of the educational programs constituted a response to an alarmingly high rate of unemployment among young people, and was therefore designed to give them the skills necessary to enter the job market so that they could be more autonomous.

241 The witnesses for the respondent explained that their intention in developing the new system was to help young people in their particular situation. However, the language of much of the regulatory scheme appears, on its face, to suggest that the educational programs, and the monetary incentives that accompanied them, were blind as to the age of participants. Sections 32, 35.0.1 and 35.0.2 of the Regulation give no indication that such programs were specifically designed for young people. This is confirmed by the fact that while the programs ostensibly targeted those under 30, some people 30 and over did participate in the programs. In his judgment, Robert J.A. gave considerable weight to the fact that there were not enough places available in the programs to meet the needs of all beneficiaries under 30. When the programs were started, 30 000 places were opened, even though 85 000 single people under 30 were on social assistance. As was mentioned earlier, the programs were also open to persons 30 and over. I do not consider evidence of the number of places opened to be a significant factor in determining legislative purpose.

242 In my view, the treatment of legislative purpose at this stage of the s. 15(1) analysis must not undermine or replace that which will be undertaken when applying s. 1. Whether the distinction is made explicitly in the legislation, as compared with a facially neutral scheme, is immaterial when looking at legislative purpose. Indeed, this Court has adopted a unified approach to discrimination for claims under both the *Charter* and provincial human rights statutes, and affirmed that the method of discrimination is irrelevant. As McLachlin J. wrote for a unanimous Court in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (SCC), [1999] 3 S.C.R. 3, at paras. 47-48:

> In the *Charter* context, the distinction between direct and adverse effect discrimination may have some analytical significance but, because the principal concern is the effect of the impugned law, it has little legal importance. As Iacobucci J. noted at para. 80 of *Law*, *supra*:
>
> > While it is well established that it is open to a s. 15(1) claimant to establish discrimination by demonstrating a discriminatory legislative purpose, proof of legislative intent is not required in order to found a s. 15(1) claim: *Andrews*, *supra*, at p. 174. What is required is that the claimant establish that either the purpose or the effect of the legislation infringes s. 15(1), such that the onus may be satisfied by showing only a discriminatory effect. (Emphasis in original.)
>
> Where s. 15(1) of the *Charter* is concerned, therefore, this Court has recognized that the negative effect on the individual complainant's dignity does not substantially vary depending on whether the discrimination is overt or covert. [Emphasis in original.]

243 Whether a positive legislative purpose may be relevant under the *Law* analysis at the s. 15 stage is another matter. As is clear in the passage from*Law* that I have just reproduced, a claimant may demonstrate an infringement of s. 15(1) by either the legislative purpose or the effect. In the context, it is clear that Iacobucci J. is talking only about a detrimental purpose or effect, since it is nonsensical to think that a claimant might establish that a beneficial or benign purpose or effect infringes s. 15(1). It may be argued that a positive legislative intention might make some difference in the subjective-objective assessment of a distinction's impact on a claimant's human dignity, but the "principal concern", as McLachlin J. put it, remains the effect. Furthermore, any argument based on the positive legislative intention must take into account the impugned distinction. As stated earlier, the assumption that long-term benefits of training are greater for younger persons has nothing to do with the present need of all persons for a minimum amount of support and their likely response to the availability of training programs through penalties or incentives.

244 Indeed, giving too much weight here to what the government says was its objective in designing the scheme would amount to accepting a s. 1justification before it is required. Commentators have already raised concerns with the blurring between s. 15 and s. 1: see e.g. C. D. Bredt and A. M. Dodek, "The Increasing Irrelevance of Section 1 of the Charter" (2001), 14 *Sup. Ct. L. Rev.* (2d) 175, at p. 182; Hogg, *supra*, at p. 52-27. In my view, it is highly significant whether certain factors are considered under s. 15 or s. 1. As the Chief Justice recently wrote for the majority of this Court in *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 (CanLII), [2002] 3 S.C.R. 519, 2002 SCC 68, at para. 10:

> The *Charter* distinguishes between two separate issues: whether a right has been infringed, and whether the limitation is justified. The complainant bears the burden of showing the infringement of a right (the first step), at which point the burden shifts to the government to justify the limit as a reasonable limit under s. 1 (the second step). These are distinct processes with different burdens.

The point is that under the *Oakes* analysis, the legislative objective is not accepted uncritically. At the s. 15 stage, it is not appropriate to accept at face value the legislature's characterization of the purpose of the legislation and then use that to negate the otherwise discriminatory effects.

245 In any case, as I have noted, the legislature's intention is much less important at this stage of the *Law* analysis than the real effects on the claimant. The fundamental question, then, in this case, is not how the legislature viewed the scheme, nor how members of the majority would have viewed it in relation to the claimant group. The approach set out for us by *Law* is to ask how any member of the majority, reasonably informed, would feel in the shoes of the claimant, experiencing the effects of the legislation. This approach is essential: if people whom the legislature views as different are not demonstrably different at all, the measure should not be acceptable. In other words, this Court's holding that substantive equality can mean treating different people differently applies only where there is a genuine difference.

246 Moreover, unlike the situation in *Law*, in which the legislation in question gradually decreased the benefits from the age of 45 to 35, the *Social Aid Act* created a bright line at 30, a line which appears to have had little, if any, relationship to the real situation of younger people. As the appellant has demonstrated, and the respondent conceded, the dietary and housing costs of people under 30 are no different from those 30 and over. The respondent argued that those under 30 were more likely to live with their parents than those 30 and over. While this appears to have been true, the government had no empirical data to support that view when it adopted the Regulation; it was also shown that those over 25 were much less likely to live with their parents than those under 25. Thus, the decision to draw a bright line at the age of 30 appears to have little to do with the actual situation of the affected group.

247 No attempt appears to have been made by the government to actually identify those recipients who were living with their parents, either through the Regulation or through the screening and application process. In fact, no effort was made to establish what living conditions were and a presumption was adopted that all persons under 30 received assistance from their family. This was obviously untrue, as the appellant's personal experience has shown. It is worth mentioning here that this situation is very different from that in *Law*, where there was a rational basis for presuming that younger widows had fewer needs and superior means of meeting those needs than older widows. In contrast, the young in the present case have similar needs to their elders and their relative youth provides no advantage in meeting those needs.

248 While the government offered evidence to show that the programs it established targeted what it saw as the needs of those under 30, there does seem to have been a certain degree of reliance on the fact that, by happenstance, the distinction between those under 30 years of age and those 30 and over had traditionally existed in Quebec's social assistance laws. As the government economist Pierre Fortin noted in his report, speaking about the need to do something about the difficult situation facing young welfare recipients:

> [TRANSLATION] An opportunity was provided by the existence of the reduced scale for those capable of working who were under 30 years of age, which could be brought back up to the regular scale provided the recipient participated in one or other of the employability development measures.
>
> (P. Fortin, "Les mesures d'employabilité à l'aide sociale: origine, signification et portée" (February 1990), at p. 3)

The prior existence of the distinction between beneficiaries under 30 and those 30 and over was based upon older schemes which had sought to emphasize the "principle of parental responsibility" and which had been created within the context of much lower levels of youth unemployment. Thus, the relationship between the actual needs of welfare recipients under 30 and the provisions of the *Social Aid Act* and Regulation was not particularly strong. By relying on a distinction that had existed decades earlier and that did not take into account the actual circumstances faced by those under 30 in the 1980s, the legislation appears to have shown little respect for the value of those recipients as individual human beings. It created for them what it defined as substandard living conditions on the basis of their age. Where, as here, persons experience serious detriment and evidence shows that the presumptions guiding the legislature were factually unsupported, it is not necessary to demonstrate actual stereotyping, prejudice, or other discriminatory intention. Nor does a positive intention save the regulation. That is the lesson to be drawn from this Court's cases on indirect or effects discrimination: *BCGSEU*, *supra*; *Eldridge v. British Columbia (Attorney General)*,1997 CanLII 327 (SCC), [1997] 3 S.C.R. 624; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*,1987 CanLII 109 (SCC), [1987] 1 S.C.R. 1114. I would therefore disagree with the Chief Justice's views as expressed at para. 38 of her reasons. She writes there that far from being stereotypical or arbitrary, the program was calibrated to address the particular needs and circumstances of young adults requiring social assistance. In my view it is more appropriate to characterize the government's action in this way: Based on the unverifiable presumption that people under 30 had better chances of employment and lower needs, the program delivered to those people two thirds less of what the government viewed as the basic survival amount, drawing its distinction on a characteristic over which those people had no control, their age.

249 Before turning to the next contextual factor, I wish to address the issue of evidence and the burden of proof necessary to demonstrate a *Canadian*

Charter infringement. The Chief Justice is clearly influenced by what she perceives as the lack of evidence from other individuals besides Ms. Gosselin in support of the contentions of adverse effect. It appears to me that the Chief Justice is also influenced by the procedural fact that Ms. Gosselin's claim was authorized as a class action. It is clear that, in Quebec, to obtain authorization for a class action, the applicant must prove the existence of a group of persons harmed by facts deriving from a common origin: P.-C. Lafond, *Le recours collectif comme voie d'accès à la justice pour les consommateurs* (1996), at p. 400. Ms. Gosselin obtained authorization, and that authorization is not a live issue in this appeal, so it is established that she has proved the existence of such a group before the court. While even respecting the common law mechanism it is not necessary that common issues predominate or that the class members be identically situated *vis-à-vis* the opposing party (*Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (CanLII), [2001] 2 S.C.R. 534, 2001 SCC 46, at para. 39, *per* McLachlin C.J.), the legislature in Quebec deliberately departed from the conception of common interest by which all points at issue must be identical, questions of law as well as questions of fact. The legislative intention was for the class action to apply where the problem raised by a member of the group resembles without being identical to those raised by other members. See Lafond, *supra*, at pp. 405-6; *Code of Civil Procedure*, R.S.Q., c. C-25, art. 1003(*a*). The question of the extent of individual disadvantage suffered would become relevant much later, when calculating damages. At this stage, however, it would be a departure from past jurisprudence for this Court to refuse to find a *Canadian Charter* breach on the basis that the claimant had not proven disadvantage to enough others. As the Chief Justice wrote in *Sauvé*, *supra*, at para. 55: "Even one person whose *Charter* rights are unjustifiably limited is entitled to seek redress under the *Charter*."

(iii) Ameliorative Purpose

250 The respondent argues that the purpose of this legislation was ameliorative in that it was meant to improve the situation of unemployed youths through academic and experiential benefits, as opposed to exclusively pecuniary assistance. Quite simply, this is not a useful factor in determining whether this legislation's differential treatment was discriminatory. In *Law*, *supra*, Iacobucci J. held that a piece of legislation might be less harmful to a group's dignity if its purpose or effect is to help a more disadvantaged person or group in society. In that case, the fact that the purpose of the legislation was to aid elderly widows meant that the impact on the dignity of those under the age of 35 was lessened. Such is not the case here. In this case, the legislature has differentiated between the appellant's group and other welfare recipients based on what it claims is an effort to ameliorate the situation of the very group in question. Groups that

are the subject of an inferior differential treatment based on an enumerated or analogous ground are not treated with dignity just because the government claims that the detrimental provisions are "for their own good". If the purpose and effect of the distinction really are to help the group in question, the government should be able to show a tight correspondence between the grounds upon which the distinction is being made and the actual needs of the group. Here, no correspondence has been shown between the lower benefit and the actual needs of the group, even though it may have been established that the programs were themselves beneficial. The only logical inference for the differential treatment is that younger welfare recipients will not respond as positively to training opportunities and must be coerced by punitive measures while older welfare recipients are expected to respond positively to incentives.

(iv) Nature of the Interest Affected

251 The more important the interest that is affected by differential treatment, the greater the chance that such differential treatment will threaten a group's self-worth and dignity. This determination will generally require both a qualitative assessment of the interest affected and a quantitative inquiry as to the extent to which it is denied to the claimant. This case deals with a social assistance program which, despite the admitted existence of a secondary objective of helping people integrate into the workforce, has as its stated purpose the provision of the basic necessities for those in need. Thus, when the government creates a distinction that in some cases will result in people receiving only one third of what it has deemed to be the bare minimum for the sustainment of life, the effect on the members of the group is severe. As Iacobucci J. held in *Law*, *supra*, citing L'Heureux-Dubé J. in *Egan*, *supra*: "the discriminatory calibre of differential treatment cannot be fully appreciated without evaluating not only the economic but also the constitutional and societal significance attributed to the interest or interests adversely affected by the legislation in question" (para. 74). Here, there is an obvious and important interest in having enough money to assure one's own survival.

252 In *Law*, the Court noted that the purpose and function of the impugned CPP provisions were not to remedy the immediate financial need experienced by widows and widowers, but rather to enable older widows and widowers to meet their basic needs in the long term. In this case, while it is admitted that dealing with long-term dependancy is one of the legislation's

objectives, the short-term remedying of immediate financial needs continues to play a dominant role in the objectives of the legislation. The difference in the nature and importance of the interest affected — provision for basic needs immediately as opposed to over the long term — is one of the crucial distinctions between the present case and *Law*. The effect of the distinction in the present case is that the claimant and others like her would have had their income far below not just the government's poverty line, but its basic survival amount. A genuine contextual approach will appreciate this distinction and will not find the result determined by the apparent similarities in that both cases address an age distinction for a government benefit.

253 In her submissions, the respondent argues that it was not the creation of a lower base level of support for young people that was responsible for the deplorable situation in which many of them found themselves during the early 1980s. Instead, she argues, what was being offered were skills to allow young persons to enter the workforce, thereby reinforcing their dignity and self-worth:

> [TRANSLATION] . . . work is universally recognized as an essential component of human dignity. . . .

254 This statement says nothing about the differential treatment of those offered opportunities to obtain training or work experience. Furthermore, what much of the government's reasoning neglects is that the global economic situation that created the need for a program to help young people was characterized by the fact that there were no jobs available. The reason that these young people were not in the labour force was not exclusively that their skills were too low, or that they were undereducated, but that there were no jobs to be had. This is not to question the wisdom of the government's programs, but to emphasize that the effect that the maintenance of this distinction had on the members of the group in question was real and severe given the economic context of the time. Even if one were to accept, as I do not, that the government's positive intention was a significant factor in diminishing the impact of the impugned law on human dignity, or that there was no implicit stereotype that young persons would not have participated in training programs absent severe deprivation, any reading of the evidence indicates that it was highly improbable that a person under 30, with the best intentions, could at all times until he or she was 30 years old be registered in a program and therefore receive the full subsistence amount. Not all programs were open to each welfare recipient, and there would inevitably be waiting periods between the completion of one program and the start of another. During such periods, persons under 30 would clearly be exposed to deep poverty unlike persons

30 and over, in a way going directly to their human dignity and full participation as equally valued members of society.

255 The situation of Ms. Gosselin herself is illustrative of the manner in which s. 29(*a*) operated and affected her basic human dignity. There is no necessity for her to bring evidence of actual deprivation of other named welfare recipients under the age of 30. From the inception of the legislative scheme in question, Ms. Gosselin spent some months participating in the programs, receiving full benefits, and some months between programs, receiving a reduced amount in benefits. During the times that she was participating in the programs, she benefited from the experience that the programs offered, as well as the increase in benefits that such participation provided her. But, being a person under 30 years of age, much of the time she was living in fear of being returned to the reduced level of support. At certain times, she was not immediately capable of entering into a program; then, as well as when a program ended, she was left to fall back on the lower benefit. When she was given the opportunity of participating in a program, she took advantage of it. But if her participation in a particular program did not work out, as when she discovered that she had an allergy to animals and could no longer work at the pet store, she was left to survive on the reduced amount until another placement was made available to her. The presumption that she could rely on her mother was not based on true fact. She was in reality forced to survive on less than the recognized minimum received by those 30 and over.

256 This threat to her living income, described by a government witness as "the stick" to accompany "the carrot", caused a great deal of stress to the appellant. This additional stress, which was not experienced by those recipients 30 and over, dominated the appellant's life. Even when she was able to live with her mother, the arrangement was not ideal. It was in fact a situation she expended a great deal of energy in avoiding. At certain times, living with her mother was not even an option, as when the rules in her mother's housing changed, preventing the appellant from sharing her mother's one-bedroom apartment. Undoubtedly, this is a situation that would be stressful for any person, but for the purposes of s. 15 what made the appellant's experience demeaning was the fact that she was placed in a position that the government itself admits is a precarious and unliveable one, while it provided that older recipients of social assistance would be permitted to participate in at least one of the same programs and to receive an equivalent increase in benefits. Older recipients did not suffer a massive decrease in their benefits for failure to participate in a self-improvement program. This distinction

was made simply on the basis of age, not need, opportunity or personal circumstances.

257 I wish to reiterate that, as this Court's jurisprudence makes clear, the fourth contextual inquiry focuses on the particular interest denied or limited in respect of the claimant, not the societal interests engaged by the legislature's broader program or another particular benefit purportedly being provided to the claimant. In my view, the interests that the Chief Justice discusses under the fourth inquiry of the *Law* test at para. 65 belong properly under the s. 1 justification. The interest denied to the appellant in this case was not "faith in the usefulness of education", but rather welfare payments at the government's own recognized subsistence level. Consideration of any "positive impact of the legislation" belongs in the proportionality analysis at s. 1.

258 In conclusion, the appellant has shown that in certain circumstances, and in her circumstances in particular, there were occasions when the effect of the Regulation's differentiation between those under 30 years of age and those 30 and over was such that beneficiaries under 30 could objectively be said to have experienced governmental treatment that failed to respect them as full persons. Given that this differential treatment was based on the enumerated ground of age, it was already suspect for the purposes of s. 15. The fact, among others, that no matter what she did, a beneficiary under 30 would never receive the same benefit as a beneficiary 30 or over participating in a similar program confirms, from the standpoint of the reasonable person, that such treatment would affect one's own feeling of self-worth. I would therefore find that the distinction made by s. 29(*a*) of the Regulation is discriminatory.

