Positive that the Government is obligated to support you? Think again

While financial struggles are not unique to times of emergency, the COVID-19 pandemic has thrown many Canadians into dire straits, such as losing their jobs, being unable to support their families, or even pay their rent.[1] Since mid-March, the Federal Government has been providing financial support to Canadians out of work because of COVID-19.[2]

The events of the COVID-19 pandemic have reignited discussions of what the government should do to support Canadians in general. For example, the British Columbia Government has been discussing the idea of implementing a universal basic income to support BC residents even once the pandemic is over.[3]

But not all provincial governments have indicated they will follow BC's lead, and one is left to wonder what will happen to the people relying on the Federal Government's support once the pandemic is over. What about people who were unable to work for reasons unrelated to COVID-19 who were not eligible for the emergency benefit?[4] When the pandemic ends and the cheques dry up, Canadians may be wondering: "Is there a constitutional right to be provided with a basic income?"

Current interpretations by the courts of the *Charter of Rights and Freedoms* (*Charter*) suggest that the government is *not* required to provide a basic standard of living.

The *Charter* does not currently include economic protection

The Supreme Court of Canada (SCC) has stated that the right to a basic standard of living is not included in *Charter*.[5] The Court ruled in a Quebec case called *Gosselin*, that the government is not required to provide people with financial support to access their section 7 *Charter* rights to "life, liberty, and security of the person."[6] The decision in *Gosselin* still stands today, which means the government has no legal obligation to provide economic support to those in need. However, there are some who believe the *Charter* should be used to tell the government what it must provide to Canadians – or in other words, that the government should be obligated to provide economic "positive rights" to Canadians. Positive rights are rights that the government has to provide to Canadians, as opposed to negative rights which require the government not to deprive Canadians of their rights. For example, section 7 of the *Charter* says that Canadians have a right not to be deprived of life, liberty, or security of the person. This means the government cannot do anything to withhold those rights from Canadians (unless it is justifiable).

The courts have been unwilling to impose obligations on governments

Some argue that the courts should not impose positive financial obligations on governments because it is inappropriate for courts to make decisions on complex public policy issues, such as how the government should use public funds[7] –that specific rights to housing, education, and minimal financial aid are complex issues better left to elected members of government.[8] The Supreme Court itself has said that the courts cannot decide how to use public funds, unless they have been granted authority to do so in legislation, or if a constitutional challenge is launched.[9]

Another argument against having the courts interpret section 7 of the *Charter* to impose financial obligations on the government, is that the wording of section 7 does not explicitly include positive rights. This is unlike section 23 of the *Charter*, which explicitly imposes an obligation on the government to provide education opportunities for minority language groups.[10] Section 7 just references the right to "life, liberty, and security of the person".[11] There is nothing in the wording of the section that implies the government must positively DO something. The courts are left to interpret what those words mean.

Interestingly, one of the justices in the *Gosselin* case, Madame Justice Arbour, disagreed with the majority of the other justices in the case, and suggested that positive rights are an inherent part of the *Charter*. She provided some examples of positive rights specified in the *Charter,* such as the right to vote, the right to a trial within a reasonable time, and the right to be presumed innocent until proven guilty. [12] She stated that section 7 should be interpreted to include positive rights.[13] The proper approach to interpreting *Charter* rights is a "purposive" approach, where the fullest protection of the *Charter* is given to people by the courts.[14] According to Justice Arbour, interpreting section 7 in a narrow way, as the Court did in *Gosselin*, does not expand or provide the fullest possible protection of rights.[15]

Although the decision in the *Gosselin* case is that section 7 of the *Charter* does not impose a positive obligation on the government to provide a basic income to Canadians, this does not mean that the Court's position cannot change over time. The Canadian *Constitution* has been referred to as a living tree, where interpretation can evolve over time to reflect the "… realities of modern life."[16] The way the words of the *Charter* are interpreted can change depending on the context and the facts in a future constitutional challenge. A different fact situation may arise that encourages the Court to consider imposing an obligation on the government to provide a basic income to Canadians. Furthermore, the fact that there are some judges and legal scholars who have disagreed with the Court's decision in the *Gosselin* case, opens the door to the possibility of different perspectives being considered moving forward.

SCC interpretations of positive and negative rights - critiques

Some scholars argue against the distinction between positive and negative rights relied on by the courts in cases such as *Gosselin*.[17] It is suggested that using the positive/negative rights distinction as the basis to dismiss economic rights claims, represents a fundamental failure of constitutionalism.[18] However, it is still relied on by Canadian courts when they refuse to remedy violations to the rights to health, housing, social assistance, and other

socio-economic rights, rights which have been called fundamental to the guarantee of the right to life, liberty, and security of the person.[19]

The distinction between positive and negative rights has been described as the idea that civil and political rights are separate from economic rights. This extends to the narrow idea that the only way for governments to respect these rights requires them to either (a) not infringe on individual's civil or political rights (negative obligation), or (b) provide services, money, or other benefits to ensure that economic rights can be accessed (positive obligation).[20] The idea that civil rights might connect to economic rights does not apply under this distinction.

