Section 7 *Charter* Protection against Retrogressive Socio-Economic Measures: A Commentary on *Canadian Doctors for Refugee Care v Canada (Attorney General)*

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Introduction

Section 7 of the *Canadian Charter of Rights and Freedoms* guarantees everyone's "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."[1] Whether this provision merely entrenches a negative right to be free from state interference, or if it also imposes a positive obligation on governments to assure a level of socio-economic necessities in support of life, liberty, and security of the person remains a point of contention among jurists. In *Gosselin v Quebec (Attorney General)*, the Supreme Court of Canada left the door open for section 7 of the *Charter* to one day be interpreted as giving rise to positive socio-economic duties,[2] holding that the question "is not whether s. 7 has ever been—or will ever be—recognized as creating positive rights" but "whether the present circumstances warrant [such] a novel application of s. 7."[3]

Since *Gosselin*, repeated attempts have been made to turn the possibility of positive section 7 rights a reality. However, to date, no Canadian courts have recognized positive socio-economic rights under section 7, at least not expressly. The closest that the Supreme Court of Canada has come to imposing a state obligation to provide a socio-economic good is in *Canada (Attorney General) v PHS Community Society*.[4] This case concerned the constitutionality of the federal health minister's refusal to renew an exemption required by a safe injection facility to operate without contravening the criminal prohibition against possession and trafficking of controlled substances. As the Court ultimately ordered the minister to grant an exemption to the safe injection site, some commentators have characterized the *PHS* decision as "suggestive of

[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[2] 2002 SCC 84 at paras 80–82 [*Gosselin*].
[3] *Ibid* at para 82.
[4] 2011 SCC 44 [*PHS*].

positive health rights."[5] Be that as it may, the Court in *PHS* never considered itself to be breaking new legal grounds, and it consistently referred to the health minister's impugned decision as a government action, as opposed to inaction, which implied a negative rights approach.

Without a clear precedent from the Supreme Court of Canada, lower courts in Canada have been reluctant to interpret section 7 as inclusive of positive socio-economic rights. As much as possible, they have avoided engaging section 7 arguments that are grounded in positive rights, preferring to consider the constitutional question at issue through a negative rights lens.[6] When they do confront positive rights claims, they are often hung up on the lack of precedent, instead of heeding the Supreme Court's dictum in *Gosselin* that positive section 7 rights may be recognized if the circumstances in the case at bar warrant it. For example, in *Flora v Ontario Health Insurance Plan*, the Ontario Court of Appeal dismissed a section 7 claim for a positive right to life-saving medical treatments.[7] Despite explicitly referencing *Gosselin*, the appellate court concluded that "the existing jurisprudence [did] not permit [it] to interpret s. 7 as imposing a constitutional obligation on the [government]."[8] Such judicial reticence has at times even prevented *Charter* claims for positive section 7 rights from being heard on their merits. In *Tanudjaja v Canada (Attorney General)*, a majority of the Ontario Court of Appeal struck a *Charter* challenge of the government's failure to reduce, and eventually end, homelessness for being non-justiciable.[9] Among other things, the majority judges ruled that it was "a doubtful proposition" for the litigants to assert that "s. 7 confers a general free-standing right to adequate housing."[10]

In hope of nudging the case law forward, legal writers have proffered a number of "special circumstances," which, according to the majority in *Gosselin*, would serve as a condition precedent for courts to impose a positive duty on governments to secure individuals' section 7 *Charter* rights.[11] For instance, Alison Latimer has argued in favour of recognizing positive section 7 rights for children, given the inadequacy of negative rights in accommodating

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[5] See Matthew Rottier Voell, "*PHS Community Services Society v Canada (Attorney Genera)*: Positive Health Rights, Health Care Policy, and Section 7 of the *Charter*" (2011) 31 Windsor Review of Legal and Social Issues 41 at 55–56.
[6] See e.g. *Victoria (City) v Adams*, 2009 BCCA 563.
[7] 2008 ONCA 538 [*Flora*].
[8] *Ibid* at para 109.
[9] 2014 ONCA 852.
[10] *Ibid* at para 30.
[11] *Gosselin*, *supra* note 2 at para 83.

their fledgling autonomy and in safeguarding their capacity for growth.[12] Vanessa MacDonnell, on the other hand, has postulated a state obligation under section 7 to protect individuals from a third party's deprivation of their life, liberty, and security interests.[13] Offering still another perspective, Michael Da Silva suggests the willingness of Canadian courts to accept positive section 7 rights will depend in part on their being presented with persuasive factual record as well as transnational and academic evidence of the viability of constitutionalizing positive socio-economic rights.[14]