259 It can be argued that the government could not design a perfect program, and that in a program such as this, some people are bound to fall through the cracks. Indeed, the Chief Justice accepts this argument, noting that a government need not achieve a perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group. But in light of the importance of the interest affected, this should not provide a bar to a finding that Ms. Gosselin's dignity was adversely affected. The severe harm suffered by the appellant as a result of the age-based distinction far exceeds the margin of imperfection Iacobucci J. contemplated in *Law*, *supra*, at para. 105. The

respondent's claim that such treatment was in the best interest of the appellant is better left to the s. 1analysis where the government can argue that the adverse effects that the legislation had on the appellant's dignity were justifiable given the practical, economic and social reality of designing a complex social assistance program. Indeed, this sort of reasoning is typical of reasoning under the *Oakes* test, at minimal impairment or proportionality, to determine whether a breach, once found, is justifiable: *R. v. Edwards Books and Art Ltd.*, 1986 CanLII 12 (SCC), [1986] 2 S.C.R. 713. It is not what we associate with s. 15 reasoning, and in this case serves to make sustaining a breach much more onerous. As I noted earlier, the burden of proof is significant, too. The Chief Justice appears to believe that the appellant has the onus, under s. 15(1), to demonstrate not only that she is harmed, but also that the government program allows more than an acceptable number of other individuals to fall through the cracks. Given the government's resources, it is much more appropriate to require it to adduce proof of the importance and purpose of the program and its minimal impairment of equality rights in discharging its burden unders. 1.

(3) Section 1

260 Since it is found that the appellant's equality rights were infringed by the legislation, the burden falls on the government to prove that such a limit on her rights was a reasonable one that is demonstrably justifiable in a free and democratic society; see *Oakes*, *supra*, at pp. 136-37. In order to demonstrably justify such a limit, the government must show that the provision pursues an objective that is sufficiently important to justify limiting a *Charter* right, and that it does so in a manner that is (1) rationally connected to that objective, (2) impairs the right no more than is reasonably necessary to accomplish the objective, and (3) does not have a disproportionately severe effect on the persons to whom it applies; see *Oakes*, at pp. 138-39.

261 These criteria will be applied with varying levels of rigour depending on the context of the appeal; see *Thomson Newspapers Co. v. Canada (Attorney General)*, 1998 CanLII 829 (SCC), [1998] 1 S.C.R. 877. In this case, we are presented with a law that attempts to remedy the financial situation of the chronically unemployed by providing them with cash benefits and training in order to ensure their subsistence and help them integrate into the workforce. The development of the training programs was obviously a complex process that involved the balancing of various interests, the expenditure of large sums of public money, and a consideration of many variables. Social policy is by no means an exact science; a certain degree of deference should be accorded in reviewing this

type of legislation. That being said, the government does not have *carte blanche* to limit rights in the area of social policy.

262 In *Thomson Newspapers*, I held that part of what may lead to deference under a contextual approach to s. 1 is the fact that the legislation is meant to protect a vulnerable group. In such a case, the importance of deferring to the government's decision in balancing competing interests is highlighted. However, in this case, the government claims that the group that it is in fact trying to protect is the very same group whose rights have been infringed. This should militate against an overly deferential approach. If the government wishes to help people by infringing their constitutional rights, the courts should not, given the peculiarities of such an approach, be overly deferential in assessing the objective of the impugned provision or whether the means used were minimally impairing to the right in question.

(i) Objective — Pressing and Substantial

263 In his reasons, Robert J.A. held that for the purposes of the *Oakes* test, it is the objective of the distinction that should be analysed. In doing so, he determined that the distinction served two purposes: (1) to avoid attracting young adults to social assistance, and (2) to facilitate integration into the workforce by encouraging participation in the employment programs. The appellant argues that the objective of the distinction should be analysed in light of the legislation as a whole, in particular, the explicit objective of the legislation under s. 6 to provide supplemental aid to those who fall below a subsistence level. Furthermore, she argues that the objective of the legislation cannot, pursuant to this Court's decision in *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, be found to have "evolved". The respondent agrees with the double objective analysis of Robert J.A.

264 In my view, the double objective analysis of Robert J.A. is correct. While the s. 1 analysis must not take place in a contextual vacuum, when a specific legislative provision has been found to infringe a *Charter* right, the s. 1 analysis must focus on the objective of that particular provision. In cases such as *Vriend*, *supra*, in which this Court focussed on the legislation as a whole, it did so because the legislation was being challenged for underinclusion; thus, there was no specific provision to be considered. Here, s. 29(*a*) is clearly the impugned provision. The s. 1 analysis must therefore focus on the distinction it creates. If too

much weight is given to the objective of the legislation as a whole, this will lead the court into an inquiry of what would be the best way to formulate an entire piece of legislation. That is the province of the legislature.

265 While the "shifting emphasis" argument accepted by Robert J.A. seems to suggest a novel approach to the s. 1 analysis, I believe it was appropriate to accept it in this case. This Court has normally held that the objectives of legislation cannot be found to have evolved over time. But in this case, it was a legislative act that signalled the change in emphasis: *Big M Drug Mart*, *supra*. In my view, the 1984 changes to the Act, which established the educational programs and provided for an increase in assistance for those who participated in them, constituted a legislative signal that the objective of the distinction in s. 29(*a*) had, to a certain degree, shifted.

266 Having found that the objective of the distinction had shifted towards encouraging the integration of young people into the workforce, and given the dire situation of that segment of the population during those years, I would find the objectives of s. 29(*a*) to be pressing and substantial.

(ii) Rational Connection

267 The appellant attacks the rational connection between the means used by the government and its dual objective on two fronts. First, she argues that the choice of age 30 as the point of distinction was made arbitrarily and that it had no bearing on the means by which the government would achieve its objective. She argues that the government distinguished beneficiaries on the basis of age 30 simply because that distinction already existed, and therefore, in the words of a government witness, because [TRANSLATION] "an opportunity was provided". She also argues that the level of assistance accorded to those under 30 who did not participate in the programs was arbitrary. In her view, if the purpose of selecting a low level of assistance was to encourage participation in the programs, then there should have been enough places available in the programs to accommodate everyone under the age of 30, which there was not.

268 The respondent agrees with Robert J.A.'s conclusion that while the connection between the means and the objective might not have been shown to be

particularly strong, there was a logical link between the different treatment of those under 30 and the objective of encouraging the integration of these people into the workforce. She disagrees, however, with some of his analysis, emphasizing again that the distinction made in s. 29(*a*) has to be analysed in the context of the rest of the legislation and the economic situation of the time.

269 On this issue I am again in agreement with the findings of Robert J.A. There is a logical link between the provisions of the Regulation and the objective of integrating people under 30 into the workforce. It is logical and reasonable to suppose that young people are at a different stage in their lives than those 30 and over, that it is more important, and perhaps more fruitful, to encourage them to integrate into the workforce, and that in order to encourage such behaviour, a reduction in basic benefits could be expected to achieve that objective.

(iii) Minimal Impairment

270 It is on the issue of minimal impairment that Robert J.A. found that the legislation could not be upheld under s. 1. Again, I find myself in substantial agreement.

271 First, I would agree with Robert J.A.'s comments regarding the onus that the government must meet at this stage of the analysis. When analysing social legislation, it is true that the Court should avoid second-guessing government policy. The government need not have chosen the least drastic means at its disposal. Nonetheless, it must have chosen to infringe the right as little as was reasonably possible. The respondent argues that given the government's objectives and the evidence it put forth, the methods employed were reasonable and should therefore pass the minimal impairment test. I do not believe that this is the case.

272 The respondent argues that by allowing people under 30 to participate in programs in order to increase their benefits to the level of those 30 and over, the government demonstrated that the needs and concerns of young social assistance recipients were given careful consideration and were respected. She rejects the

alternatives proposed by the appellant — such as the elimination of s. 29(*a*) or the creation of a universally conditional program — as either eliminating the objective completely or as being impossible to implement. An examination of the evidence, however, fails to demonstrate that such approaches would not have been appropriate. With regard to increasing the level of support provided to those under 30, the government insists that such an approach would have prevented it from achieving its objective of integrating young people into the workforce. This is presumably based on the assumption that there would be less incentive to enter the workforce or to participate in the programs if the full benefit was provided unconditionally. However, this remains unproven in the record. There is nothing to show why the response of beneficiaries under 30 would have been different from that of older beneficiaries, and nothing to show why integration in the workforce would have been superior for participants under 30 as compared to older participants. Witnesses for the respondent repeatedly referred to the [TRANSLATION] "attraction effect" that would result from increasing the benefits of people under 30, but they failed to adduce any evidence of studies or previous experience to justify the hypothesis. Aside from supporting the contention that the provisions reflect a discriminatory and stereotypical view of irresponsible youth, such participation by some persons among those 30 and over demonstrates that tying the programs to reduced benefits was not the only option that was available to the government.

273 I also find the argument that the reforms of 1989 which made the programs universally conditional could not have been implemented earlier to be somewhat unconvincing. When the *Charter* was passed in 1982, a three-year delay was placed on the implementation of s. 15 in recognition of the effect it could have had on government legislation and the complexity of making appropriate changes. With the passage of the omnibus *Act respecting the Constitution Act, 1982*, the government of Quebec provided itself with two extra years to deal with the requirements of the equality provision. Therefore, as of 1982, the Quebec government had five years to consider the implications that the *Charter*'s equality provision would have for its *Social Aid Act*. Although the government demonstrated that such changes took 18 to 24 months to implement, it did not demonstrate why that process could not have begun at an earlier date.

274 Thus, it seems to me that the above alternatives cannot be characterized as unreasonable; certainly they would also have been less impairing. However, given the complexity of designing social assistance programs, I accept that the Court should not be in the business of advocating completely new policy

directions for the legislature. At the time the legislation was passed, in 1984, it seems clear that the government believed that the continued distinction between those under 30 and those 30 and over was necessary in order to achieve its objective of facilitating the integration of young people into the workforce. Nevertheless, given the availability of the alternative approaches that would have been less impairing to the right, the onus is on the government to demonstrate that the approach it took was itself minimally impairing.

275 Like Robert J.A., upon examination of the manner in which the legislation in question was implemented, I have come to the conclusion that the government's initiative was not designed in a sufficiently careful manner to pass the minimally impairing test. As Robert J.A. held at p. 1084, the government has failed to show:

> [TRANSLATION]
>
> (1) that it set sufficiently flexible eligibility requirements for access to the programs; [and] (2) that it acted reasonably in determining the requirements for an increase in assistance, which was only possible through participation in the measures.

276 In assessing whether the legislation in place was minimally impairing to the right, the first fact that comes to light is that only 11 percent of social assistance recipients under the age of 30 were in fact enrolled in the employment programs that allowed them to receive the base amount allocated to beneficiaries 30 years of age and over. This in and of itself is not determinative of the fact that the legislation was not minimally impairing, but it does bring to our attention the real possibility that the programs were not designed in a manner that would infringe upon the appellant’s rights as little as is reasonably possible. In examining the record, I have found four areas in which the structure of the legislation and the programs can be shown to have been designed in a manner that was not minimally impairing of the appellant’s rights.

277 First, one major branch of the scheme, the Remedial Education Program, did not provide for full benefits for those who participated, leaving them $100 short of the base benefit. Thus, the government foresaw, in the creation of its programs, that a large number of even those who participated in the programs would, in return for their efforts, continue to receive less than the amount received

by those 30 and over who were not participating in the programs. As mentioned earlier, the most uneducated, the illiterate, were originally left out of this program entirely. The government argues that the amount of assistance must be examined in tandem with the government student loan and bursary program. However, because the Remedial Education students were in high school, the government witness admitted that the only money that they would receive through student loans would be to pay for specific school-related expenses such as books and school supplies. As such, the student loan program did not raise the Remedial Education participant's benefits to the same level as those 30 and over. In reality, given that almost 50 percent of participants under 30 were involved with the Remedial Education Program, this meant that a very large portion of the participants would not be receiving the full amount of benefits that those 30 and over were receiving.

278 It might be argued that the value of the education and experience being derived from such programs cannot be calculated on a purely pecuniary basis. I would agree that the power of education can be invaluable to its recipient. However, the strength of this argument is diminished by the fact that the cost of this education is, in this case, the reduction of benefits that are supposed to guarantee certain standards of minimal subsistence. While the long-term value of the education and experience is certainly important, this must be balanced against the short-term need for survival that social assistance is intended to placate. Moreover, those people who participated in the programs who were not under 30 were not required to make a similar sacrifice.

279 Second, the design of the programs was not tailored in such a way as to ensure that there would always be programs available to those who wanted to participate. For instance, for a student who could not find a job after finishing school, the Remedial Education Program was only available after nine months. The On-the-job Training Program was only available after 12 months. This left the Community Work Program, which, given its very remedial nature, may not have been useful to everyone, and was prioritized for those who had been on social assistance for more than 12 months. The existence of this priority is itself evidence that the programs were not available to all applicants at all times. For someone who had completed CEGEP, the Remedial Education and On-the-job Training Programs would simply be unavailable. Even if he or she were then able to participate in the Community Work Program, this would only last for one year, after which the young social assistance recipient would, because of the 12-month limit on the program, be left with no program in which to participate. Take someone like Ms. Gosselin, whose prospects for moving into the private

workforce, like many in her situation, do not, unfortunately, appear to have been very promising. After one year in a Community Work Program (and, if they could find one, a year in an On-the-job Training placement), she would be unable to receive the same benefit as someone 30 or over. Thus, in reality, the system of training and education gave social assistance recipients under 30 who were able to access programs two years to get a job before they had their benefit reduced to $170 per month — with some extra time available at a moderately reduced rate for those who had not yet received their high school diploma.

280 Another substantive flaw in the design of the programs was that faced by illiterate or severely undereducated persons, who were unable to participate in the Remedial Education Program. While ineligible for the Remedial Education Program, such persons would also face difficulty entering On-the-job Training, and would thus be left with the Community Work Program, which, as has been noted, was limited to one year. This flaw was apparently addressed in 1989 with the creation of a special literacy program, but it nonetheless serves as an example of another situation where even those participants who were willing to participate were at times unable to do so.

281 Third, in addition to the problems with the design of the programs, their implementation presented still more hurdles which young recipients were forced to overcome. For instance, when a person under 30 years of age found himself or herself on social assistance, he or she would have to organize a meeting with a social aid worker. An "evaluation interview" would follow, sometimes several, in order to determine what type of program would be best suited to the recipient. This process would sometimes take several weeks. Then, once it was determined which program would be best, there was often another delay, as space in the program in which the recipient could participate had to be found. If, for instance, someone wanted to participate in the Remedial Education Program in June, he or she would have to wait until September, for school to start. In the case of the On-the-job Training Program, the process provided that one would have to wait until a suitable employer was found. Also, the employer had the final say as to whether he or she wished to hire a particular individual. This caused more delay. Once a placement was completed, this process was started all over again. Thus, in the course of his or her time on social assistance, a young person desiring to receive the full benefit of the programs would most likely spend at least a month or two on the reduced benefit.

282 Given the precarious situation of those on social assistance, even a short lapse in additional benefits was certainly enough to cause major difficulties in the recipients' lives, difficulties that someone 30 and over would not have to face. Ms. Gosselin herself spent a considerable amount of time between programs, this sometimes leading to periods of mental breakdown. One government witness described the situation of many of those young people on social assistance as being an existence "on the edge of capacity" — walking a tightrope along the border of aptness and inaptitude for work. Falling back onto the reduced amount was therefore a very real possibility that could have exaggerated effects on the capacity of young recipients to cope with life.

283 A fourth and final reason why the approach taken by the government was not reasonably minimally impairing was the fact that even though 85 000 single people under 30 years of age were on social assistance, the government at first only made 30 000 program places available. The respondent argues, and Baudouin J.A. agreed, that the government should not have been forced to open up places for everyone when it knew that not everyone would participate. I think this is right. The government did not have to prove that it had 85 000 empty chairs waiting in classrooms and elsewhere. However, the very fact that it was expecting such low levels of participation brings into question the degree to which the distinction in s. 29(*a*) was geared towards improving the situation of those under 30, as opposed to simply saving money. The government noted that many places did not have to be made available because 50 percent of young people were thought to be living with their parents. As noted earlier, this was not proven and if true would have left 50 percent of recipients in an unjustified state of deprivation. Also, it is by no means clear why young persons living at home would not want to take advantage of such programs if they provided them with an extra $296 per month. Moreover, it is not clear why, if the object of s. 29(*a*) was to encourage the integration of young people into the workforce, the government would not expect or want those on social assistance who were living at home to participate in the programs.

284 The government maintains that it always had more places available if the need arose, but the evidence has left me questioning how a program such as On-the-job Training which relied on private enterprises to provide jobs could provide an endless stream of positions for any young person on social assistance who wanted one. It also seems somewhat disingenuous to suggest that there were

unlimited spaces in the program when the program profiles clearly outline that some groups were to be specifically targeted, others given preference. How can there be preferences when access to the programs is unlimited? It also seems odd that a government that claims it would not have been able to eliminate the reduced benefit level for people under 30 for economic reasons would have been able to support a program in which a significant portion of those persons participated in the programs and, therefore, had their benefits increased to the normal level. If legislation is found to infringe upon a group's right and the government claims that the right is minimally impaired due to the operation of another program, the fact that only 20 percent of the affected group participates would seem to suggest that the right was not being reasonably infringed.

285 Accordingly, I would hold that, even according a high degree of deference, the respondent has failed to demonstrate that the provision in question constituted a means of achieving the legislative objective that was reasonably minimally impairing in respect of the appellant's equality rights. Other reasonable alternatives to achieve the objective were available. The approach taken by the government involved providing a vulnerable group with a base amount of money that was one third of the level the government itself had deemed to be a subsistence level for others and, moreover, the programs themselves were additionally found to have several important shortcomings. This was not minimally impairing of the right. The respondent has therefore failed to meet its burden of demonstrably justifying the limitation on the appellant's rights.

286 Even accepting the general approach of differentiating between those under 30 and those 30 and over that the legislature adopted to achieve its objectives, there are several other means by which the substantive equality of young people would have been considerably more respected and less impaired. First, as Robert J.A. suggested, the full benefit could have been extended to those individuals who had expressed their willingness to participate in a program, as opposed to requiring them to be at all times participating in programs that, by their design and implementation, did not allow for constant participation. Another approach, given the government's opinion that the majority of young people on welfare were living at home and therefore did not require the full benefit, would have been to tie the benefits to whether the recipient — whatever his or her age — was actually living at home. This was already being done for other recipients since anyone 30 and over living with family had his or her benefits reduced by $85. This would have had the effect of recognizing that many

young people did not require the full amount of social assistance, while basing the amount awarded on their actual situation as opposed to the proxy of age.

287 Having found that the legislation was not minimally impairing of the appellant's right to equality, I would hold that the legislation was not a reasonable limit on the right that was demonstrably justified. The final branch of the *Oakes* test need not therefore necessarily be addressed. However, given the deleterious effect that the legislation had on the appellant's right it would, I believe, be useful to consider that branch of the test as well.