Further, the courts cannot force the government to provide a basic income because it involves complex social policy decisions that should be left to the elected governments to deal with.[21] Viewing economic rights as social policy issues, as opposed to fundamental human rights, allows governments to deal with them without interference from the courts or the *Charter*.[22] Therefore, if a government decides not to implement economic assistance programs, the courts are not likely to intervene.

The reliance on the positive/negative distinction has led to the pattern of Canadian courts recognizing and enforcing economic rights in a limited way.[23]

Economic rights have been set out in the *Universal Declaration of Human Rights* and the *International Covenant on Economic, Social and Cultural Rights*, both of which Canada is a signatory to.[24] Some of the rights set out in the *Universal Declaration* recognize individual economic rights as being connected to basic human rights.[25] For example, article 25(1) states: "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." This runs counter to how the Supreme Court of Canada has interpreted section 7 of the *Charter*.

Conclusion

While section 7 of the *Charter*, as currently interpreted, does not oblige the government to provide a basic income to Canadians, this could change. The *Constitution* is a living tree and international sources such as the *Universal Declaration of Human Rights* and the *International Covenant on Economic, Social and Cultural Rights* may provide fruit to argue for an interpretation of section 7 that includes economic rights, and a positive obligation on the government for a minimum basic income. Just because the government is not currently obligated to provide this type of economic support, does not mean that it cannot choose to do so in the future. However, a government's decision to provide support is not the same thing as Canadian's having a right to said support. Just as the events of the COVID-19 pandemic have reignited discussions about providing basic economic support to Canadians, they could also rejuvenate legal discussions over whether interpretations of the *Charter* should expand to include universal basic income under section 7.

[1] Jacob Lorinc, "Students face sudden unemployment as pandemic freezes job market", *The Star* (8 April, 2020), online: <https://www.thestar.com/business/2020/04/07/students-face-sudden-unemployment-as-pandemic-freezes-job-market.html>; Postmedia News, "36% of Canadians were struggling financially before COVID-19: Report", *Toronto Sun* (5 May, 2020), online: <https://torontosun.com/business/money-news/36-of-canadians-were-struggling-financially-before-covid-19-lockdowns-report>; Jane Gerster, "3 in 10 Canadians couldn't pay bills if they lost job due to coronavirus, per Ipsos survey", *Global News* (12 April, 2020), online: <https://globalnews.ca/news/6794246/coronavirus-canadian-savings/>.

[2] Government of Canada, *Questions and Answers on the Canada Emergency Response Benefit* (Ottawa: Government of Canada, 2020) <https://www.canada.ca/en/services/benefits/ei/cerb-application/questions.html> [CERB FAQ].

[3] Rob Shaw, "B.C. explores universal basic income for post-pandemic world" (13 May, 2020), online: <https://www.healthing.ca/news/b-c-explores-universal-basic-income-for-post-pandemic-world> at para 4.

[4] CERB FAQ, *supra* note 2.

[5] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (UK), c 11 .

[6] *Ibid* s 7; *Gosselin v Quebec (Attorney General)*, 2002 SCC 84 .

[7] Lawrence David, "A Principled Approach to the Positive/Negative Rights Debate in Canadian Constitutional Adjudication" (2014) 23:1 Const Forum Const 41 at 41 [David].

[8] *Ibid* at 42.

[9] *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at para 5; cited in *Ibid* at 41.

[10] David, *supra* note 7 at 42; *Charter*, *supra* note 5 s23.

[11] *Charter*, *supra* note 5 s7.

[12] *Gosselin*, *supra* note 6 at para 320; *Charter*, *supra* note 5 s3, 11(*b*), 11(*d*).

[13] *Gosselin*, *supra* note 6 at para 344.

[14] *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at p 344, 18 DLR (4th) 321.

[15] *Gosselin*, *supra* note 6 at para 344.

[16] *Reference re Same-Sex Marriage*, 2004 SCC 79 at para 22.

[17] *Gosselin*, *supra* note 6 at para 81-83.

[18] Martha Jackman, "*Charter* Remedies for Socio-economic Rights Violations: Sleeping Under a Box?", in Robert J Sharpe & Kent Roach, eds, *Taking Remedies Seriously* (Montreal: Canadian Institute for the Administration of Justice, 2010) 279-301 at 283 [Jackman].

[19] *Ibid* at 281.

[20] *Ibid* at 284.

[21] *Ibid*.

[22] *Ibid*.

[23] Jackman notes that of the more than 200 cases contained in the 2008 report by the International Commission of Jurists, *Eldridge* was the only case that was decided in favour of imposing an obligation on the government; *Ibid* at 282; see also *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, 151 DLR (4th) 577.

[24] Jackman, *supra* note 18 at 282; see also *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 ; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966 (entered into force 3 January 1976).

[25] Also see: Article 22 of the *Universal Declaration* states that, "[e]veryone, as a member of society, has the right to social security and is entitled to its realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."*Universal Declaration*, *supra* note 24 article 22, 25(1).