The present article adds to this body of literature by arguing that Canadian courts should recognize positive rights under section 7, at least when the challenged government measure curtails existing socio-economic benefits or protection and thereby threatens individuals' lives, liberty, or security of the person. I will make my case by reflecting on the Federal Court's ruling in *Canadian Doctors for Refugee Care v Canada (Attorney General)*, which concerned the legality of the federal government's decision in 2012 to cut the health-care benefits of refugees and refugee claimants.[15] I argue that recognizing positive section 7 rights in situations of policy backsliding aligns with Canada's obligation under international law to progressively realize socio-economic rights and to justify retrogressive measures. Moreover, positive section 7 claims of this sort generally do not raise the same institutional concerns that tend to be associated with claims for free-standing positive state duties in the absence of any prior state action. This makes their justiciability especially compelling.

In the process of providing a partial answer to the unsettled question of when section 7 can be interpreted to encompass positive socio-economic rights, this article also pays homage to two strands of Professor Martha Jackman's distinguished scholarship. First, by choosing *Canadian Doctors* as the point of reference for my analysis, this article draws inspiration from Jackman's long-standing advocacy for a strong, publicly funded health-care system that is

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[12] Alison Latimer, "A Positive Future for Section 7?: Children and Charter Change" (2014) 67 Supreme Court Law Review 537.
[13] Vanessa MacDonnell, "The Protective Function and Section 7 of the *Canadian Charter of Rights and Freedoms*" (2012) 17:1 Review of Constitutional Studies 53.
[14] Michael Da Silva, "Positive Charter Rights: When Can We Open the 'Door?'" (2021) 58:3 Osgoode Hall Law Journal 669. But see Martha Jackman, "One Step Forward and Two Steps Back: Poverty, the *Charter* and the Legacy of *Gosselin* (2019) 39 National Journal of Constitutional Law 85 [Jackman, "Legacy of Gosselin"], for a different take on the majority of the Supreme Court Canada's ruling concerning the evidentiary record in *Gosselin*. According to Jackman, the majority judges' dismissal of Louise Gosselin's evidence as insufficient reflected their bias towards people living in poverty.
[15] 2014 FC 651 [*Canadian Doctors*].

accessible to marginalized groups, including newcomers to Canada.[16] For her, this serves as a necessary counterbalance to section 7 *Charter* challenges that rely on negative rights claims to undo legislation designed to maintain the spirits of equity and solidarity within Canada's public health-care system (known as "Medicare"), such as the ban on private health insurance. As she once wrote, "instead of ceding the *Charter* to [people] pursuing *Charter* litigation as a means of dismantling the single-payer system, those who believe in [M]edicare, and want to make it better, must call on governments and the courts alike to interpret the *Charter* in a way that reflects and reinforces the systemic equality and other human rights objectives of the single-payer system."[17] This article answers Jackman's call, with a particular focus on advancing the right to health care for newcomers, many of whom cannot afford to purchase health care privately.[18]

Additionally, my proposed expansion of government duties under section 7 echoes Jackman's push for rigorous *Charter* review to function as a health-care accountability mechanism in Canada. As she sees it, the current interpretation of section 7 contributes to a negative understanding of the right to health care, which emphasizes the need for governments to refrain from interfering with people's health-care access but imposes virtually no obligation on governments to facilitate such access. She maintains that this judicial stance accords too much deference to policy-makers regarding whom and which goods and services should be covered under Medicare and is therefore "out of touch with Canadians' understanding of the social significance of the [M]edicare system and their conception of health care as a fundamental right."[19] In her view, judges should instead embrace *Charter* review as an avenue for assessing the validity of the government's health-care decision-making. My identification in this article of

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[16] Martha Jackman was the co-counsel for the Charter Committee on Poverty Issues in *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624 (a case concerning public funding of medical interpretation services for deaf patients) [*Eldridge*]; co-counsel for the Women's Legal Education and Action Fund in *Irshad (Litigation Guardian of) v Ontario (Ministry of Health)* (2001), 55 OR (3d) 43 (a *Charter* challenge of Ontario's restriction on newcomers' health-care entitlement); and counsel for the Charter Committee on Poverty Issues and the Canadian Health Coalition in *Chaoulli v Quebec (AG)*, 2005 SCC 35 (a legal challenge to Quebec's ban on private health insurance) [*Chaoulli*]; among others.