(iv) Proportionality

288 At this stage of the *Oakes* test, a court must determine whether the deleterious effects that a legislative provision has on a given rights holder are outweighed by the salutary effects of the same legislation in achieving the stated government objective. Here, again, I agree with Robert J.A. It is clear from the evidence that $170 per month is not enough money for one to live on. While the government claims that those under 30 had the right to increased benefits if they participated in the programs, there were clear holes in the programs which prevented certain individuals, at certain times, from accessing the additional benefits. Moreover, Remedial Education students never achieved parity. In fact, though this is not determinative, only 11 percent of single persons under 30 years of age who were on social assistance actually received what the government had determined to be the basic amount needed to support one's self. This constitutes a severe deleterious effect on the equality and self-worth of the appellant and those in her group. With respect to the salutary effects side of the equation, the government was not required to demonstrate that the programs had any actual significant salutary effect on the well-being of young people; it nevertheless had to demonstrate that the reduction in benefits would reasonably be expected to facilitate the integration of the younger social assistance beneficiaries in the workplace. This onus has not been met.

289 The respondent argues that government cannot be held responsible for the "partial failures" of legislation. She insists that the government had a real concern for the situation in which young people found themselves and attempted to craft a program that would benefit them. While the effects stage of the *Oakes*test should not be an opportunity for courts to punish governments for failed legislative

undertakings, when the potential deleterious effects of the legislation are so apparent, I do not believe that it is asking too much of the government to craft its legislation more carefully. Given the economic data that the government has presented in evidence, it was entirely foreseeable that upon completion of the programs, the opportunities for young people to integrate into the workforce would continue to be limited. There was no justification presented for leaving them on the reduced benefit at that point in time, regardless of the problem of delays earlier discussed.

290 Accordingly, I find that s. 29(*a*) of the Regulation's *Charter* breach should not be upheld as a justified and reasonable limit under s. 1. In the legislative and social context of the legislation, which provided a safety net for those without means to support themselves, a rights-infringing limitation must be carefully crafted. In this case, the programs left too many opportunities for young people to fall through the seams of the legislation. This is borne out to some degree by the low participation rate among beneficiaries under the age of 30 and the fact that there was no basis for the assumption that beneficiaries under 30 were living with their parents and had lesser needs. While the respondent argues that no evidence was presented to show that most if any of the 73 percent of recipients under 30 were not participating in the programs for anything more than personal reasons, I would point out that at the s. 1 stage of analysis, it is the government's responsibility to show that the legislation limits the right as little as reasonably possible.

(4) Remedy

291 The appellant argued that if s. 29(*a*) was found to have been an infringement on her *Charter* rights, it should be declared invalid under s. 52(1) of the *Constitution Act, 1982*, and that she and the members of her class should be compensated for their losses under s. 24(1) of the *Charter*. Engaging in an elaborate analysis of the proper type of declaratory relief to extend in this case borders on the absurd, given the fact that the legislation in question has been repealed for over a decade. Determining, for instance, the proper duration for which any declaration might be suspended in order to give the government an opportunity to amend its legislation is a purely hypothetical exercise. Nonetheless, given the appellant's claim for pecuniary relief under s. 24(1), a brief outline of the factors to be considered in fashioning a declaration of invalidity in this case may be warranted.

292 In determining the appropriate remedy in the case of legislation that is found to violate a *Charter* right, courts must walk a fine line between fulfilling their judicial role of protecting rights and intruding on the legislature's role; *Schachter*, *supra*. Simply striking down s. 29(*a*) would have lead to the result that all social assistance beneficiaries would have received the full benefit unconditionally. The respondent has argued that the government would never have adopted such a measure, and more importantly, that it would have been unable, from a financial standpoint, to fulfill such a legislative commitment. It is in recognition of this that Robert J.A. held that s. 23 of the Regulation, which set the actual amounts of the benefits, should also be invalidated so that the legislative intent of the Act would not be distorted by the court. The problem that this approach raises is that it may in fact lead to an even more severe transgression of the legislature's intention; it could mean that the *Social Aid Act* no longer supplies anyone with benefits. At the very least, the provision of benefits unconditionally to those under 30 would help to fulfill the statute's objective of providing for the needy. To declare s. 23 invalid would be to completely eliminate the legislative objective.

293 In *Schachter*, *supra*, Lamer C.J. held that a delayed declaration of invalidity would be appropriate when striking down unconstitutional legislation if immediate relief (1) posed a danger to the public, (2) threatened the rule of law, or (3) deprived deserving persons of benefits. In this case, the invalidation of s. 29(*a*) would not pose a danger to the public, nor would it deprive deserving persons of benefits, since it would expand the category of beneficiaries. However, given the broad impact of this legislation on Quebec society, as well as the wide range of alternatives that might be taken in order to bring complex social legislation such as this into line with constitutional standards, I believe that suspension of the declaration would have been appropriate in this case. Given the large sums of money spent by legislatures on social assistance programs such as this and the complexity of the programs at issue, a court should not intrude too deeply into the role of legislature in this field. As noted earlier, given that the provision in question is no longer in force, this issue is moot. However, if the legislation was still in place, I would have ordered that the declaration of invalidity be suspended for a period of 18 months, the period that the government demonstrated would be required to implement changes to the legislation.

294 The appellant also requests that this Court make an order under s. 24(1) of the *Charter* compensating the members of her group for the difference between the full benefit and the reduced amount during the time they were on the

reduced benefit. The appellant argues that without such an order, her rights will not have been given any real effect.

295 On this point, I find myself in substantial agreement with the conclusion of Robert J.A., who refused to grant a monetary award under s. 24(1). As Lamer C.J. held in *Schachter*, where a provision is struck down under s. 52, a retroactive s. 24(1) remedy will not generally be available. The appellant argues that the odd facts of this case may make it one of those extraordinary occasions in which a s. 24(1) remedy could be added to a s. 52 declaration. The facts of this case do not allow for such a result.

296 First, I agree with Robert J.A. that because this case involves a class action, there is more difficulty in ordering a s. 24(1) remedy. It would be impossible for this Court to determine the precise amount that was owed to each individual in the class. Who participated in the programs, and who did not, the number of months during which they did not participate, the amount of the shortfall in benefits at different times, are all impossible to determine.

297 Second, the significant cost that would be incurred by the government were it required to pay damages must be considered. As Lamer C.J. held in*Schachter*, while a consideration of expenses might not be relevant to the substantive *Charter* analysis, it is relevant to the determination of the remedy. Requiring the government to pay out nearly half a billion dollars, the amount requested, would have a significant impact on the government's fiscal situation, and potentially on the general economy of the province of Quebec.

298 Thirdly, as I have shown in my reasons, the creation of a social assistance program that is respectful of the equality rights of young people need not necessarily have involved increasing the benefit levels of those under 30 to the level of the 30-year-old beneficiaries. The government might have chosen to improve the coverage given by the programs to those under 30, or, as it did in 1989, to impose conditions on all beneficiaries.

299 Accordingly, I would deny the appellant's request for an order for damages pursuant to s. 24(1) of the *Charter*.

C. *Quebec Charter of Human Rights and Freedoms*

Section 45 of the *Quebec Charter*

300 The appellant also claims that s. 29(*a*) violated her s. 45 rights under the *Quebec Charter*. Section 45 of the *Quebec Charter* reads as follows:

> **45.** Every person in need has a right, for himself and his family, to measures of financial assistance and to social measures provided for by law, susceptible of ensuring such person an acceptable standard of living.

The respondent argues that the terms "provided for by law" and "susceptible" have the effect of limiting the degree to which the government must act to provide a decent standard of living. She argues that the section means that the government need only provide, in an efficient manner, the assistance that it defines in its own legislation. In his reasons, Robert J.A. engaged in an extensive analysis of international human rights documents in order to offer context to the interpretation of the section, and in particular, the aforementioned terms. He found that in the context of the other social rights enumerated in the *Quebec Charter*, as well as the language of international social charters, the terms "provided for by law" and "susceptible" should not be read restrictively. The appellant, likewise, argues that those terms, instead of limiting the right, create a positive obligation on the state to put in place social assistance by law.

301 When compared to the other social rights enumerated in the *Quebec Charter*, in particular those that are limited by the words "to the extent provided by law" (emphasis added) (e.g., s. 44), I would agree with the appellant that the term "provided for by law" should not be read too restrictively. In my view, the word "susceptible" defines the nature of the benefit to be provided which could encompass social programs such as the ones that were established under the legislation impugned in these proceedings. Thus, I would find that, on its face, s. 45 does create some form of positive right to a minimal standard of living.

302 There is no need, however, to enter into a lengthy examination of whether the legislation in question here provided for social assistance which met

the standard required by s. 45. This is because the section must be interpreted in light of the remedial provisions of the *Quebec Charter*. Section 52 of the *Quebec Charter* reads as follows:

> **52.** No provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the Charter.

In my view, it is quite clear that the court has no power to declare any portion of a law invalid due to a conflict with s. 45. Section 52 simply cannot apply.

303 The appellant also argues that she should be entitled to damages pursuant to s. 49 of the *Quebec Charter*. Section 49 reads as follows:

> **49.** Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.

This Court interpreted s. 49 in *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc*., 1996 CanLII 208 (SCC), [1996] 2 S.C.R. 345. In that case, Gonthier J. held (at paras. 119-21) that:

> In my view, the first paragraph of s. 49 and art. 1053 *C.C.L.C.* are based on the same legal principle of liability associated with wrongful conduct . . . .
>
> It is thus clear that the violation of a right protected by the *Charter* is equivalent to a civil fault. The *Charter* formalizes standards of conduct that apply to all individuals. The legislative recognition of these standards of conduct has to some extent exempted the courts from clarifying their content. This recognition does not, however, make it possible to distinguish in principle the standards of conduct in question from that under art. 1053*C.C.L.C.*, which the courts apply to the circumstances of each case. The violation of one of the guaranteed rights is therefore wrongful behaviour, which, as the Court of Appeal has recognized, breaches the general duty of good conduct. . . .
>
> The nature of the damages that may be obtained under the first paragraph of s. 49 reinforces the parallel with civil liability. It is understood that the moral and material damages awarded by a court following a *Charter* violation are strictly compensatory in nature. The wording of the provision leaves no doubt in this regard, since it entitles the victim of an unlawful interference with a protected right to obtain "compensation for the moral or material prejudice resulting therefrom".

In *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, 1996 CanLII 172 (SCC), [1996] 3 S.C.R. 211, L'Heureux-Dubé J. clarified this further by holding, for a unanimous Court (at para. 116), that:

> To find that there has been unlawful interference, it must be shown that a right protected by the *Charter* was infringed and that the infringement resulted from wrongful conduct. A person's conduct will be characterized as wrongful if, in engaging therein, he or she violated a standard of conduct considered reasonable in the circumstances under the general law . . . .

304 Thus, in order to substantiate a s. 49 claim against the government for having drafted legislation that violates a *Quebec Charter* right, one would need to demonstrate that the legislature has breached a particular standard of care in drafting the legislation. It seems to me unlikely that a government could, under s. 49, be held responsible for having simply drafted faulty legislation. This view was shared by Gonthier J. in *Guimond*, *supra*, at para. 13, where he quoted approvingly Delisle J.A.:

> [TRANSLATION] In terms of the civil law, there is no doubt that the Crown is not negligent when it enacts a law that is subsequently declared invalid, any more than the public official who attends to its implementation.

Thus, on the s. 45 issue, I would find that while the section appears to create some form of right to a statutory social assistance regime providing a minimum standard of living, in this case, that right is unenforceable; neither s. 52 nor s. 49 of the *Quebec Charter* applies.

305 The appellant argues that it makes no sense to have a section that is of no effect. My response to that is two-fold. First, no s. 49 remedy could be substantiated in this case because no wrongful conduct was found to exist. This does not mean that a private actor, or a state official, acting in a wrongful manner, could not, in another case, be found to have violated someone's s. 45 rights. In such a case, the court would be free to award damages. Secondly, even though the section does not provide for financial redress from the government in this case, the section is not without value. Indeed it is not uncommon for governments to outline non-judiciable rights in human rights charters. Courts are not the only institutions mandated to enforce constitutional documents. Legislatures also have a duty to uphold them. If, in this case, the court cannot force the government to change the law by virtue of s. 45, the *Quebec Charter* still has moral and political force.

VIII. Conclusion

306 For these reasons, I would allow the appeal. I would declare s. 29(*a*) of the Regulation unconstitutional. The constitutional questions are answered as follows:

1. Did s. 29(*a*) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, adopted under the *Social Aid Act*, R.S.Q., c. A-16, infringes. 15(1) of the *Canadian Charter of Rights and Freedoms* on the ground that it established a discriminatory distinction based on age with respect to individuals, capable of working, aged 18 to 30 years?

Yes.

2. If so, is the infringement justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

No.

3. Did s. 29(*a*) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, adopted under the *Social Aid Act*, R.S.Q., c. A-16, infringes. 7 of the *Canadian Charter of Rights and Freedoms* on the ground that it deprived those to whom it applied of their right to security of the person contrary to the principles of fundamental justice?

No.

4. If so, is the infringement justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*.

It is not necessary to answer this question.

The following are the reasons delivered by

307 ARBOUR J. (dissenting) — The facts, as well as the history of this litigation, are set out at length in my colleagues' opinions and I need not repeat them here. Essentially, the appellant asserts on her own behalf and on behalf of a class of claimants that a provision of the regulations under the *Social Aid Act*, R.S.Q., c. A-16, in force between 1984 and 1989 which provided for lesser benefits for single adults under the age of 30 than for those 30 and over was unconstitutional as violating ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*.

308 I would allow this appeal on the basis of the appellant's s. 7 *Charter* claim. In doing so, I conclude that the s. 7 rights to "life, liberty and security of the person" include a positive dimension. Few would dispute that an advanced modern welfare state like Canada has a positive moral obligation to protect the life, liberty and security of its citizens. There is considerably less agreement, however, as to whether this positive moral obligation translates into a legal one. Some will argue that there are interpretive barriers to the conclusion that s. 7 imposes a positive obligation on the state to offer such basic protection.

309 In my view these barriers are all less real and substantial than one might assume. This Court has never ruled, nor does the language of the *Charter*itself require, that we must reject any positive claim against the state — as in this case — for the most basic positive protection of life and security. This Court has consistently chosen instead to leave open the possibility of finding certain positive rights to the basic means of subsistence within s. 7. In my view, far from resisting this conclusion, the language and structure of the *Charter* — and of s. 7 in particular — actually compel it. Before demonstrating all of this it will be necessary to deconstruct the various firewalls that are said to exist around s. 7, precluding this Court from reaching in this case what I believe to be an inevitable and just outcome.

I. Preliminary Concerns

310 It is often suggested that s. 7 of the *Charter* cannot impose positive legal obligations on government. Before embarking on the usual textual, purposive and contextual analysis required in constitutional interpretation, it is therefore necessary to address the barriers that are traditionally said to preclude *a priori* a positive claim against the state under s. 7.

A. *Economic Rights*

311 There was some discussion in the courts below concerning whether s. 7 extends its protection to the class of so-called "economic rights". That discussion gets its impetus from certain dicta of Dickson C.J. in *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927. In *Irwin Toy*, Dickson C.J. compared the wording of s. 7 to similar provisions in the American *Bill of Rights* and noted the following, at p. 1003:

> The intentional exclusion of property from s. 7, and the substitution therefor of "security of the person" . . . 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 has no relevance to the present appeal. On its face, the statement purports to rule out of s. 7 only those economic rights that are generally encompassed by the term "property". The appellant in this case makes no claim that could reasonably be construed as a claim to a right of property. Indeed, the claim she does make — namely, to a level of social assistance adequate for the provision of her basic needs of subsistence — is one which Dickson C.J. explicitly excepted from his statement in *Irwin Toy*, at pp. 1003-4:

> This is not to 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.

This prudent exercise in judicial restraint was understandable given that, unlike the case here, the question was not directly relevant in *Irwin Toy*. The instant appeal, in contrast, makes obvious why "those economic rights fundamental to human life or survival" should not in fact be treated as of the same ilk as corporate-commercial economic rights. Simply put, the rights at issue here are so intimately intertwined with considerations related to one's basic health (and hence "security of the person") — and, at the limit, even of one's survival (and hence "life") — that they can readily be accommodated under the s. 7 rights of "life, liberty and security of the person" without the need to constitutionalize "property" rights or interests.

312 Indeed, the rights at issue in this case are so connected to the sorts of interests that fall under s. 7 that it is a gross mischaracterization to attach to them the label of "economic rights". Their only kinship to the economic "property" rights that are *ipso facto* excluded from s. 7 is that they involve some economic value. But if this is sufficient to attract the label "economic right", there are few rights that would not be economic rights. It is in the very nature of rights that they crystallize certain benefits, which can often be quantified in economic terms. What is truly significant, from the standpoint of inclusion under the rubric of s. 7 rights, is not therefore whether a right can be expressed in terms of its economic value, but as Dickson C.J. suggests, whether it "fall[s] within 'security of the person'" or one of the other enumerated rights in that section. It is principally because corporate-commercial "property" rights fail to do so, and not because they contain

an economic component *per se*, that they are excluded from s. 7. Conversely, it is because the right to a minimum level of social assistance is clearly connected to "security of the person" and "life" that it distinguishes itself from corporate-commercial rights in being a candidate for s. 7 inclusion.

313 In my view, this tells decisively against any argument that relies upon a supposed economic rights prohibition within s. 7 of the *Charter*. There is, however, a related argument, advanced by Professor Hogg among others, to suggest that the kind of interest claimed by the appellant in this case cannot fall within the scope of s. 7 (P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 44-12.1):

> The trouble . . . is that it accords to s. 7 an economic role that is incompatible with its setting in the legal rights portion of the Charter — a setting that the Supreme Court of Canada has relied upon as controlling the scope of s. 7.

As I understand the argument it purports to rule out the kind of interest claimed here, not so much because it has an economic component (though that is ostensibly part of the objection), but because it fails to exhibit the characteristics of a "legal right". I take this last point to be the real thrust of the objection, since the argument would lose its teeth against an historically recognized legal right which nevertheless also had an economic component: for example, the right to a trial by jury in certain criminal cases, which right inevitably involves incurring additional costs in the administration of justice. I will now turn to this specific issue.

