Gosselin v. Québec (Attorney General)

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Authors' Note

Some of the authors of this judgment have a history with *Gosselin v. Quebec (Attorney General)* that pre-dates the creation of the Women's Court of Canada. Rachel Cox and Gwen Brodsky were co-counsel to the National Association of Women and the Law (NAWL) in its 2001 intervention in *Gosselin* at the Supreme Court of Canada. Shelagh Day was an advisor to NAWL's legal team in that litigation. Kate Stephenson was not directly involved in the *Gosselin* case, but her work as a leading anti-poverty litigator makes her intimately familiar with the reasoning and outcome. Each of the authors has been affected by the Supreme Court of Canada's decision. Rachel Cox, who lived in Montréal in the 1980s when the Social Aid Regulation reduced young people's welfare benefit by two-thirds, felt keenly the gulf between the reality of the time and the Supreme Court of Canada's characterization of the scheme as "an affirmation of [young people's] potential" and dignity.

For those living in Québec in the 1980s, the reason for the reduced rate was clear: to save the government money. Even if people disagreed about whether that was right or wrong, no one believed at the time that the government had designed the scheme in a sincere effort to help young people on welfare. There was a recession and somebody had to pay. Simply put, the court case was about whether or not it was legal for the government to make already very poor welfare recipients pay so much of the cost. As for the workfare programs, once the government decided that it could not afford to keep its electoral promise to do away with the reduced rate, the programs were just a guilty afterthought. Like the scarce life boats on the Titanic that were appropriated by the wealthier passengers, the workfare programs saved some of the fittest, most functional, and most employable young welfare recipients from total destitution, leaving the majority to fend for themselves.

In any hearing before the courts, a particular situation, such as Louise Gosselin's, is described, usually years after the fact, through testimony and exhibits and other documentation. Choices are made. Some aspects of the situation are described in testimony or written and filed in evidence; others are not. The case takes on a life of its own. The judge chooses which of the multitude of facts that made it into evidence to report in his

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or her decision. This decision then becomes the official version of what happened. Inevitably, the decision distills the facts, crystallizing some while others fade away. The Supreme Court of Canada decision has become the official version of Louise Gosselin's story. However, this official version was constructed through a long and convoluted judicial process that started in the gritty streets of Montreal and finished in the polished marble halls of the Supreme Court of Canada in Ottawa. It seemed important to us to tell the story differently.

It also seemed important to construct a legal argument that is more caring, more feminist, and—we claim—more authentically Canadian than the one issued by the majority of the Supreme Court of Canada. The majority's decision alienated us from an institution we care about, and the apparent indifference of some members of the Court to the unnecessary suffering of young women and men living in poverty struck us as being in conflict with central Canadian and Québec values.

At the 2005 inaugural meeting of the Women's Court of Canada at Jackson's Point in Ontario, in the company of women who think hard and care deeply about equality jurisprudence and about the rights of women and men who are disadvantaged, we concluded that if the fashionable concept of constitutional dialogue is to mean something lively and rich, its participants must be expanded beyond courts and governments to include the groups who are the intended beneficiaries of equality rights. We were reminded that the Supreme Court of Canada judges, while being very important because of the status and authority of the institution they serve, are not the only decision makers that matter. The world outside the Court is also made up of decision makers whose exercise of judgment, and ongoing participation in constructive and engaged criticism of the Court, is crucial to the integrity and vitality of constitutional jurisprudence.

We decided to participate in the Women's Court's reconsideration of *Gosselin* because we believe that sections 15 and 7 of the *Canadian Charter of Rights and Freedoms* and section 45 of the Québec *Charter of Human Rights and Freedoms* are fully capable of addressing poverty issues and that the reluctance of courts in Canada to interpret them in this way reflects what Louise Arbour has called "judicial timidity."

We wrote the Women's Court judgment to show that, even on a narrow understanding of equality rights that is preoccupied with the evil of invidious stereotypes, the withholding of welfare benefits from young women and men by the government of Québec was discriminatory. The reduced rate rested on a stereotype of young people as freeloaders—unwilling to seek education or job training unless coerced. However, although we believe that Louise Gosselin's claim should have succeeded based on a version of section 15 that is grounded in an anti-stereotyping principle, so blatant is the negative

stereotyping in this case, and so shocking is the majority's refusal to acknowledge the problem, we also felt compelled to go beyond an analysis based on stereotyping. In our view, a substantive reading of section 15 reveals that governments in Canada have a positive obligation to provide adequate social assistance to persons in need because social assistance is an equality-constituting benefit.

The implications of our analysis are far-reaching and perhaps controversial. We believe that section 15 would be violated if the Québec legislature had chosen to reduce the social assistance of *all* recipients to less than a subsistence rate, if it had eliminated social assistance entirely, or if it had decided to subject some recipients to a reduced rate based on an entirely arbitrary, though perhaps not stereotypical, classification.

A robust exploration of the idea that section 15 has an irreducible core has been rendered necessary by the propensity of courts to fail to perceive the operation of stereotypical thinking when it is systemic and applied to society's most disadvantaged groups and by the license that governments believe they have to erode social programs and to respond to successful equality rights challenges by equalizing downwards. Vulnerable Canadians need the guardians of their section 15 equality rights to tell governments that there are some benefits and protections that are so essential to the inherent equality of the person that there is a constitutional obligation on governments to provide them and to ensure their adequacy. A subsistence income adequate to ensure access to food, clothing, and housing is such a benefit.

Similarly, in our view, sections 7 of the *Charter* and 45 of the Québec *Charter* deserve serious attention from the Court that they did not receive. We do not believe that section 7 can be read merely as a negative right. It creates a positive obligation on governments to provide protection against deprivations of life and security of the person that are caused by extreme poverty. Section 45 of the Québec *Charter* goes farther in recognizing that the right to food, clothing, and housing underpins the effective exercise and enjoyment of all other fundamental rights and freedoms than any other human rights legislation in Canada. In *Gosselin*, the Supreme Court of Canada recognized that section 45 requires the Québec government to provide social assistance measures but concluded that the adequacy of the particular measures adopted is beyond the reach of the courts, confirming but, at the same time, seriously limiting the justiciability of the rights granted by section 45.

It was important to us to resist the tendency of other Canadian courts to give rights a ''thin and impoverished'' reading when social programs and economic benefits are at stake. The commitment to positive obligations is not a ''stretch'' under the Canadian and Québec *Charters*, as Canadian courts tend

to suggest. On the contrary, the exclusion of such obligations is a stretch, requiring reasoning that is not consistent with the interests that appear to be clearly protected by the plain words of the documents and by the values underlying them[1].

1. A French translation of the W.C.C. decision in *Gosselin*, including this "Author's note" begins at p. 255