[17] Martha Jackman, "*Chaoulli* to *Cambie*: Charter Challenges to the Regulation of Private Care" in Colleen M Flood & Bryan Thomas, eds, *Is Two-Tier Health Care the Future?* (Ottawa: University of Ottawa Press, 2020) 37 at 68.

[18] The poverty rate of newcomers is higher than that of the Canadian born (9.1 percent versus 6.6 percent in 2020). The risk of experiencing poverty is especially high among refugees and recent immigrants. See André Bernard & Xuelin Zhang, "Census in Brief: Disaggregated Trends in Poverty from the 2021 Census of Population", *Statistics Canada* (9 November 2022) <www12.statcan.gc.ca/census-recensement/2021/as-sa/98-200-X/2021009/98-200-x2021009-eng.cfm>.

[19] Martha Jackman, "Charter Review as a Health Care Accountability Mechanism in Canada" (2010) 18 Health Law Journal 1 at 29.

one instance where positive socio-economic rights ought to be recognized under section 7, which in turn requires governments to justify any failure in discharging their corresponding duties, dovetails with Jackman's call for closer judicial scrutiny of health-care policies in light of *Charter* principles.

The* Canadian Doctors *Decision

Policy Changes Leading Up to Canadian Doctors

Since 1995, individuals claiming refugee protection in Canada have accessed publicly funded health care through the Interim Federal Health Program (IFHP).[20] The establishment of the IFHP was seen as being "in the public interest" and necessitated by humanitarian considerations.[21] Until June 2012, all refugee claimants enjoyed both basic and supplemental coverage under the program from the moment that their refugee claim was found eligible to be referred to the Immigration and Refugee Board for determination to either shortly after their recognition as a protected person or, in the event of an unsuccessful claim, their scheduled removal from Canada.[22] Basic coverage under the IFHP consisted of roughly the same basket of medically required hospital, physician, nursing, laboratory, diagnostic, and ambulance services that are covered by Medicare for Canada's general population. Supplemental coverage furnished refugee claimants with additional health-care goods and services, akin to those received by low-income persons under provincial social assistance programs, including essential prescription medications, certain medical devices, limited vision and dental care, home care, long-term care, and services provided by some allied health professionals. Newly arrived refugees who were

[20] For a brief history of refugees' and refugee claimants' health-care entitlement in Canada, including their inclusion in the Interim Federal Health Program (IFHP), see YY Brandon Chen, "Canada's Refugee Health-Care System and Its Humanitarian Undertow" in Christina R Clark-Kazak, ed, *Forced Migration in/to Canada: From Colonization to Refugee Resettlement* (Montreal and Kingston: McGill-Queen's University Press, 2024) 334 [Chen, "Canada's Refugee Health-Care System].

[21] *Toussaint v Canada (AG)*, 2010 FC 810 at para 44 (the IFHP was created by the federal government pursuant to the authority found in Order in Council PC 1957-11/848, an authority to be exercised "only when circumstances render it the best course of action in the public interest, and only when humane interests more or less obligate the [federal government] to accept the responsibility").

[22] Chen, "Canada's Refugee Health-Care System", *supra* note 20.

resettled to Canada from abroad were also granted this supplemental coverage for up to two years in order to temporarily augment their coverage under Medicare.[23]

In April 2012, without any prior consultation with the affected communities or service providers, the federal government announced significant cuts to the IFHP, which took effect two months later.[24] The immigration minister at the time explained the government's rationale in a news release:

> [W]e do not want to ask Canadians to pay for benefits for protected persons and refugee claimants that are more generous than what they are entitled to themselves. … With this reform, we are also taking away an incentive from people who may be considering filing an unfounded refugee claim in Canada. … These reforms allow us to protect public health and safety, ensure that tax dollars are spent wisely and defend the integrity of our immigration system all at the same time.[25]

Featured prominently in the minister's remarks was a stereotype that painted refugee claimants as "bogus" and "queue jumpers" in contrast to refugees who, supposedly, were waiting patiently abroad for their turn to be resettled to Canada.[26] The same anti-fraud imperative had given rise to a number of contemporaneous legislative changes that made applying for refugee protection in Canada more difficult.[27]

Reflecting the government's rhetoric, under the revised IFHP, only refugees who received governmental resettlement assistance and victims of human trafficking maintained pre-existing health-care coverage, which was rebranded as "expanded health care coverage."[28] All other beneficiaries under the former IFHP had their health-care entitlement reduced or even eliminated. For most, this health-care coverage was limited to services deemed urgent or essential. Preventative care and medications were no longer covered unless they were for