B. *Legal Rights*

314 The argument is that s. 7 is an umbrella of legal rights and that ss. 8 to 14, using a kind of *ejusdem generis* rule, inform and limit its scope. This restrictive interpretation of s. 7 formed no part of the reasoning in *Irwin Toy* that excluded corporate-commercial property rights from s. 7. Rather, it seems to have had its genesis in the concurring reasons of Lamer J. (as he then was) in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*,1990 CanLII 105 (SCC), [1990] 1 S.C.R. 1123 ("*Prostitution Reference*"), at pp. 1171-74, where he observed that:

> [T]he guarantees of life, liberty and security of the person are placed together with a set of provisions . . . which are mainly concerned with criminal and penal proceedings. . . . It is significant that the rights guaranteed by s. 7 as well as those guaranteed in ss. 8-14 are listed under the title "Legal Rights", or in the French

> version "*Garanties juridiques*". The use of the term "Legal Rights" suggests a distinctive set of rights different from the rights guaranteed by other sections of the *Charter*. . . .
>
> . . .
>
> Section 7 and more specifically ss. 8-14 protect individuals against the state when it invokes the judiciary to restrict a person's physical liberty through the use of punishment or detention, when it restricts security of the person, or when it restricts other liberties by employing the method of sanction and punishment traditionally within the judicial realm.

315 This approach to s. 7, curtailing its footprint to "legal rights" of the type contained in ss. 8 to 14, has been attenuated in more recent cases. For example, in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII), [2000] 2 S.C.R. 307, 2000 SCC 44, this Court held (at para. 46) that "[s]ection 7 can extend beyond the sphere of criminal law, at least where there is 'state action which directly engages the justice system and its administration'" (emphasis added). The recognition in that case that s. 7 protection extends beyond the criminal or penal context was in itself nothing new. What was noteworthy in Bastarache J.'s dictum was the suggestion, implied by his use of the phrase "at least", that s. 7 might even extend beyond the justice system and its administration. That his use of this phrase should be interpreted permissively rather than restrictively was later confirmed indirectly in *Winnipeg Child and Family Services v. K.L.W.*, 2000 SCC 48 (CanLII), [2000] 2 S.C.R. 519, 2000 SCC 48. In that case, this Court found that apprehension of a child by an agent of the state, pursuant to legislative authority and in the absence of a judicial order, constituted a deprivation of the parents' security of the person. While the Court went on to find the deprivation to be in conformity with the principles of fundamental justice, what is significant for present purposes is that the right to security of the person was found to be implicated by state action that had little relation to any judicial or quasi-judicial proceeding. The apprehension itself was entirely disconnected from the justice system and its administration and simply involved implementation of a legislative provision by a government official.

316 In the light of these recent developments, I think that there is considerable room for doubt as to whether the placement of s. 7 within the "Legal Rights" portion of the *Charter* is controlling of its scope. Moreover, the appeal to a *Charter* subheading as a way of limiting the kinds of interests that are protected by a rights-granting provision appears to be at odds with the generous and purposive approach that this Court has repeatedly identified as the proper approach

to the interpretation of *Charter* rights: *Hunter v. Southam Inc*., 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145; *R. v. Big M Drug Mart Ltd*.,1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295; *R. v. Therens*, 1985 CanLII 29 (SCC), [1985] 1 S.C.R. 613; *Re B.C. Motor Vehicle Act*,1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, 1990 CanLII 135 (SCC), [1990] 1 S.C.R. 425; *Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3; *R. v. S. (R.J.)*,1995 CanLII 121 (SCC), [1995] 1 S.C.R. 451; *Vriend v. Alberta*, 1998 CanLII 816 (SCC), [1998] 1 S.C.R. 493. Indeed, it is more consistent with the kind of "legalistic" interpretation associated with cases decided under the *Canadian Bill of Rights*, R.S.C. 1985, App. III, and that Dickson J. (as he then was) specifically contrasted with the purposive approach in *Big M Drug Mart*, *supra*, at p. 344:

> The meaning of a right or freedom guaranteed by the *Charter* [is] to be ascertained by an analysis of the purpose of such a guarantee; it [is] to be understood, in other words, in the light of the interests it [is] meant to protect.
>
> . . . The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. [Emphasis added; emphasis in original deleted.]

Whereas the course of s. 7 jurisprudence may have once supported a legalistic reliance on the subheading "Legal Rights" as a way of delimiting the scope of s. 7protection, the more recent turn in s. 7 jurisprudence indicates that this interpretive device has been supplanted by a purposive and contextual approach to the recognition of constitutionally protected rights.

317 Finally, one should not underestimate the significance of the historical context in which Lamer J. made his comments in the *Prostitution Reference*,*supra*. At the time, almost all s. 7 cases involved challenges to state action in the context of criminal proceedings. It might then have appeared that this was the range of interests that s. 7 was meant to protect. The evolution of the case law no longer compels that conclusion. As s. 7 jurisprudence has developed, new kinds of interests, quite apart from those engaged by one's dealings with the justice system and its administration, have been asserted and found to be deserving ofs. 7 protection. To now continue to insist upon the restrictive significance of the placement of s. 7 within the "Legal Rights" portion of the *Charter* would be to freeze constitutional interpretation in a manner that is inconsistent with the vision of the Constitution as a "living tree" which has always been part of the Canadian constitutional landscape. As this Court recognized in *Reference Re Provincial Electoral Boundaries (Sask.)*, 1991 CanLII 61 (SCC), [1991] 2 S.C.R. 158, at p. 180:

> The doctrine of the constitution as a living tree mandates that narrow technical approaches are to be eschewed . . . . It also suggests that the past plays a critical but non-exclusive role in determining the content of the rights and freedoms granted by the *Charter*. The tree is rooted in past and present institutions, but must be capable of growth to meet the future.

318 In spite of this, some will suggest that we must distinguish cases like *K.L.W., supra,* from the instant appeal on the basis that it is difficult to point to any affirmative state action in the present case which could properly be said to constitute a violation of one of the enumerated rights in s. 7. Whatever the merits of this argument, it is important to keep it distinct from the "Legal Rights" argument which has been the focus of the present discussion. The significance of cases like*Blencoe* and *K.L.W.* in the context of this discussion is that they make room for the kind of interest at issue in this appeal by relaxing any supposed requirement that the right claimed under s. 7 display the characteristics of a "legal right" similar in nature to those at stake in the administration of criminal justice. Whether these cases — or others — would also bar the present action by imposing another requirement of affirmative (or positive) state action as a *sine qua non* of s. 7protection is a different question, to which I now turn.

C. *Negative vs. Positive Rights and the Requirement of State Action*

319 There is a suggestion that s. 7 contains only negative rights of non-interference and therefore cannot be implicated absent any positive state action. This is a view that is commonly expressed but rarely examined. It is of course true that in virtually all past s. 7 cases it was possible to identify some definitive acton the part of the state which could be said to constitute an interference with life, liberty or security of the person and consequently ground the claim of a s. 7violation. It may also be the case that no such definitive state action can be located in the instant appeal, though this will largely depend on how one chooses to define one's terms and, in particular, the phrase "state action". One should first ask, however, whether there is in fact any requirement, in order to ground a s. 7claim, that there be some affirmative state action interfering with life, liberty or security of the person, or whether s. 7 can impose on the state a duty to act where it has not done so. (I use the terms "affirmative", "definitive" or "positive" to mean an identifiable action in contrast to mere inaction.) No doubt if s. 7 contemplates the existence only of negative rights, which are best described

as rights of "non-interference", then active state interference with one's life, liberty or security of the person by way of some definitive act will be necessary in order to engage the protection of that section. But if, instead, s. 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. We must not sidestep a determination of this issue by assuming from the start that s. 7 includes a requirement of affirmative state action. That would be to beg the very question that needs answering.

320 It is not often clear whether the theory of negative rights underlying the view that s. 7 can only be invoked in response to a definitive state action is intended to be one of general application, extending to the *Charter* as a whole, or one that applies strictly to s. 7. As a theory of the *Charter* as a whole, any claim that only negative rights are constitutionally recognized is of course patently defective. The rights to vote (s. 3), to trial within a reasonable time (s. 11(*b*)), to be presumed innocent (s. 11(*d*)), to trial by jury in certain cases (s. 11(*f*)), to an interpreter in penal proceedings (s. 14), and minority language education rights (s. 23) to name but some, all impose positive obligations of performance on the state and are therefore best viewed as positive rights (at least in part). By finding that the state has a positive obligation in certain cases to ensure that its labour legislation is properly inclusive, this Court has also found there to be a positive dimension to the s. 2(*d*) right to associate (*Dunmore v. Ontario (Attorney General)*, 2001 SCC 94 (CanLII), [2001] 3 S.C.R. 1016, 2001 SCC 94). Finally, decisions like *Schachter v. Canada*, 1992 CanLII 74 (SCC), [1992] 2 S.C.R. 679, and *Vriend*, *supra*, confirm that "[i]n some contexts it will be proper to characterize s. 15 as providing positive rights" (*Schachter*, *supra*, at p. 721). This list is illustrative rather than exhaustive.

321 Moreover, there is no sense in which the actual language of s. 7 limits its application to circumstances where there has been positive state interference. It is sometimes suggested that the requirement is implicit in the use of the concept of "deprivation" within s. 7. This is highly implausible. *The Shorter Oxford English Dictionary* (3rd ed. 1973), vol. 1, at p. 524, defines the term "deprive" in such a way as to include, not only active taking away, divesting, or dispossession, but also mere "keep[ing] out *of* [or] debar[ing] *from*". In other words, the concept of deprivation is sufficiently broad to embrace withholdings that have the effect of erecting barriers in the way of the attainment of some object.

322 Nor does the phrase "principles of fundamental justice" contain a requirement of positive state action by necessary implication, particularly when one rejects a restrictive interpretation of s. 7 confining it to a "Legal Rights" umbrella. If s. 7 were nothing more than a composite of the other "legal rights", one might think that it only comes into play when the machinery of justice is activated by the state. But I have already indicated why in my view we must reject the assumption that s. 7 protects only against the kinds of incursions one might expect to suffer in connection with one's dealings with the justice system and its administration. This obliterates the foundation for the idea that the phrase "principles of fundamental justice" includes an implicit requirement of positive state action. It also leaves s. 7 bereft of any trace of language that might contain a requirement of positive state action before a breach may occur.

323 In fact, the context in which s. 7 is found within the *Charter*'s structure favours the conclusion that it can impose on the state a positive duty to act. Even though s. 7 cannot be reduced to an "umbrella" of the "legal rights" contained in ss. 8 to 14, there is often overlap between the two. This Court has in the past emphasized the connection of these sections to s. 7 itself. In *Re B.C. Motor Vehicle Act*, *supra*, at pp. 502-3, Lamer J. indicated that ss. 8 to 14 are "illustrative" of the principles of fundamental justice that are referred to in s. 7 (see also, the *Prostitution Reference*, *supra*, at pp. 1171-72). Given this, if some of these "principles of fundamental justice" in ss. 8 to14 entrench positive rights, one should expect that s. 7 rights would also contain a positive dimension. No doubt this is what prompted Lamer C.J. to make the following observation in *Schachter*, *supra*, at p. 721: "the right to life, liberty and security of the person is in one sense a negative right, but the requirement that the government respect the 'fundamental principles of justice' may provide a basis for characterizing s. 7 as a positive right in some circumstances".

324 Finally, the case law is consistent with the view that s. 7 includes a positive dimension. In *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC), [1999] 3 S.C.R. 46, at para. 107, this Court explicitly held that s. 7 provided a positive right to state-funded counsel in the context of a child custody hearing. Lamer C.J. put the point quite baldly: "The omission of a positive right to state-funded counsel in s. 10 . . . does not preclude an interpretation of s. 7 that imposes a positive constitutional obligation on governments to provide counsel in those cases when it is necessary to ensure a fair hearing."

325 One must resist the temptation to dilute the obvious significance of this decision by attempting to locate the threat to security of the person in *G. (J.)* in state action. It is of course true that the proceedings at issue in *G. (J.)* were initiated by the government. But Lamer C.J. pointed out that it was not the actions of the state in initiating the proceedings, *per se*, that gave rise to the potential s. 7 violation. Rather, "[t]he potential s. 7 violation . . . would have been the result of the failure of the Government of New Brunswick to provide the appellant with state-funded counsel . . . after initiating proceedings under Part IV of the *Family Services Act*" (*G. (J.)*, *supra*, at para. 91 (emphasis added)). This focus on state omission rather than state action is consistent with Lamer C.J.'s characterization of the state's obligation to provide counsel as a positive obligation. It is in the very nature of such obligations that they can be violated by mere inaction, or failure to perform the actions that one is duty-bound to perform.

326 In *Blencoe*, *supra*, this Court considered whether a state-caused delay in moving forward a human rights complaint violated the psychological integrity, and hence personal security, of the individual against whom the complaint was being made by subjecting him to prolonged and undue stigma. Bastarache J. stated at para. 57 that in order for state interference with an individual's psychological integrity to engage s. 7, "the psychological harm must be state imposed, meaning that the harm must result from the actions of the state" (emphasis deleted). This passage may appear to support the idea that positive state action is required to engage s. 7. There are, however, good reasons to find that it is not. For example, there are special problems relating to causation in the context of s. 7claims involving psychological integrity which may support the need for a requirement of state action in such cases, without importing that requirement into s. 7 as a whole. Moreover, while this Court found on the particular facts of that case that there was no s. 7 violation, it also allowed that such state-caused delay might sometimes constitute a s. 7 violation, even if "only in exceptional cases" (*Blencoe*, at para. 83). In other words, *Blencoe* held that state-caused delay — the inertia (or lack of action) in moving a case forward — was not in itself incompatible with the s. 7 requirement that the impugned harm must result from "actions of the state". Therefore, *Blencoe* does not hold that all s. 7 protection is limited to cases in which one's life, liberty or security of the person is violated by positive state action. Quite the contrary, it implies that such protection will sometimes be engaged by mere state inaction.

327 Nor does there appear to be any support for the opposite conclusion in other case law emanating from this Court. Far from it, by impliedly sanctioning state inaction as a sufficient ground for making a s. 7 claim in at least some circumstances, *Blencoe* and *G. (J.)* are entirely consistent with other Supreme Court case law on point, sparse as it is. Thus, in *Dunmore*, *supra*, at para. 22, this Court held that "exclusion from a protective regime may in some contexts amount to an affirmative interference with the effective exercise of a protected freedom". *Dunmore* confirms that state inaction — the mere failure of the state to exercise its legislative choice in connection with the protected interests of some societal group, while exercising it in connection with those of others — may at times constitute "affirmative interference" with one's *Charter* rights. Thus in certain contexts, the state is under a positive duty to extend legislative protections where it fails to do so inclusively.

328 Of course, it may well be that in order for such positive obligations to arise the state must first do <u>something</u> that will bring it under a duty to perform. But even if this is so, it is important to recognize that the kind of state action required will not be action that is causally determinative of a right violation, but merely action that "triggers", or gives rise to, a positive obligation on the part of the state. Depending on the context, we might even expect to see altogether different kinds of state action giving rise to a positive obligation under s. 7. In the judicial context, it will be natural to find such a state action in the initiation by the state of judicial proceedings. In the legislative context, however, it may be more appropriate, following cases like *Vriend* and *Dunmore*, to search for it in the state's decision to exercise its legislative choice in a non-inclusive manner that significantly affects a person's enjoyment of a *Charter* right. In other words, in certain contexts the state's choice to legislate over some matter may constitute state action giving rise to a positive obligation under s. 7.

329 The finding that s. 7 may impose positive obligations on the state brings us directly to a frequently expressed objection in the context of claims like the ones at issue in the present case that courts cannot enforce positive rights of an individual to the basic means of basic subsistence. The suggestion is that they cannot do so without being drawn outside their proper judicial role and into the realm of deciding complex matters of social policy better left to legislatures. I turn now to this concern.

D. *Justiciability*

330 I found the obstacles to positive claims considered in the last sections to be unfounded under a correct interpretation of the *Charter*. In contrast, the concern I discuss now may present a barrier to some claimants under particular circumstances. However, it does not do so in the present case for reasons I explain below. The ostensible difficulty that confronts the appellant here is the general assertion that positive claims against the state for the provision of certain needs are not justiciable because deciding upon such claims would require courts to dictate to the state how it should allocate scarce resources, a role for which they are not institutionally competent. Professor Hogg, *supra*, puts the point as follows (at p. 44-12.1):

> [This] involves a massive expansion of judicial review, since it would bring under judicial scrutiny all of the elements of the modern welfare state . . . . As Oliver Wendell Holmes would have pointed out, these are the issues upon which elections are won and lost . . . .

331 While the claim asserted here hardly in itself has the potential to bring "all of the elements of the modern welfare state" under judicial scrutiny, the concern raised by this justiciability argument is a valid one. Questions of resource allocation typically involve delicate matters of policy. Legislatures are better suited than courts to addressing such matters, given that they have the express mandate of the taxpayers as well as the benefits of extensive debate and consultation.

332 It does not follow, however, that courts are precluded from entertaining a claim such as the present one. While it may be true that courts are ill-equipped to decide policy matters concerning resource allocation — questions of how much the state should spend, and in what manner — this does not support the conclusion that justiciability is a threshold issue barring the consideration of the substantive claim in this case. As indicated above, this case raises altogether a different question: namely, whether the state is under a positive obligation to provide basic means of subsistence to those who cannot provide for themselves. In contrast to the sorts of policy matters expressed in the justiciability concern, this is a question about what kinds of claims individuals can assert against the state. The role of courts as interpreters of the *Charter* and guardians of its fundamental freedoms against legislative or administrative infringements by the state requires them to adjudicate such rights-based claims. One can in principle answer the question of whether a *Charter* right exists — in this case, to a level of welfare sufficient to meet one's basic needs — without addressing how much expenditure

by the state is necessary in order to secure that right. It is only the latter question that is, properly speaking, non-justiciable.

333 Of course, in practice it will often be the case that merely knowing whether the right exists is of little assistance to the claimant. For, unless we also know what is required, or how much expenditure is needed, in order to safeguard the right, it will usually be difficult to know whether the right has been violated. This difficulty does not arise in the present case. Once a right to a level of welfare sufficient to meet one's basic needs is established, there is no question on the facts of this case that the right has been violated. This Court need not enter into the arena of determining what would satisfy such a "basic" level of welfare because that determination has already been made by the legislature, which is itself the competent authority to make it.

334 Indeed, the very welfare scheme that is challenged here includes provisions that set out the basic amount. Section 23 of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, provides that the amount receivable is established according to the "ordinary needs" ("*besoins ordinaires*") of the recipients. The bare minimum a single adult aged 30 or over can receive is $466. This is the amount that was deemed by the legislature itself to be sufficient to meet the "ordinary needs" of a single adult. The present case comes before us on the basis that the government failed to provide a level of assistance that, according to its own standards, was necessary to meet the ordinary needs of adults aged 18 to 29. The only outstanding questions are whether this is in fact established and, if so, whether the claimants had a right to the provision of their ordinary needs.

335 Thus any concern over the justiciability of positive claims against the state has little bearing on this case. At any rate, these issues, to some extent, obscure the real question. At this stage we are less concerned with what, if anything, the state must do in order to bring itself under a positive obligation than with whether s. 7 can support such positive obligations to begin with. I have already indicated several reasons for thinking that it can. I now want to supplement these reasons by means of an interpretive analysis of s. 7. As it turns out, any acceptable approach to *Charter* interpretation — be it textual, contextual, or purposive — quickly makes apparent that interpreting the rights contained in s. 7 as including a positive component is not only possible, but also necessary.

II. Analysis of Section 7 of the *Charter*

A. *Textual Interpretation: The Language of Section 7*

336 My colleague Bastarache J. rightly notes that "[w]ithout some link to the language of the *Charter*, the legitimacy of the entire process of *Charter*adjudication is brought into question" (para. 214). With this in mind, I set out s. 7 in its entirety:

> **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. [Emphasis added.]

I have drawn attention to the conjunction in s. 7 for two reasons: first, it constitutes an integral part of the grammatical structure of the section; and second, up until now, it has not been the subject of much judicial attention.

337 This is surprising. The two parts of the section could as easily have been punctuated to form more or less separate sentences. Indeed the French version of s. 7 is so punctuated. It reads as follows:

> **7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

My reasons for emphasizing this grammatical point are straightforward. Past judicial treatments of the section have habitually read out of the English version of s. 7the conjunction and, with it, the entire first clause. The result is that we typically speak about s. 7 guaranteeing only the right not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice. On its face, this is a questionable construction of the language of s. 7: for it equates the protection of the second clause alone with the protection of the section as a whole. We no doubt would be less likely to make this equation had the two clauses been punctuated rather than conjoined. As it turns out, moreover, our failure to have due regard for the structure of the section has potentially dramatic consequences for the scope of the s. 7 guarantee. This was implicitly recognized by Lamer J. in *Re B.C. Motor Vehicles Act*, *supra*, at p. 500:

> It is clear that s. 7 surely protects the right not to be deprived of one's life, liberty and security of the person when that is done in breach of the principles of fundamental justice. The outcome of this case is dependent upon the meaning to

> be given to that portion of the section which states "and the right not to be deprived thereof except in accordance with the principles of fundamental justice". On the facts of this case it is not necessary to decide whether the section gives any greater protection, such as deciding whether, absent a breach of the principles of fundamental justice, there still can be, given the way the section is structured, a violation of one's rights to life, liberty and security of the person under s. 7. [Emphasis added.]

The quoted passage indicates that, from the earliest stages of s. 7 interpretation, this Court has considered it a very live issue whether the first clause in s. 7involves some greater protection than that accorded by the second clause alone.

338 It is in fact arguable, as Professor Hogg, *supra*, points out (at p. 44-3), "that s. 7 confers two rights": a right, set out in the section's first clause, to "life, liberty and security of the person" full stop (more or less); and a right, set out in the section's second clause, not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice. Wilson J. explicitly considered this interpretation of s. 7 in *Operation Dismantle Inc.v. The Queen*, 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441, at p. 488. Although in that case she expressed misgivings regarding the feasibility of the interpretation, she ultimately left its status undecided. In fact, in *Re B.C. Motor Vehicle Act*, *supra*, at p. 523, which was heard later in the same year, she may have overcome her earlier misgivings and impliedly accepted the two-rights interpretation by stating that a deprivation of life, liberty or security of the person would require s. 1 justification even if the principles of fundamental justice were satisfied. Her statement in this regard is consistent with the notion that the first clause ins. 7 affords additional protection, over and above that afforded in the second clause, with the result that mere compliance with the principles of fundamental justice does not in itself guarantee that the rights to life, liberty and security of the person will not be violated.

339 The two-rights interpretation of s. 7 has fallen into relative obscurity since these latest references to it by Lamer and Wilson JJ. in *Re B.C. Motor Vehicle Act*, *supra*. To some extent, this was to be expected. As indicated above, this Court has most often had occasion to visit issues of s. 7 interpretation in criminal, or quasi-criminal, contexts. In those contexts, there is little need to concern ourselves with any potentially self-standing right in the first clause of s. 7. Since what we are concerned with in such penal cases is the constitutional validity of positive state action that actively deprives individuals of their liberty, it is not surprising that the s. 7 analysis would focus only upon the second clause, which deals with those types of deprivation. *Re B.C. Motor Vehicles Act* was a case in

point. Unlike Lamer J. in that case, however, we have not always been careful in such cases to delineate the scope of our s. 7 discussion. This has led to a general impression that s. 7 is reduced to the right contained in the second clause.

340 As I have already suggested, this is not a plausible construction of the text of s. 7. Only by ignoring the structure of s. 7 — by effectively reading out the conjunction and, with it, the first clause — is it possible to conclude that it protects exclusively "the right not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice". There may be some question as to how far, precisely, the protection of s. 7 extends beyond this, but that the section's first clause affords some additional protection seems, as a purely textual matter, beyond reasonable objection.

341 The instant appeal requires us to consider, perhaps for the first time, what this additional protection might consist of. Without wanting to limit the possibilities at this early stage of interpreting the first clause, there are at least two alternatives that present themselves. The first was alluded to by both Lamer and Wilson JJ. in *Re B.C. Motor Vehicle Act*, *supra*. In essence, it entails reading the first clause as providing for a completely independent and self-standing right, one which can be violated even absent a breach of fundamental justice, but requiring a s. 1 justification in the event of such violation. This interpretation gets its starting point from the fact that the first clause of s. 7 makes no mention of the principles of fundamental justice. It follows, the thinking goes, that the right to life, liberty and security of the person provided for in the first clause can be violated even where the state conducts itself in accordance with the principles of fundamental justice. And since the justificatory analysis under s. 1 was, at an early stage of *Charter* jurisprudence, given a very limited role in the context of s. 7violations primarily because it was thought that the violation of a right in breach of fundamental justice could almost never be justified, this interpretation restores tos. 1 a more active role to play in the context of at least some s. 7 violations.

342 Another possible interpretation of what the additional protection afforded by the first clause of s. 7 consists of focuses less on the omission of any reference to the principles of fundamental justice, and more on its failure to make any mention of the term "deprivation". There is indeed something plausible in the idea that, by omitting such language, the first clause extends the right to life,

liberty and security of the person beyond protection against the kinds of state action that have habitually been associated with the term "deprivation". Essentially, this interpretation would suggest that by omitting the term "deprivation" in the first clause, the section implies that it is at most in connection with the right afforded in the second clause, if at all (see *supra*, at para. 321), that there must be positive state action in order to ground a violation; the right granted in the first clause would be violable merely by state inaction.

343 I need not decide here which of these two interpretations, if any, is to be preferred. Indeed, they do not appear to be mutually exclusive. For the purposes of the present appeal, it suffices to raise the following two points: first, either interpretation is preferable to the way s. 7 has habitually been interpreted to this point in time, not only textually but also, as I will now demonstrate, from the standpoints of contextual and purposive analysis; and second, either interpretation accommodates — indeed demands — recognition of the sort of interest claimed by the appellant in this case.

B. *Purposive Analysis*

344 The proper approach to the definition of the rights and freedoms guaranteed by the *Charter* is, as I have mentioned (at para. 316), a purposive one. In *Big M Drug Mart*, *supra*, Dickson J. stated at p. 344:

> The meaning of a right or freedom guaranteed by the *Charter* [is] to be ascertained by an analysis of the purpose of such a guarantee; it [is] to be understood, in other words, in the light of the interests it [is] meant to protect.
>
> . . . The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. [Emphasis deleted.]

An interpretation of s. 7 which reduces it to the right contained in the second clause — the "deprivation" clause — is seriously at odds with any purposive interpretation of the right to life guaranteed by the section. Indeed, if that interpretation were to be accepted, it would effectively denude the right to life of any purpose whatsoever, rendering it essentially vacuous.

345 Professor Hogg, *supra*, implies as much when he argues that "[s]o far as 'life' is concerned, the section has little work to do" (p. 44-6). This is only true, however, if we understand the s. 7 guarantee as it has been habitually understood. For in that case, the protection of the section would extend only to "deprivations" of life that were not in accordance with the principles of fundamental justice. And since "principles of fundamental justice" has so far been interpreted to invoke the basic tenets of the "legal system", narrowly defined to include only courts and tribunals that perform court-like functions, the purpose of guaranteeing the right to life would seem limited on this interpretation to guarding against capital punishment, which is the only obvious way in which the "legal system", so defined, could potentially trench on a person's right to life. But, as Professor Hogg points out, such a purpose might just as well be served by s. 12 of the *Charter*, which protects individuals against cruel and unusual punishment. In effect, then, on this interpretation the s. 7 guarantee of the right to life would be purposeless, and the right itself emptied of any meaningful content.

346 One should not readily accept that the right to life in s. 7 means virtually nothing. To begin with, this result violates basic standards of interpretation by suggesting that the *Charter* speaks essentially in vain in respect of this fundamental right. More importantly, however, it threatens to undermine the coherence and purpose of the *Charter* as a whole. After all, the right to life is a prerequisite — a *sine qua non* — for the very possibility of enjoying all the other rights guaranteed by the *Charter*. To say this is not to set up a hierarchy of *Charter* rights. No doubt a meaningful right to life is reciprocally conditioned by these other rights: they guarantee that human life has dignity, worth and meaning. Nevertheless, the centrality of the right to life to the *Charter* as a whole is obvious. Indeed, it would be anomalous if, while guaranteeing a complex of rights and freedoms deemed to be necessary to human fulfilment within society, the *Charter* had nothing of significance to say about the one right that is indispensable for the enjoyment of all of these others.

347 Thus, in my view, any interpretation of the *Charter* that leaves the right to life such a small role to play is one that threatens to impugn the coherence of the whole *Charter*. Far from being a poor relation of other *Charter* rights — one which deserves protection merely as a negative right, while certain other *Charter* rights are granted recognition as full-blown positive rights — the right to life is, in a very real sense, their essential progenitor. So much so that to deny any real significance to the *Charter* guarantee of the right to life would be to undercut the significance of every other *Charter* guarantee.

348 A purposive interpretation of s. 7 as a whole requires that all the rights embodied in it be given meaning. But by leaving no meaningful role to be played by the right to life, the habitual interpretation of s. 7 threatens not only the coherence, but also the purpose of the *Charter* as a whole. In order to avoid this result, we must recognize that the state can potentially infringe the right to life, liberty and security of the person in ways that go beyond violating the right contained in the second clause of s. 7. Whether one chooses to characterize matters by stating: (a) that it is not merely active "deprivations" of life, liberty and security of the person (as opposed to the mere withholdings) that s. 7 is concerned with; or (b) that s. 7 can be violated even absent a breach of the "principles of fundamental justice"; the basic point is that s. 7 must be interpreted as protecting something more than merely negative rights. Otherwise, the s. 7 right to life will be reduced to the function of guarding against capital punishment — a possibly redundant function in light of s. 12 — with all of the intolerable conceptual difficulties attendant upon such an interpretation.

C. *Contextual Analysis*

349 Quite apart from its specific relation to the right to life guaranteed in s. 7, the structure and purpose of the *Charter* also provide relevant context for the interpretation of *Charter* rights more generally. This idea was implicit in this Court's dicta regarding constitutional interpretation in *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, at para. 50:

> Our Constitution has an internal architecture, or what the majority of this Court in *OPSEU v. Ontario (Attorney General)*, 1987 CanLII 71 (SCC), [1987] 2 S.C.R. 2, at p. 57, called a "basic constitutional structure". The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole.

What holds for "the Constitution as a whole" also holds for its constituent parts, including the *Charter*. Individual elements in the *Charter* are linked to one another, and must be understood by reference to the structure of the *Charter* as a whole. Support for this interpretive approach can be located in *Big M Drug Mart*, *supra*, at p. 344: "the purpose of [any] right or freedom . . . is to be sought by reference to the character and the larger objects of the *Charter* itself".

350 Clearly, positive rights are not at odds with the purpose of the *Charter*. Indeed, the *Charter* compels the state to act positively to ensure the protection of a significant number of rights, including, as I mentioned earlier (at para. 320), the protection of the right to vote (s. 3), the right to an interpreter in penal proceedings (s. 14), and the right of minority English- or French-speaking Canadians to have their children educated in their first language (s. 23). Positive rights are not an exception to the usual application of the *Charter*, but an inherent part of its structure. The *Charter* as a whole can be said to have a positive purpose in that at least some of its constituent parts do.

351 Also instructive is s. 1. The great conceptual challenge faced by courts under s. 1 is to identify limitations to individual rights or freedoms that properly respect those rights or freedoms, without subverting them to majoritarian interests. Questions regarding the limits of individual rights can be characterized just as well in terms of delineating the scope of those rights. We can therefore expect to learn a great deal about rights definition in general, and in the context of this case specifically, by paying careful attention to the way in which this Court has handled such issues in the context of s. 1. Properly understood, the justificatory enterprise in s. 1 demonstrates that the rights-granting provisions in the *Charter* include a positive dimension.

352 This Court developed early on a general approach to s. 1 justification, focussing on the kinds of considerations appropriate to the justificatory analysis. That general approach was expressed in Dickson C.J.'s landmark judgment in *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, at p. 135:

> It is important to observe at the outset that s. 1 has two functions: first, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and, second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the *Constitution Act, 1982*) against which limitations on those rights and freedoms must be measured.

We sometimes lose sight of the primary function of s. 1 — to constitutionally guarantee rights — focussed as we are on the section's limiting function.

353 Our oversight in this regard is perhaps exacerbated by the fact that the two functions served by s. 1 appear, at first blush, to conflict with one another. In what sense, after all, can one be said to be guaranteeing *Charter* rights, even as one places limits upon them? The answer lies in part in the other "limiting" sections (s.

33 and s. 38 of the *Constitution Act, 1982*): the justified limits to *Charter* rights that are permitted under s. 1 must not be confused with exceptions, denials, or other forms of restriction that would abrogate or derogate from the rights themselves (*Attorney General of Quebec v. Quebec Association of Protestant School Boards*, 1984 CanLII 32 (SCC), [1984] 2 S.C.R. 66, at p. 86). Dickson C.J. provides the remainder of the solution in the passage that follows, *Oakes*, *supra*, at p. 136:

> A second contextual element of interpretation of s. 1 is provided by the words "free and democratic society". Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society . . . . The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the*Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified. [Emphasis added.]

In this way, the two functions served by s. 1 are prevented from operating at cross purposes, as it were, because the very values that underlie and are the genesis of the rights and freedoms guaranteed by the *Charter* are the values that must be invoked in demonstrating that a limit on those rights and freedoms is justified. This "unity of values" underlying the dual functions of s. 1 ensures that due regard and protection is given to *Charter* rights even as justified limits are placed upon them (see L. E. Weinrib, "The Supreme Court of Canada and Section One of the Charter" (1988), 10 *Sup. Ct. L. Rev.* 469, at p. 483). In fact, it would not be far from the truth to state that the types of limits that are justified under s. 1 are those, and only those, that not only respect the content of *Charter* rights but alsofurther those rights in some sense — or to use the language of s. 1 itself, "guarantee" them — by further advancing the values at which they are directed.

354 To say this is in part to recognize that limitations on rights are necessary if only to harmonize competing rights, or to give the fullest expression possible to conflicting rights. Freedom of religion, for example, can only be fulfilled for all by guarding against establishment, thereby ensuring the existence of the positive conditions necessary for all to express their own religious views: *Big M Drug Mart*, *supra*; *Plantation Indoor Plants Ltd. v. Attorney General of Alberta*,1985 CanLII 71 (SCC), [1985] 1 S.C.R. 366. Freedom of the press cannot trump the right to a fair trial (see *Dagenais v. Canadian Broadcasting Corp.*,1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, 1996 CanLII 184 (SCC), [1996] 3 S.C.R. 480), which in turn cannot override privacy interests (see *R. v. O'Connor*, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411; *R. v. Mills*,1999 CanLII 637 (SCC), [1999] 3 S.C.R. 668). In every case, the courts will search for the proper accommodation

that will give the fullest expression to each of the clashing rights. See also *R. v. McClure*, 2001 SCC 14 (CanLII), [2001] 1 S.C.R. 445, 2001 SCC 14; *Smith v. Jones*, 1999 CanLII 674 (SCC), [1999] 1 S.C.R. 455.

355 In that sense, *Charter* rights and freedoms find protection in s. 1, not only because they are guaranteed in that section, but because limitations on some rights are required by the positive protection of others. This approach to s. 1 justification, which invokes the values that underpin the *Charter* as the only suitable basis for limiting those rights, confirms that *Charter* rights contain a positive dimension. Constitutional rights are not simply a shield against state interference with liberty; they place a positive obligation on the state to arbitrate competing demands arising from the liberty and rights of others.

356 In other words, the justificatory mechanism in place in s. 1 of the *Charter* reflects the existence of a positive right to *Charter* protection asserted in support of alleged interference by the state with the rights of others. If such positive rights exist in that form in s. 1, they must, *a fortiori*, exist in the various*Charter* provisions articulating the existence of the rights. For instance, if one's right to life, liberty and security of the person can be limited under s. 1 by the need to protect the life, liberty or security of others, it can only be because the right is not merely a negative right but a positive one, calling for the state not only to abstain from interfering with life, liberty and security of the person but also to actively secure that right in the face of competing demands.

357 This concludes my interpretive analysis of s. 7. In my view, the results are unequivocal: every suitable approach to *Charter* interpretation, including textual analysis, purposive analysis, and contextual analysis, mandates the conclusion that the s. 7 rights of life, liberty and security of the person include a positive dimension.

358 It remains to show that the interest claimed in this case falls within the range of entitlements that the state is under a positive obligation to provide under s. 7. In one sense it seems obvious that it does. As I have already suggested, a minimum level of welfare is so closely connected to issues relating to one's basic health (or security of the person), and potentially even to one's survival (or life interest), that it appears inevitable that a positive right to life, liberty and security

of the person must provide for it. Indeed in this case the legislature has in fact chosen to legislate in respect of welfare rights. Thus determining the applicability of the foregoing general principles to the case at bar requires only that we analyse this case through the lens of the underinclusiveness line of cases, of which *Dunmore*, *supra*, is the chief example.