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[23] *Ibid.*
[24] Citizenship and Immigration Canada, News Release, "Reform of the Interim Federal Health Program Ensures Fairness, Protects Public Health and Safety" (25 April 2012).
[25] *Ibid.*
[26] Johanna Reynolds & Jennifer Hyndman, "Shifting Grounds of Asylum in Canadian Public Discourse and Policy" in Thy Phu & Vinh Nguyen, eds, *Refugee States: Critical Refugee Studies in Canada* (Toronto: University of Toronto Press, 2021) 23 at 24.
[27] *Ibid.*
[28] *Orders Respecting the Interim Federal Health Program, 2012*, SI/2012-26, s 6.1 [*IFHP Orders*].

communicable diseases or conditions raising a public safety concern. Also excluded was coverage for elective medical procedures and rehabilitative care.[29] For refugee claimants from one of the countries that Canada designated as being unlikely to be a source of genuine refugees, as well as those who were refused refugee protection, the IFHP's coverage was further restricted to services that were necessary to diagnose, prevent, or treat an illness posing a risk to public health or public safety. In other words, such individuals were required to pay privately for health care relating to pregnancy, non-communicable diseases like diabetes and cancer, or mental illnesses considered not dangerous to the public.[30] Individuals who were scheduled for removal from Canada but who had applied for an assessment of the risk associated with their return to the former country of residence lost their health coverage entirely under the new IFHP.[31]

These IFHP cuts had a devastating impact on the health and well-being of refugees and refugee claimants.[32] The stories of two refugee claimants serve as illustration. Hanif Ayubi arrived in Canada in 2001 from Afghanistan. After his claim for refugee protection was denied, he remained in the country because Canada had temporarily suspended all deportations to Afghanistan out of safety concerns. As a person living with diabetes and related complications, Ayubi's health was put at risk under the new IFHP when he lost public coverage for the medications and medical supplies that he needed, which he could not afford to pay out of pocket. His survival depended on his continued ability to obtain free samples of insulin that were donated to a community health centre by a pharmaceutical company, which was far from guaranteed.[33] He described living in "constant and severe psychological stress" as a result of such uncertainty.[34]

Daniel Garcia Rodrigues, another unsuccessful refugee claimant, similarly had his IFHP benefits reduced to public health or public safety health-care coverage in June 2012.[35] Although his refugee claim had been refused, he was in the process of applying for permanent residence in Canada as the spouse of a protected person. Within months of the new IFHP coming into effect,

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[29] See Ruby Dhand & Robert Diab, "Canada's Refugee Health Law and Policy from a Comparative, Constitutional, and Human Rights Perspective" (2015) 1 Canadian Journal of Comparative and Contemporary Law 351.
[30] *Ibid.*
[31] *Ibid.*
[32] See Helen P Harris & Daniyal Zuberi, "Harming Refugee and Canadian Health: The Negative Consequences of Recent Reforms to Canada's Interim Federal Health Program" (2015) 16 Journal of International Migration and Integration 1041.
[33] *Canadian Doctors*, *supra* note 15 at paras 22–24.
[34] *Ibid* at para 188.
[35] *Ibid* at paras 25–28.

he began experiencing vision loss and was ultimately diagnosed with retinal detachment. Unable to pay for the sight-saving surgery that he required, which would have cost ten thousand dollars and was no longer covered as a part of his IFHP benefits, he experienced "severe emotional distress" for fear that he would become permanently blind and unable to provide for his family.[36] That outcome could well have materialized had it not been for a doctor who agreed to perform the surgery and to provide the necessary post-operative care free of charge.[37]

Tales of hardship like these helped mobilize advocacy efforts across Canada. Three public interest groups—namely, Canadian Doctors for Refugee Care, the Canadian Association of Refugee Lawyers, and Justice for Children and Youth—along with Hanif Ayubi and Daniel Garcia Rodrigues mounted a court challenge against the order in council that instituted the 2012 IFHP.[38] They contested the legality of the impugned order in council on both administrative law and *Charter* grounds. As my focus in this article is on section 7 of the *Charter*, the next subsection will only outline the parties' arguments concerning the *Charter* as well as the Federal Court's ruling in this regard.