III. Application to the Case at Bar

359 As my colleague Bastarache J. observes, "[t]he question of whether a fundamental freedom can be infringed through the lack of government action was canvassed most recently in the case of *Dunmore*, *supra*" (para. 220). This Court recognized in that case that underinclusive legislation might in some contexts constitute "affirmative interference with the effective exercise of a protected freedom" (*Dunmore*, *supra*, at para. 22). In the process, we confirmed, at para. 23, L'Heureux-Dubé J.'s earlier comment in *Haig v. Canada*, 1993 CanLII 58 (SCC), [1993] 2 S.C.R. 995, at p. 1039, that "a situation might arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action might be required".

360 The combined effect of these statements is at least two-fold. Most obviously, they stand for the proposition that the *Charter*'s fundamental freedoms can be infringed even absent overt state action. Mere restraint on the part of government from actively interfering with protected freedoms is not always enough to ensure *Charter* compliance; sometimes government inaction can effectively constitute such interference.

361 Beyond that, however, the statements also confirm that in some contexts the fundamental freedoms enumerated in the *Charter* place the state under a positive obligation to ensure that its legislation is properly inclusive. Indeed, as I have already stressed, positive rights distinguish themselves from negative rights precisely in that they are violable by mere inaction, such as the failure on the part of the state to include all those who should be included under a regime of protective legislation. Thus, in holding 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* affirmed that the *Charter* provides for positive rights.

362 Of course, such positive rights to inclusion in a legislative regime had previously been recognized by this Court in the s. 15(1) context in *Vriend*,*supra*. In that case, a unanimous Court observed that there is nothing in the wording of s. 32 of the *Charter* "to suggest that a positive act encroaching on rights is required" (emphasis in original). Rather, s. 32 is "worded broadly enough to cover positive obligations on a legislature such that the *Charter* will be engaged even if the legislature refuses to exercise its authority" (*Vriend*, at para. 60, quoting D. Poithier "The Sounds of Silence: *Charter* Application when the Legislative Declines to Speak" (1996), 7 *Constitutional Forum* 113, at p. 115). The primary significance of *Dunmore*, from the perspective of the instant appeal, is that it extended the positive right to legislative inclusion to *Charter* claims going beyond the equality context.

363 It would, in my view, be inaccurate to suggest in the light of this that claims of underinclusion are the natural province of s. 15. I think it is preferable to approach such claims by first attempting to ascertain the threat that is posed by a given piece of underinclusive legislation. Where the threat is to one of the specifically enumerated fundamental rights and freedoms guaranteed by the *Charter*, it will be appropriate to entertain the claim of underinclusion under the section that provides for that freedom. Admittedly, there will be cases in which underinclusion is based on a prohibited ground and threatens human dignity, and therefore is properly treated under s. 15(1), even though it does not implicate any of the other enumerated *Charter* rights. To that extent, s. 15(1) is perhaps the proper venue for addressing certain kinds of claims of underinclusion *per se*.

364 But we must not conclude from this that claims based upon the underinclusiveness of legislation sit uneasily under the protection provided by other specifically enumerated *Charter* rights. As my colleague observes, total exclusion of a group from a statutory scheme protecting a certain right may in some circumstances engage that right to such an extent that the exclusion in essence infringes the substantive right as opposed to the equality right protected under s. 15(1).

365 *Dunmore* articulated the criteria necessary for making a *Charter* claim based on underinclusion outside the context of s. 15. In my view, these criteria are satisfied in this case. They are as follows:

1. The claim must be grounded in a fundamental *Charter* right or freedom rather than in access to a particular statutory regime (*Dunmore*, at para. 24).

2. A proper evidentiary foundation must be provided, before creating a positive obligation under the *Charter*, by demonstrating that exclusion from the regime constitutes a substantial interference with the exercise and fulfillment of a protected right (*Dunmore*, at para. 25).

3. It must be determined whether the state can truly be held accountable for any inability to exercise the right or freedom in question (*Dunmore*, at para. 26).

These criteria are directed at ensuring that the necessary conditions for making out virtually any *Charter* claim are in place. To begin with, the claim must be grounded in an appropriate *Charter* right. That is, it must be grounded in a substantive right outside of s. 15, rather than in exclusion from a statutory regime itself, which exclusion could at best implicate the equality guarantee. Beyond this, however, all successful *Charter* claims require that the claimant establish both that his or her right has been interfered with and that it is the government that is responsible for such interference. The second and third criteria are directed at establishing the presence of these two conditions. While establishing their presence is often a relatively straightforward matter in cases where it is the infringement of a negative right that is claimed — one must simply be able to point to a positive government action that infringes the right or freedom — the case is somewhat different here. Because claims based upon underinclusion essentially call upon the courts to find a positive obligation on the part of government to actively secure fulfilment of a *Charter* right, it would be both extremely difficult (if not impossible) for claimants to point to some positive state act that constitutes an interference with their *Charter* rights, and inappropriate to expect this of them. Instead, their claim will essentially be grounded in a lack of effective state action. We must be sensitive to this difference in conducting our analysis of the criteria. With this in mind, I will now consider each of them in turn.

A. *Is the Claim Grounded in an Appropriate Charter Right?*

366 In *Dunmore*, this Court distinguished underinclusion cases that are superficially similar such as *Haig*, *supra*, and *Native Women's Assn. of Canada v. Canada*, 1994 CanLII 27 (SCC), [1994] 3 S.C.R. 627 ("*NWAC*"), on the basis that the *Charter* claims made in the latter cases constituted nothing more than a demand for access to a particular statutory regime (at para. 24):

> [I]n *Haig*, the majority of this Court held that "(a) government is under no constitutional obligation to extend (a referendum) to anyone, let alone

> toeveryone", and further that "(a) referendum as a platform of expression is . . . a matter of legislative policy and not of constitutional law" (p. 1041 (emphasis in original)). Similarly, in *NWAC*, the majority of this Court held that "[i]t cannot be claimed that NWAC has a constitutional right to receive government funding aimed at promoting participation in the constitutional conferences" (p. 654). In my view, the appellants in this case do not claim a constitutional right to general inclusion in [a statutory regime], but simply a constitutional freedom to organize a trade association. This freedom to organize exists independently of any statutory enactment . . . .

The instant appeal is also distinguishable from *Haig* and *NWAC*, and on all fours with *Dunmore* itself, in this respect.

367 Though it is true that the claimants in the present case attack the underinclusiveness of the regulations under the *Social Aid Act* under s. 15 on the basis that exclusion from the statutory regime on a prohibited ground in itself constitutes an affront to human dignity, their s. 7 claim is entirely independent of this. Under s. 7, their claim is not that exclusion from the statutory regime is illicit *per se*, but that it violates their self-standing right to security of the person (and potentially their right to life as well). As in *Dunmore*, this right exists independently of any statutory enactment.

368 The distinction between the s. 7 claim and the s. 15 claim can be illustrated as follows: if it were the case that the claimants could meet their basic needs through means outside of the *Social Aid Act* — for instance through an independent government program providing for subsidized housing, food vouchers, etc., in exchange for the performance of works of public service — their s. 7 claim would entirely disappear, but their s. 15 claim would potentially remain intact inasmuch as it would still be open to them to argue that being forced to resort to these alternative means somehow violated their human dignity. The problem in this case, by way of contrast, is that exclusion from this statutory regime effectively excludes the claimants from any real possibility of having their basic needs met through any means whatsoever. Thus, it is not exclusion from the particular statutory regime that is at stake but, more basically, the claimants' fundamental rights to security of the person and life itself.

B. *Is there a Sufficient Evidentiary Basis to Establish that Exclusion from the Social Aid Act Substantially Interfered with the Fulfilment and Exercise of the Claimants' Fundamental Right to Security of the Person?*

369 In order to address adequately the question that is posed here, we must first be clear about what would be sufficient to constitute the required evidentiary basis. In *Dunmore*, *supra*, at para. 25, Bastarache J. stated the requirement as follows:

> [T]he evidentiary burden in these cases is to demonstrate that exclusion from a statutory regime permits a substantial interference with the exercise of protected s. 2(*d*) activity. Such a burden was implied by Dickson C.J. in the *Alberta Reference* . . . where he stated that positive obligations may be required "where the absence of government intervention may in effect substantially impede the enjoyment of fundamental freedoms" (p. 361). [Emphasis deleted.]

For clarity, Bastarache J. went on to add that "[t]hese dicta do not require that the exercise of a fundamental freedom be impossible, but they do require that the claimant seek more than a particular channel for exercising his or her fundamental freedoms" (para. 25 (emphasis added)).

370 In view of this, one must avoid placing undue emphasis on whatever (often remote) possibility there might have been that the claimants could have satisfied their basic needs through private means, whether in the open market or with the assistance of other private actors such as family members or charitable groups. There is simply no requirement that they prove they exhausted all other avenues of relief before turning to public assistance. On the contrary, all that is required is that the claimants show that the lack of government intervention "substantially impede[d]" the enjoyment of their s. 7 rights. This requirement is best put in language that mirrors that used by L'Heureux-Dubé J. in *Haig*, *supra*, that the claimants must show that government intervention was necessary in order to render their s. 7 rights meaningful.

371 There is ample evidence in this case that the legislated exclusion of young adults from the full benefits of the social assistance regime substantially interfered with their s. 7 rights, in particular their right to security of the person. Welfare recipients under the age of 30 were allowed $170/month. The various remedial programs put in place in 1984 simply did not work: a startling 88.8 percent of the young adults who were eligible to participate in the programs were unable to increase their benefits to the level payable to adults 30 and over. In these conditions, the physical and psychological security of young adults was

severely compromised during the period at issue. This was compellingly illustrated by the appellant's own testimony and by that of her four witnesses: a social worker, a psychologist, a dietician and a community physician. The sizeable volume of the appellant's record prohibits an exhaustive exposé of the dismal conditions in which many young welfare recipients lived. I will nevertheless outline the evidence illustrating how the exclusion of young adults from the full benefits of the social assistance regime amounted to a substantial interference with their fundamental right to security of the person and drove them to resort to other demeaning and often dangerous means to ensure their survival.

372 On $170/month, paying rent is impossible. Indeed, in 1987, the rent for a bachelor apartment in the Montreal Metropolitan Area was approximately $237 to $412/month, depending on the location. Two-bedroom apartments went for about $368 to $463/month. As a result, while some welfare recipients were able to live with parents, many became homeless. During the period at issue, it is estimated that over 5 000 young adults lived on the streets of the Montreal Metropolitan Area. Arthur Sandborn, a social worker, testified that young welfare recipients would often combine their funds and share a small apartment. After paying rent however, very little money was left to pay for the other basic necessities of life, including hot water, electricity and food. No telephone meant further marginalization and made job hunting very difficult, as did the inability to afford suitable clothes and transportation.

(1) Interference with Physical Security of the Person

373 The exclusion of welfare recipients under the age of 30 from the full benefits of the social assistance regime severely interfered with their physical integrity and security. First, there are the health risks that flow directly from the dismal living conditions that $170/month afford. Obviously, the inability to pay for adequate clothing, electricity, hot water or, in the worst cases, for any shelter whatsoever, dramatically increases one's vulnerability to such ailments as the common cold or influenza. According to Dr. Christine Colin, persons living in poverty are six times more likely to develop diseases like bronchial infections, asthma and emphysema than persons who live in decent conditions. Dr. Colin also testified that the poor not only develop more health problems, but are also more severely affected by their ailments than those who live in more favourable conditions.

374 Second, the malnourishment and undernourishment of young welfare recipients also result in a plethora of health problems. In 1987, the cost of proper nourishment for a single person was estimated at $152/month, that is 89 percent of the $170/month allowance. Jocelyne Leduc-Gauvin, a dietician, gave detailed evidence of the effects of poor and insufficient nourishment. Malnourished young adults suffer from lethargy and from various chronic problems such as obesity, anxiety, hypertension, infections, ulcers, fatigue and an increased sensitivity to pain. Malnourished women are prone to gynecological disorders, high rates of miscarriage and abnormal pregnancies. Children born to malnourished mothers tend to be smaller and are often afflicted by congenital deficiencies such as poor vision and learning disorders. Like many welfare recipients under the age of 30, the appellant suffered the consequences of malnutrition. As noted by Ms. Leduc-Gauvin, there is a sad irony in the fact that those who were left to fend for themselves on a lean $170/month — young adults aged 18 to 29 — in fact required a higher daily intake of calories and nutrients than older adults.

375 In order to eat, many young welfare recipients benefited from food banks, soup kitchens and like charitable organizations. But since these could not be relied upon consistently other avenues had to be pursued. While some resorted to theft, others turned to prostitution. Dumpsters and garbage cans were scavenged in search of edible morsels of food, exposing the hungry youths to the risks of food poisoning and contamination. In one particular case reported by Mr. Sandborn, two young adults paid a restauranteur $10/month for the right to sit in his kitchen and eat whatever patrons left in their plates.

(2) Interference with Psychological Security of the Person

376 The psychological and social consequences of being excluded from the full benefits of the social assistance regime were equally devastating. The hardships and marginalization of poverty propel the individual into a spiral of isolation, depression, humiliation, low self-esteem, anxiety, stress and drug addiction. According to a 1987 enquiry by Santé Québec, one out of five indigent young adults attempted suicide or had suicidal thoughts. The situation was even more alarming among homeless youths in Montreal, 50 percent of whom reportedly attempted to take their own lives.

377 In my view, this evidence overwhelmingly demonstrates that the exclusion of young adults from the full benefits of the social assistance regime substantially interfered with their fundamental right to security of the person and, at the margins, perhaps with their right to life as well. Freedom from state interference with bodily or psychological integrity is of little consolation to those who, like the claimants in this case, are faced with a daily struggle to meet their most basic bodily and psychological needs. To them, such a purely negative right to security of the person is essentially meaningless: theirs is a world in which the primary threats to security of the person come not from others, but from their own dire circumstances. In such cases, one can reasonably conclude that positive state action is what is required in order to breathe purpose and meaning into their s. 7 guaranteed rights.

C. *Can the State Be Held Accountable for the Claimants' Inability to Exercise their Section 7 Rights?*

378 In one sense, there appears to be considerable overlap between this third criterion for making out a successful underinclusion claim and the second criterion just discussed. In fact, once one establishes in accordance with the second criterion that a claimant's fundamental rights cannot be effectively exercised without government intervention, it is difficult to see what more would be required in order to demonstrate state accountability.

379 The absence of a direct, positive action by the state may appear to create particular problems of causation. Of course, state accountability in this context cannot be conceived of along the same lines of causal responsibility as where there is affirmative state action that causally contributes to, and in some cases even determines, the infringement. By contrast, positive rights are violable by mere inaction on the part of the state. This may mean that one should not search for the same kind of causal nexus tying the state to the claimants' inability to exercise their fundamental freedoms. Such a nexus could only ever be established by pointing to some positive state action giving rise to the claimants' aggrieved condition. While this focus on state action is appropriate where one is considering the violation of a negative right, it imports a requirement that is inimical to the very idea of positive rights.

380 Among the immediate implications of this is that the claimants in this case need not establish, in order to satisfy the third criterion, that the state can be held causally responsible for the socio-economic environment in which their s. 7 rights were threatened, nor do they need to establish that the government's inaction worsened their plight. Here, as in all claims asserting the infringement of a positive right, the focus is on whether the state is under an obligation of performance to alleviate the claimants' condition, and not on whether it can be held causally responsible for that condition in the first place.

381 All of which indicates that government accountability in the context of claims of underinclusion is to be understood simply in terms of the existence of a positive state obligation to redress conditions for which the state may or may not be causally responsible. On this view, the third criterion serves the purpose of ensuring not only that government intervention is needed to secure the effective exercise of a claimant's fundamental rights or freedoms, but also that it is obligatory. This accords with much of the dicta in *Dunmore* explaining how it is possible for government accountability to be established, not only by underinclusion that "orchestrates" or "encourages" the violation of fundamental freedoms, but also by underinclusion that "sustains" the violation (*Dunmore*, at para. 26). In conceiving of state accountability in terms of the breach of a positive duty of performance, it becomes possible for the first time to recognize how underinclusive legislation can violate a fundamental right by effectively turning a blind eye to, or sustaining, independently existing threats to that right.

382 A focus on state obligation was also the driving force behind this Court's finding in *Dunmore* that the government could be held accountable for the violation of the claimants' s. 2(*d*) rights in that case. It led to the search for a "minimum of state action" (para. 28) that would bring the government within reach of the *Charter* by engaging s. 32. Ultimately, the minimum of state action was satisfied in *Dunmore* by the mere fact that the government had chosen to legislate over matters of association. In this Court's view, that choice triggered a state obligation that invoked *Charter* scrutiny and removed any possibility of the state claiming lack of responsibility for the violation of associational rights (at para. 29):

> Once the state has chosen to regulate a private relationship such as that between employer and employee . . . it is unduly formalistic to consign that relationship to a "private sphere" that is impervious to *Charter* review. As Dean P. W. Hogg has stated, "(t)he effect of the governmental action restriction is that there is a private realm in which people are not obliged to

> subscribe to 'state' values, and into which constitutional norms do not intrude. The boundaries of that realm are marked, not by an *a priori* definition of what is 'private', but by the absence of statutory or other governmental intervention" (see *Constitutional Law of Canada* (loose-leaf ed.), at p. 34-27).

There can be no doubt that these dicta apply with equal force to the instant appeal.

383 The *Social Aid Act* is quite clearly directed at addressing basic needs relating to the personal security and survival of indigent members of society. It is almost a cliché that the modern welfare state has developed in response to an obvious failure on the part of the free market economy to provide these basic needs for everyone. Were it necessary, this Court could take judicial notice of this fact in assessing the relevance of the *Social Aid Act* to the claimants' s. 7rights. As it happens, any such necessity is mitigated by the fact that s. 6 of the Act explicitly sets out its objective: to provide supplemental aid to those who fall below a subsistence level.

384 Additional support for the proposition that the *Social Aid Act* is directed at securing the interests that s. 7 of the *Charter* was meant to protect can be found in various statements made by the Quebec government in a policy paper that ultimately led to the reform of the social assistance regime in 1989, putting an end to the differential treatment between younger and older welfare recipients. This paper was published in 1987 by the government of Quebec, and signed by Pierre Paradis (the then Minister of Manpower and Income Security). It is entitled *Pour une politique de sécurité du revenu*. In it, the Quebec government unequivocally states that it [TRANSLATION] "recognizes its duty and obligation to provide for the essential needs of persons who are unable to work." It then goes on to state that it must [TRANSLATION] "resolutely tackle the deficiencies" of the social assistance programs, which, it admits, "remain barriers to the autonomy and emancipation of welfare recipients". On the same page, the government specifically identifies the difference in treatment between younger and older welfare recipients as such a deficiency, describing it as a [TRANSLATION] "problem".

385 At the very least, these statements indicate that the *Social Aid Act* constituted an excursion into regulating the field of interests that generally fall within the rubric of s. 7 of the *Charter*. Legislative intervention aimed at providing for essential needs touching on the personal security and survival of

indigent members of society is sufficient to satisfy whatever "minimum state action" requirement might be necessary in order to engage s. 32 of the *Charter*. By enacting the *Social Aid Act*, the Quebec government triggered a state obligation to ensure that any differential treatment or underinclusion in the provision of these essential needs did not run afoul of the fundamental rights guaranteed by the *Charter*, and in particular by s. 7. It failed to discharge this obligation. The evidence shows that the underinclusion of welfare recipients aged 18 to 29 under the *Social Aid Act* substantially impeded their ability to exercise their right to personal security (and potentially even their right to life). In the circumstances, I must conclude that this effective lack of government intervention constituted a violation of their s. 7 rights.

IV. The Principles of Fundamental Justice

386 Under most circumstances, it would now be necessary to determine whether this *prima facie* violation of the appellant's s. 7 rights was "in accordance with the principles of fundamental justice". Such an inquiry appears to have no application to this case for two reasons. First, my analysis indicates that the protection of positive rights is most naturally grounded in the first clause of s. 7, which provides a free-standing right to life, liberty and security of the person and makes no mention of the principles of fundamental justice. Moreover, as Lamer J. observed in *Re B.C. Motor Vehicle Act*, *supra*, at p. 503 "the principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system." But positive rights, by nature violable by mere inaction on the part of the state, do not bring the justice system into motion by empowering agents of the state to actively curtail the life, liberty and security of the person of individuals. The source of a positive rights violation is in the legislative process, which is of course itself quite distinct from the "inherent domain of the judiciary" and "the justice system" as it has been traditionally conceived. Indeed, the kinds of considerations that would serve to justify the decision to enact one form of protective legislation over another "lie in the realm of . . . public policy", which this Court has specifically divorced from the principles of fundamental justice. The principles of fundamental justice therefore have little relevance in the present circumstances, which invoke the inherent domain of the legislature and not that of the justice system.

387 In view of this, any limitation that might be placed on the s. 7 right asserted in this case — if not in all cases where it is a positive right that is asserted — must be found, not in the principles of fundamental justice, but in the reasonable limits prescribed by law that can be justified in a free and democratic society. Accordingly, it is to s. 1 that we must turn.

V. Section 1 of the *Charter*

388 As is apparent from the above, there is an onerous burden placed on claimants who seek to establish a positive right violation under s. 7 of the*Charter*. Apart from the justiciability concern — which, though not an issue in this case, may at times present a significant obstacle in the way of finding such a violation — claimants are faced with the unenviable task of providing a sound evidentiary basis for the conclusion that their s. 7 rights are rendered essentially meaningless without active government intervention.

389 The difficulty faced by claimants in this regard is partially justified by the fact that, once a violation of s. 7 has been established and there is a shift in the burden of showing that the violation is demonstrably justified as a reasonable limit prescribed by law, a similarly onerous task awaits the government. Lamer C.J.'s comments in *G. (J.)*, *supra*, at para. 99, indicate why this must be so:

> Section 7 violations are not easily saved by s. 1. . . .This is so for two reasons. First, the rights protected by s. 7 — life, liberty, and security of the person — are very significant and cannot ordinarily be overridden by competing social interests. Second, rarely will a violation of the principles of fundamental justice . . . be upheld as a reasonable limit demonstrably justified in a free and democratic society.

Of course, only the first of these two rationales applies to the case at bar. Since there is no need to find that the violation of a positive right under s. 7 accords with the principles of fundamental justice, the second rationale does not come into play. To that extent, the violation of such a right may be somewhat easier to justify under s. 1. Still, the rights enshrined in s. 7, whether positive or negative, are of sufficient importance that they "cannot ordinarily be overridden by competing social interests".

390 There are, in addition, more general constraints on s. 1 justification discussed above, such that a limitation on *Charter* rights under that section will only be justified where it furthers the values at which the rights are themselves

directed. These constraints magnify the difficulty of the government's task in showing that the impugned violation is justified.

391 In this case, the legislated differential treatment, or underinclusion, is purportedly directed at: (1) preventing the attraction of young adults to social assistance; and (2) facilitating their integration into the workforce by encouraging participation in the employment programs. Insofar as either of these "double objectives" is understood as being principally driven by cost considerations, it would fail (barring cases of prohibitive cost) to be pressing and substantial. However, it is possible to frame these objectives in such a way as to ensure that they are properly adapted to the justificatory analysis under s. 1 by focusing instead on their long-term tendency to promote the liberty and inherent dignity of young people. Thus framed, they might indeed satisfy the "pressing and substantial objective" requirement under *Oakes*.

392 The problem, in my view, is that subsequent stages of the *Oakes* analysis raise doubts concerning the appropriateness of framing the objectives in this manner. For example, it is difficult to accept that denial of the basic means of subsistence is rationally connected to values of promoting the long-term liberty and inherent dignity of young adults. Indeed, the long-term importance of continuing education and integration into the workforce is undermined where those at whom such "help" is directed cannot meet their basic short-term subsistence requirements. Without the ability to secure the immediate needs of the present, the future is little more than a far-off possibility, remote both in perception and in reality. We have already seen, for example, how the inability to afford a telephone, suitable clothes and transportation makes job hunting difficult if not impossible. More drastically, inadequate food and shelter interfere with the capacity both for learning as well as for work itself. There appears, therefore, to be little rational connection between the objectives, as tentatively framed, and the means adopted in pursuit of those objectives.

393 Moreover, I agree with Bastarache J.'s finding that those means were not minimally impairing in a number of ways: (1) not all of the programs provided participants with a full top-up to the basic level; (2) there were temporal gaps in the availability of the various programs to willing participants; (3) some of the most needy welfare recipients — the illiterate and severely undereducated — could not participate in certain programs; (4) only 30 000 program places were made available in spite of the fact that 85 000 single young adults were on social

assistance at the time. As my colleague points out, this last factor in particular "brings into question the degree to which the distinction in s. 29(*a*) was geared towards improving the [long-term] situation of those under 30, as opposed to simply saving money" (para. 283). Thus, at the minimal impairment stage of the *Oakes* test, there is additional cause for doubting whether the legislated distinction at issue can be properly characterized as being directed at furthering the long-term liberty and dignity of the claimants.

394 This is sufficient, in my view, to establish that the government has not in this case discharged the always heavy burden of justifying a *prima facie* violation of s. 7 under s. 1. I note in passing that it will be a rare case indeed in which the government can successfully claim that the deleterious effects of denying welfare recipients their most basic requirements are proportional to the salutary effects of doing so in contemplation of long-term benefits, for reasons that are largely encompassed by my discussion of rational connection. This is not that rare case. For this reason among others, I find that the violation of the claimants' right to life, liberty and security of the person is not saved by s. 1.

VI. Section 15(1) of the *Charter*

395 Having found a violation of s. 7 of the *Charter*, it is not strictly necessary for me to determine whether the impugned provisions also violate s. 15(1). I am, however, in general agreement with my colleague Bastarache J.'s analysis and conclusions on that issue. As he does, I would find that the impugned provision of the regulations under the *Social Aid Act* infringes s. 15 of the *Charter* and that the infringement is not saved by s. 1. The infringement cannot be saved by s. 1 for substantially the same reasons discussed above in relation to the s. 7 violation.

VII. Section 45 of the Quebec *Charter*

396 I also agree with my colleague Bastarache J. that s. 45 of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, establishes a positive right to a minimal standard of living but that this right cannot be enforced under ss. 52 or 49 in the circumstances of this case. Indeed, s. 45 falls outside the expressly defined ambit of s. 52; it is consequently of no assistance to the appellant. Moreover, since there is no question of wrongful conduct or negligence on the part of the legislature, s. 49 cannot be resorted to either. The right that is

provided for in s. 45, while not enforceable here, stands nevertheless as a strong political and moral benchmark in Quebec society and a reminder of the most fundamental requirements of that province's social compact. In that sense, its symbolic and political force cannot be underestimated.

VIII. Damages

397 Finally, I am in substantial agreement with the analysis of my colleague Bastarache J. with regard to remedy. Were the impugned provision of the Regulation still in force, I would have declared it unconstitutional pursuant to s. 52 of the *Constitution Act, 1982* as it violates the fundamental right to security of the person guaranteed under s. 7 of the *Charter*. I would have also ordered that the declaration of invalidity be suspended for a sufficient period of time to give the government an adequate opportunity to correct the legislation. However, the impugned social assistance regime having been repealed, this point is now moot.

398 The appellant also seeks monetary compensation for herself and for the members of her class. For the reasons invoked by Bastarache J., I too find this case ill-suited for the concomitant application of s. 52 of the *Constitution Act, 1982* and s. 24 of the *Charter*. I wish to note however that the financial impact of an hypothetical award on the province of Quebec would probably be less of a burden than surmised by my colleague. Indeed, the various remedial programs that failed to address the appellant's needs in this case were *Charter* proof until April 1989, protected as they were by a notwithstanding clause in their enabling statute (S.Q. 1984, c. 5, s. 4). This means that the programs' role in the *Charter* violation in this case could only be assessed within a 4-month window, representing the time between the expiry of the notwithstanding clause and the repeal of the impugned legislation.

399 Even though this affects the extent of the violation, it has no impact in my view on the usefulness of the whole of the evidence presented in this case as to the existence of the right and the nature of the infringement. The fact that *An Act to amend the Social Aid Act*, S.Q. 1984, c. 5, and the programs it enacted were shielded from the *Charter* until April 1989 is a matter that goes to the scope or extent of the breach. It does not change the fact that a breach occurred.

IX. Conclusion

400 For these reasons, I would allow the appeal and I would answer the stated constitutional questions as follows:

1. Did s. 29(*a*) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, adopted under the *Social Aid Act*, R.S.Q., c. A-16, infringes. 15(1) of the *Canadian Charter of Rights and Freedoms* on the ground that it established a discriminatory distinction based on age with respect to individuals, capable of working, aged 18 to 30 years?

Yes.

2. If so, is the infringement justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

No.

3. Did s. 29(*a*) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, adopted under the *Social Aid Act*, R.S.Q., c. A-16, infringes. 7 of the *Canadian Charter of Rights and Freedoms* on the ground that it deprived those to whom it applied of their right to security of the person contrary to the principles of fundamental justice?

Yes, the section infringed s. 7 by denying those to whom it applied of their right to security of the person.

4. If so, is the infringement justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

No.

English version of the reasons delivered by

LEBEL J. (dissenting) —

I. Introduction

401 I have read with interest the opinion of my colleague Justice Bastarache. I am in overall agreement with his reasons concerning the application ofs. 15 of the *Canadian Charter of Rights and Freedoms* ("*Canadian Charter*") and I concur in the disposition he proposes. However, while I acknowledge that the appellant was unable to establish a violation of s. 7 of the *Canadian Charter*, I

am unable, with respect, to agree with the interpretation and application he suggests. Finally, in the discussion of s. 45 of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 ("*Quebec Charter*"), I believe that certain unique aspects of the *Quebec Charter*, and the nature of the economic rights that it protects, merit a few additional comments.

II. Section 15 of the *Canadian Charter*

402 It is not disputed in this case that s. 29(*a*) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, establishes a formal distinction between the appellant (and members of her group) and other social aid recipients based on a personal characteristic, namely age. The appeal essentially relates to the third element in the analysis under s. 15 of the *Canadian Charter*, which involves determining whether the distinction in issue is discriminatory. For the reasons given by my colleague Bastarache J., and for the following reasons, I am of the opinion that s. 29(*a*), when taken in isolation or considered in light of all employability programs, discriminates against recipients under 30 years of age.

403 Differential treatment becomes discriminatory when it violates the human dignity and freedom of the individual. This will be the case where the differential treatment reflects a stereotypical application of presumed personal or group characteristics, or where it perpetuates or promotes the view that the individual concerned is less capable or less worthy of respect and recognition as a human being or as a member of Canadian society.

404 It should first be noted that in this case, the distinction was based on a ground expressly enumerated in s. 15(1) of the *Canadian Charter*. In such circumstances, it is much easier to conclude that the distinction violates the innate dignity of the individual, as Iacobucci J. held in *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), [1999] 1 S.C.R. 497. However, when compared to the other enumerated or analogous grounds, age is unique in that a distinction based on age may, in some cases, reflect the needs and abilities of individuals. In *Law*, for example, the Supreme Court upheld a distinction based on age in the Canada Pension Plan (CPP) on the ground that the distinction was not discriminatory. The CPP provided that a person must have reached the age of 35 in order to receive surviving spouse benefits. This Court reached that conclusion because the distinction based on age is justified by

theactual (not stereotypical) capacity of individuals under the age of 35 to support themselves in the long term.

405 In this case, the distinction based on age, unlike the distinction at issue in *Law*, does not reflect either the needs or the abilities of social aid recipients under 30 years of age. The ordinary needs of young people are not so different from the needs of their elders as to justify such a pronounced discrepancy between the two groups' benefits. As well, young people are no more able to find or keep a job during an economic slowdown than are their elders. In fact, young people are the first to feel the impact of an economic crisis on the labour market. Because they have little experience or seniority, they are at the top of the list for termination and lay-off (see the report by Louis Ascah, *La discrimination contre les moins de trente ans à l'aide sociale du Québec: un regard économique* (1988)). Also, because the distinction made by the social aid scheme was justified by the fact that young people are able to survive a period of economic crisis better, I, like Bastarache J., am of the opinion that this distinction perpetuated a stereotypical view of young people's situation on the labour market.

406 My colleague McLachlin C.J. says that the Quebec government was under no illusions as to the ability of young people to keep a job in a period of economic crisis. In her view, the Quebec government knew perfectly well that they would be the first to suffer the negative effects of the difficulties in the economy. This was in fact the reason why the government created the employability programs, which were designed to make up for lack of training or experience. Those programs assisted young people to re-enter the labour market, while counteracting the negative effects on vocational development of prolonged periods out of the productive work force.

407 I am prepared to concede that the Quebec government knew that young people are particularly vulnerable during an economic slowdown. As well, I readily acknowledge that the government sincerely believed that it was helping young people by making the payment of full benefits conditional on participation in an employability program. Nonetheless, the distinction made by the social aid scheme did not reflect the needs of young social assistance recipients under the age of 30. By trying to combat the pull of social assistance, for the "good" of the young people themselves who depended on it, the distinction perpetuated the

stereotypical view that a majority of young social assistance recipients choose to freeload off society permanently and have no desire to get out of that comfortable situation. There is no basis for that vision of young social assistance recipients as "parasites". It has been disproved by numerous experts. For instance, in a 1986 study prepared for the Quebec government's Commission consultative sur le travail (*Les jeunes et le marché du travail* (1986)), Professor Gilles Guérin wrote,*inter alia* (at p. 65):

> [TRANSLATION] An estimated proportion of 91% of young people (counting only those capable of working) perceive their situation on social aid as temporary and have a fierce desire to work, to have a "real" job, to collect a "real" wage, and to acquire socio-economic autonomy. An IQOP study shows that young people value being productive workers, that it is preferable in their eyes to hold a job, even one that does not interest them, than to be unemployed. The myth of the young social assistance recipient who is capable of working and is happy with social assistance is therefore completely false; work is what is most highly valued by the people around them, their friends and family and their neighbours, and by the young people themselves. [Emphasis added.]

408 As well, in *Le plein emploi: pourquoi?* (1983), L. Poulin Simon and D. Bellemare found that where income was equal, a majority of people in Quebec preferred work to unemployment. While the authors made no absolute statements, they came to substantially the same conclusions with respect to those statistics (at p. 66):

> [TRANSLATION] These results add to the doubt there might be as to the strictly utilitarian economic hypothesis that predicts that where income is equal, workers generally prefer not working to working. In our opinion, that hypothesis derives from a medieval view of economic reality, where work was a degrading activity with no intrinsic value; the serfs worked while the lords were content to amuse themselves. In an advanced industrial economy, the reality of work would seem to be quite a different matter.

409 Young social assistance recipients in the 1980s certainly did not latch onto social assistance out of laziness; they were stuck receiving welfare because there were no jobs available. Economists who studied the labour market during that period unanimously recognize the gradual but universal shrinkage in the number of jobs in the economy since 1966 (and especially since 1974) as the primary factor in the meteoric rise in the unemployment rate among young people. For instance, in his report "Le chômage des jeunes au Québec: aggravation et concentration (1966-1982)" (1984), 39 *Relations Industrielles* 419, the economist Pierre Fortin attributed three quarters of the rise in the average

unemployment rate among all young people, from 6 percent to 23 percent, since 1966 to the general deterioration of the economy, together with young people's much greater vulnerability to any slowdown in overall employment prospects. In his view, the extreme sensitivity of the youth unemployment rate to general conditions in the economy confirms that a very large majority of young people want to work and are capable of doing productive work when there are jobs for them. Accordingly, the real solution to the youth unemployment rate, he says, lies in a full employment policy for all workers, and not a simple employment incentive mechanism incorporated as part of social assistance programs.

410 Obviously, it is too easy to pass harsh judgment on the actions of a government after the fact. I certainly do not intend to dispute the appropriateness of offering incentives to work that may legitimately be the subject of a political debate. However, even if the Quebec government could validly encourage young people to work, the approach adopted discriminates between social aid recipients under 30 years of age and those who are 30 years of age and over, for no valid reason, and perpetuates the prejudiced notion that the former tend to be happy being dependent on the state, even though they are better able to make a go of things than their elders during periods of economic slowdown. With due respect for the opinion of the Chief Justice, I do not believe that the only way for the Quebec government to secure participation in those programs was to make the payment of full benefits conditional on participation in an employability program. There is nothing in the evidence that establishes that the people who did participate in the programs would not have participated without a financial incentive, nor is there anything from which that can be assumed. In my view, the Quebec government could have achieved its objective of developing employability just as well without abandoning recipients under the age of 30 to these paltry benefits.

411 In addition to the underlying stereotypes, the social aid scheme has too many other defects that would be sufficient on their own to support a finding that s. 15 of the *Canadian Charter* was violated. My colleague Bastarache J. alluded to, *inter alia*, the restrictions placed on participation in employability programs. I will not repeat his comments, but I would like to add that the programs lasted for a maximum of 12 months. At the end of that time, recipients did not qualify for full benefits. They had to participate in an employability program again (and even several times) in order to avoid the harsh reality of reduced benefits. As well, if they were still unable to find a job, young social assistance recipients, even those who had participated in all the programs offered, would again receive the “small

scale". In my view, once a recipient had participated in a program and made every effort to find a job, the scheme should have provided for payment of benefits equivalent to the benefits paid to recipients 30 years of age and over.

412 In addition to these inconsistencies in the system, the evidence shows that implementation of the programs was delayed by administrative constraints, and some recipients therefore had to wait several months before they were able to take part in an employability program. Louise Bourassa, director of work force and income security programs, in fact acknowledged in her testimony that the Department had received complaints that some recipients were on waiting lists. It appears that between the time someone registered for a program and the time the program started, reduced benefits continued to be paid.

413 All of these defects in the scheme, together with the preconceived ideas that underpinned it, necessarily lead to the conclusion that s. 29(*a*) of the*Regulation respecting social aid* infringed the equality right of recipients under 30 years of age. For the reasons given by Bastarache J., s. 29(*a*) is not saved bys. 1 of the *Canadian Charter*.

III. Section 7 of the *Canadian Charter*

414 Having regard to the foregoing conclusion, I see no point in any further consideration of whether s. 29(*a*) of the *Regulation respecting social aid*violated s. 7 of the *Canadian Charter*. While I agree with Bastarache J.'s conclusion that the appellant failed to establish a violation of s. 7, I would note that I agree with the part of the reasons of the Chief Justice in which she writes that it is not appropriate, at this point, to rule out the possibility that s. 7 might be invoked in circumstances unrelated to the justice system. In the case of s. 7, the process of jurisprudential development is not complete. With respect, I am afraid that an interpretation such as is suggested by Bastarache J. unduly circumscribes the scope of the section, in a manner contrary to the cautious, but open, approach taken in the decisions of this Court on the question. It having been established that s. 7 does not apply, we must now review the arguments made by the appellant concerning the interpretation and application of s. 45 of the *Quebec Charter*.

IV. Section 45 of the *Quebec Charter*

415 The appellant submits that s. 45 of the *Quebec Charter* recognizes the right to an acceptable standard of living, as a substantive right. She cites the dissenting opinion of Robert J.A. in the Court of Appeal (1999 CanLII 13818 (QC CA), [1999] R.J.Q. 1033), in which he found s. 45 to have independent legal effect, based on a difference between the wording of that section and of the other provisions that the *Quebec Charter* contains under the heading of social and economic rights. The respondent submits that s. 45 is no more than a mere policy statement, implementation of which may be ascertained from the relevant legislation. In the words of Baudouin J.A. in the Court of Appeal, the respondent argues that s. 45 does not authorize the courts to review the sufficiency of social measures that the legislature has chosen to adopt, in its political discretion. For the following reasons, I am of the opinion that while s. 45 is not without any binding content, it does not operate to place a duty on the Quebec legislature to guarantee persons in need an acceptable standard of living. That interpretation is supported by the wording and legislative history of s. 45, its position in the *Quebec Charter* and by the interaction between that section and the other provisions of the *Quebec Charter*.

A. *The Wording of Section 45 and its Placement in the Quebec Charter*

416 As Robert J.A. correctly observed, the *Quebec Charter* operates as a fundamental statute in the law of Quebec, and its unique nature is apparent in a variety of ways. First, it may be distinguished from other provincial human rights statutes in that its content goes well beyond the framework of mere prohibitions on discrimination. In addition to the very special importance that it assigns to the right to equality, the *Quebec Charter* protects a large number of other rights, including fundamental rights and freedoms and legal, political, social and economic rights. As well, while the *Canadian Charter* contains a justification clause that may apply to the violation of protected rights, the rights and freedoms guaranteed by the *Quebec Charter* are guaranteed without restriction, other than the restrictions inherent in the rights and freedoms themselves (with the exception, however, of the fundamental rights and freedoms in Chapter I, which may be justifiably limited under s. 9.1). In terms of remedies, the *Quebec Charter* differs from the *Canadian Charter* in that it offers various methods for compensating individuals whose rights are violated in private relationships. A final distinction worth noting is that the *Quebec Charter* is practically the only fundamental legislation in Canada, or even North America, that expressly protects social and economic rights.

417 Pierre Bosset writes that including economic and social rights in a document that solemnly affirms the existence of fundamental rights and freedoms must have some consequence. In his view, the recognition of those rights [TRANSLATION] "makes it necessary to consider the question of the protection of economic and social rights from a qualitatively different perspective, one that is appropriate to a constitutional instrument, and not as a mere branch of administrative law" (P. Bosset, "Les droits économiques et sociaux: parents pauvres de la Charte québécoise?" (1996), 75 *Can. Bar Rev.* 583, at p. 585). However, although the incorporation of social and economic rights into the *Quebec Charter* gives them a new dimension, it still does not make them legally binding. Robert J.A. is also of that opinion. In the case of s. 45 of the *Quebec Charter*, though, he creates an exception. He finds it to be binding, relying on a difference between the wording of s. 45 and the wording of the other provisions in the same chapter. In my view, that exception does not stand up to careful scrutiny of the chapter in question, the provisions of which are as follows:

> CHAPTER IV
>
> ECONOMIC AND SOCIAL RIGHTS
>
> **39.** Every child has a right to the protection, security and attention that his parents or the persons acting in their stead are capable of providing.
>
> **40.** Every person has a right, to the extent and according to the standards provided for by law, to free public education.
>
> **41.** Parents or the persons acting in their stead have a right to require that, in the public educational establishments, their children receive a religious or moral education in conformity with their convictions, within the framework of the curricula provided for by law.
>
> **42.** Parents or the persons acting in their stead have a right to choose private educational establishments for their children, provided such establishments comply with the standards prescribed or approved by virtue of the law.
>
> **43.** Persons belonging to ethnic minorities have a right to maintain and develop their own cultural interests with the other members of their group.
>
> **44.** Every person has a right to information to the extent provided by law.
>
> **45.** Every person in need has a right, for himself and his family, to measures of financial assistance and to social measures provided for by law, susceptible of ensuring such person an acceptable standard of living.

> **46.** Every person who works has a right, in accordance with the law, to fair and reasonable conditions of employment which have proper regard for his health, safety and physical well-being.
> **47.** Husband and wife have, in the marriage, the same rights, obligations and responsibilities.
>
> Together they provide the moral guidance and material support of the family and the education of their common offspring.
>
> **48.** Every aged person and every handicapped person has a right to protection against any form of exploitation.
>
> Such a person also has a right to the protection and security that must be provided to him by his family or the persons acting in their stead. [Emphasis added.]

418 Chapter IV is remarkable for the presence of both intrinsic and extrinsic limitations on the rights created in it. First, six of the ten sections in the chapter contain a reservation (worded differently from one section to another) indicating that the exercise of the rights they protect depends on the enactment of legislation. For instance, to cite a few examples, the right to free public education is guaranteed "to the extent and according to the standards provided for by law", the right of parents to have their children receive religious instruction in conformity with their convictions is guaranteed "within the framework of the curricula provided for by law" and the right to information is guaranteed "to the extent provided by law". As well, all of the rights in the chapter are excluded from the preponderance that s. 52 assigns to the other rights and freedoms guaranteed by the *Quebec Charter*. Accordingly, any interference with any of those rights may not result in a declaration under s. 52 that the legislation in question is of no force and effect. Nonetheless, it is possible, under s. 49, to obtain cessation of any interference with such a right, and compensation for the moral or material prejudice resulting therefrom.

419 In the opinion of Robert J.A., the differences in wording among the sections in Chapter IV are not of merely aesthetic significance. He is of the view that the expression "provided for by law" used in s. 45 to qualify the financial assistance and social measures that the legislature must adopt in order to ensure an acceptable standard of living does not mean the same thing as the other expressions used in the other sections in Chapter IV. While those other expressions, in his view, indicate that the rights are granted only to the extent provided for by law, the expression "provided for by law" refers, rather, to the methods by which the legislature has committed itself to providing the measures to ensure an acceptable

standard of living. That interpretation, he says, is consistent with Article 11(1) of the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, to which s. 45 bears an undeniable resemblance:

> *Article 11*. 1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

420 The apparent similarity between s. 45 and Article 11(1) of the Covenant does not necessarily mean that the Quebec legislature intended to entrench the right to an acceptable standard of living in the *Quebec Charter*. In fact, the wording of s. 45 itself seems to negate that possibility. Section 45 does not guarantee the right to an acceptable standard of living, as Article 11(1) does; rather, it guarantees the right to social measures. In my view, that distinction supports the assertion that s. 45 protects a right of access to social measures for anyone in need. The fact that anyone in need is entitled not to measures to ensure him or her an acceptable standard of living, but to measures susceptible of ensuring him or her that standard of living, is also revealing. It seems to suggest that the legislature did not intend to give the courts the power to review the adequacy of the measures adopted, or to usurp the role of the legislature in that regard.

421 As well, the expression "provided for by law" must be considered in light of the other provisions of Chapter IV that have a direct impact on the financial resources of the state. Those provisions all contain a reservation (worded in different ways from one section to another). Those reservations confirm that the rights are protected only to the extent provided for by law. It would be most surprising if the Quebec legislature had committed itself unconditionally to ensuring an acceptable standard of living for anyone in need at the same time as limiting the exercise of all of the other rights that call for it to make a direct financial investment to what is prescribed by law (M.-J. Longtin and D. Jacoby, "La Charte vue sous l'angle du législateur", in *La nouvelle Charte sur les droits et les libertés de la personne* (1977), 4, at p. 24).

422 The final point is that the interpretation adopted by Robert J.A. does not seem to be supported by the opinions expressed during the parliamentary debates that led to the enactment of the *Quebec Charter*. The Quebec Minister of Justice referred to social and economic rights in the broader framework of a charter that was intended to be a synthesis of certain democratic values accepted in Quebec, Canada and the West, and described the rationale for those provisions as follows (*Journal des débats*, vol. 15, No. 79, November 12, 1974, at p. 2744):

> [TRANSLATION] These rights are of special importance. Some may say that in certain cases they are expressions of good intentions, but I think that the fact that they are recognized in a bill like this one will give them an important place in the context of the democratic values to which I have referred, that is, that a number of these social and economic rights in a way summarize certain things, certain principles, certain values that we hold dear in Quebec. Despite the fact that some of them are subject to the effect of other government legislation, which I certainly do not deny, they nonetheless represent part of our democratic heritage. That is why we have included them in this Charter.

423 It therefore seems obvious that the Quebec legislature did not intend to give the social and economic rights guaranteed by the *Quebec Charter*independent legal effect. As well, there is nothing in the debates to suggest the intention of creating an exception with respect to s. 45.

B. *Case Law Concerning Section 45*

424 The Quebec courts have generally taken the position that s. 45, and all of the rights in Chapter IV of the *Quebec Charter*, were positive rights, the exercise of which depended on the enactment of legislation. In *Lévesque v. Québec (Procureur général)*, 1987 CanLII 964 (QC CA), [1988] R.J.Q. 223, the Court of Appeal held (at p. 226):

> [TRANSLATION] In 1975, in Chapter IV, Social and Economic Rights, the Charter granted all individuals the right to social measures, but because that provision does not prevail over the other laws of Quebec, the right to financial assistance must be determined under the appropriate legislation and regulations, in this case, the Act.

425 As well, in *Lecours v. Québec (Ministère de la Main d'œuvre et de la Sécurité du revenu)*, J.E. 90-638, the Superior Court held that s. 45 of the*Quebec*

Charter did not grant a universal right to social assistance; that right must be provided by law.

426 There is, however, one decision of the Quebec Court of Appeal that is an exception. That judgment, in *Johnson v. Commission des affaires sociales*, [1984] C.A. 61, relied on s. 45 of the *Quebec Charter* in holding that a statutory provision declaring a person who is unemployed because of a labour dispute to be ineligible for social assistance could not be applied to a striker. Johnson and his wife had found themselves without income the day after a strike vote was held. Because he was not a union member, Johnson could not receive strike pay. He then tried to obtain unemployment insurance benefits, but was unsuccessful. As a last resort, he applied for social aid, which he was denied on the ground that s. 8 of the *Social Aid Act*, R.S.Q., c. A-16, excluded persons who had lost their job because of a labour dispute from benefits. He then challenged the validity of s. 8 on the ground that it was contrary to ss. 10 and 45 of the*Quebec Charter*.

427 Bisson J.A., writing for the Court of Appeal, held that s. 8 of the Act was not based on one of the grounds of discrimination listed in s. 10 of the*Quebec Charter* because being unemployed as a result of a labour dispute was not included in the concept of social condition. That did not conclude his analysis, and he went on to declare that s. 8 was of no force and effect as against the appellant on the ground that it was contrary to a number of the principles laid down in the *Quebec Charter* and in the *Social Aid Act* (at p. 70).

> [TRANSLATION] Having found that s. 8 was valid legislation, I am nevertheless compelled to acknowledge that, as happens in the case of some legislation, a provision that is perfectly legal may, inadvertently, produce effects that the legislature did not anticipate.
>
> That is the case with s. 8 as it relates to the appellants. The effect of that statutory provision, which was intended to prevent strikes being funded by social aid, is that because of the special situation of the appellants, s. 45 of the Charter must be applied.

428 It is difficult to view *Johnson* as an express recognition of the binding effect of s. 45. For one thing, it is obvious that the Court of Appeal was influenced by the exceptional circumstances in the case before it: a worker who had been on probation had been unable to participate in the strike vote and was not entitled to

union benefits. The court was dealing with legislation that was perfectly valid but that produced effects the legislature had not anticipated. As Pierre Bosset, *supra*, points out, that case is in fact an atypical case, in which the basis for the judgment is extremely uncertain (at p. 593):

> [TRANSLATION] When restricted to the applicant's particular case, the declaration that the law was of no force and effect is perhaps not very dissimilar to a judgment in equity. However, we may also regard it as an implied application of the rule of interpretation stated in s. 53 of the*Charter*, which provides that if any doubt arises in the interpretation of a provision of the Act, it shall be resolved in keeping with the intent of the*Charter*.

429 Accordingly, other than in exceptional circumstances, it does not seem that s. 45 is capable of having independent legal effect. Robert J.A. thought that this interpretation should be rejected on the ground that it reduced s. 45 to a mere obligation that [TRANSLATION] "theoretically . . . could be no more than symbolic and purely optional" (p. 1100). His opinion, however, was not based on a proper assessment of the nature of the obligational content of s. 45. The right of access to measures of financial assistance and social measures without discrimination would not be guaranteed by the *Quebec Charter* were it not for s. 45, the reason for this being that s. 10 of the *Quebec Charter* does not create an independent right to equality. In the first decision on this point, *Commission des droits de la personne du Québec v. Commission scolaire de St-Jean-sur-Richelieu*, 1991 CanLII 1358 (QC TDP), [1991] R.J.Q. 3003, aff'd1994 CanLII 5706 (QC CA), [1994] R.J.Q. 1227 (C.A.), the Human Rights Tribunal explained the complex interaction between the right to equality and economic and social rights, in that case the right to free public education, as follows (at p. 3037):

> [TRANSLATION] [W]hile the Charter allows for the exercise of the right to free public education to be affected by various statutory restrictions, and even for it to be subject to certain exceptions (such as charging tuition fees at the college and university level, for example), it prohibits limitations that have an effect on the exercise of that right that is discriminatory on one of the grounds enumerated in s. 10.

430 The symbiosis between s. 10 and the other rights and freedoms is a direct result of the wording of s. 10, which creates not an independent right to equality but a method of particularizing the various rights and freedoms recognized (*Desroches v. Commission des droits de la personne du Québec*,1997 CanLII 10586 (QC CA), [1997] R.J.Q. 1540 (C.A.), at p. 1547). Section 10 sets out the

right to equality, but only in the recognition and exercise of the rights and freedoms guaranteed. Accordingly, a person may not base an action for a remedy on the s. 10 right to equality as an independent right. However, a person may join s. 10 with another right or freedom guaranteed by the *Quebec Charter* in order to obtain compensation for a discriminatory distinction in the determination of the terms and conditions on which that right or freedom may be exercised (P. Carignan, "L'égalité dans le droit: une méthode d'approche appliquée à l'article 10 de la Charte des droits et libertés de la personne" in *De la Charte québécoise des droits et libertés: origine, nature et défis* (1989), 101, at pp. 136-37).

431 While it is true that the existence of that right of access is itself subject to the enactment of legislation, there is opinion that suggests that a minimum duty to legislate could be inferred from the inclusion of economic and social rights in the *Quebec Charter*. That idea is argued by Pierre Bosset, *supra*, at p. 602, who sees it as an alternative to the refusal by the Quebec courts to recognize the rights set out in Chapter IV of the *Quebec Charter* as having binding effect:

> [TRANSLATION] Unless we are to think that the legislature spoke for no purpose when it included economic and social rights in the *Charter*, we must take seriously the hypothesis of minimum obligational content, of a "hard core" of rights that may be asserted against the state, despite the fact that the provisions in question do not, properly speaking, prevail over legislation. The idea of a hard core, which is more in keeping with the spirit of the *Charter* and the way that we normally think about rights and obligations than is the idea of a "purely optional" obligation, involves, at a minimum, the creation of a legal framework that favours the attainment of social and economic rights. Accordingly, failure to legislate — particularly where the way in which the right is worded expressly refers to the law — would be inconsistent with the obligations imposed by the *Charter*. Legislating solely as a matter of form, in legislation devoid of substance, would be no less problematic an idea.

432 However, that interpretation would not give the courts the power to review the adequacy of the measures adopted. Nonetheless, the task it would assign them might be incompatible with their function, which is to determine what types of measures are likely to allow for the exercise of rights.

433 In conclusion, the wording of s. 45 and its placement in the *Quebec Charter* confirm that it does not confer an independent right to an acceptable

standard of living for anyone in need. That interpretation is the one most consistent with the intention of the Quebec legislature. Although it might be desirable, entrenching economic and social rights in a charter of rights is not essential to recognition of those rights in positive law. Social law had in fact developed in Quebec well before the enactment of the *Quebec Charter*.

V. Conclusion

434 For these reasons, the appeal should be allowed, in accordance with the disposition proposed by my colleague Bastarache J.

Appeal dismissed, L'HEUREUX-DUBÉ, BASTARACHE, ARBOUR *and* LEBEL JJ. *dissenting.*

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