The Federal Court's Decision in Canadian Doctors

The applicants in *Canadian Doctors* argued that the 2012 IFHP unjustifiably violated refugees' and refugee claimants' section 7 *Charter* rights to life and security of the person, freedom from cruel and unusual treatment as guaranteed by section 12, and equality rights under section 15. Whereas their section 7 claims were dismissed by Justice Anne Mactavish of the Federal Court, they were successful, at least partially, on section 12 and section 15 grounds.

With respect to section 7 of the *Charter*, the applicants emphasized the fact that refugees and refugee claimants are people "who cannot afford to pay for their own health care or for private health insurance, and for whom alternative avenues of access to health care may be neither consistent nor satisfactory."[39] Given this, they posited that Canada's curtailment of the IFHP amounted to a roadblock in refugees' and refugee claimants' access to essential health

[36] *Ibid* at para 206.
[37] *Ibid* at para 210.
[38] See Jesse Beatson, "The Stories We Tell about Refugee Claimants: Contested Frames of the Health-Care Access Question in Canada" (2016) 32:3 Refuge 125.
[39] *Canadian Doctors*, *supra* note 15 at para 502.

services. Couching their claim in negative rights terms, they identified the *Charter*-infringing government action at issue as "the *withdrawal* of a previously available service, which expose[d] vulnerable individuals to risks to their lives and to the security of their persons."[40] In contrast, the attorney general of Canada characterized the applicants' section 7 claim as asserting a positive right to publicly funded health care, which had not yet been endorsed by Canadian courts.[41] The applicants disputed this characterization, stressing that "they [were] not asking the [federal government] to implement a social benefit program where none previously existed."[42]

Mactavish J sided with the attorney general, noting that section 7 claims similar to the one made by the applicants had already been rejected by other courts in Canada. In *Flora*, for example, a policy change that narrowed Ontarians' entitlement to public funding for out-of-country medical treatment was found not to constitute a deprivation of rights for the purpose of section 7.[43] The Ontario Court of Appeal in that case ruled that a section 7 *Charter* violation "cannot be grounded on a mere change in the law."[44] In the earlier case of *Masse v Ontario (Ministry of Community and Social Services)*, Ontario's Divisional Court reached a similar conclusion in a *Charter* challenge of a pair of provincial regulations that reduced the rates of social assistance by 21.6 percent.[45] In dismissing the *Charter* claimants' section 7 claim, the Divisional Court observed that, "in the absence of the reduced social assistance payments, the applicants would face an even greater burden brought about by the cost of rent and food," and, as such, the impugned regulations could not be considered a deprivation of the claimants' lives or personal security.[46] As a further support for her position, Mactavish J pointed out that *Gosselin* also involved a *Charter* challenge to the curtailment of a social benefit, and, yet, the Supreme Court of Canada's section 7 analysis proceeded on the understanding that a claim for positive rights was at stake in that case.

Having framed the applicants' section 7 arguments as a claim for positive rights, Mactavish J went on to reject them for lack of precedent. She held that "the current state of the law in Canada is that section 7 of the *Charter*'s guarantees of life, liberty and security of the

[40] *Ibid* at para 504 [emphasis added].
[41] *Ibid* at para 505.
[42] *Ibid* at para 552.
[43] *Flora*, *supra* note 7.
[44] *Ibid* at para 104.
[45] [1996] OJ No 363.
[46] *Ibid* at para 346.

person do not include the positive right to state funding for health care."[47] While acknowledging their economic disadvantage, she stressed that it remained possible for refugees and refugee claimants to acquire health care privately under the 2012 IFHP. As such, no deprivation of section 7 rights was found.

The applicants in *Canadian Doctors* further challenged the IFHP cuts as a cruel and unusual treatment, contrary to section 12 of the *Charter*. Although successful invocation of section 12 had hitherto been largely confined to penal or quasi-penal contexts, Mactavish J accepted the applicants' characterization of Canada's withdrawal of IFHP benefits as a government "treatment" for the purpose of section 12. She noted that refugees and refugee claimants are "effectively under the administrative control of the state" because much of their lives in Canada, including whether they may be detained or if they enjoy the rights to work, to receive social benefits, and to be granted refugee protection, depends on government decisions.[48] Moreover, Mactavish J condemned the federal government for "*intentionally target[ing]* an admittedly vulnerable, poor and disadvantaged group for adverse treatment, making the 2012 changes to the IFHP for the express purpose of inflicting predictable and preventable physical and psychological suffering on many of those seeking the protection of Canada."[49] This, in her view, distinguished the case before her from typical situations of social policy-making where governments were called upon to reconcile competing priorities, thus rendering the IFHP cuts a "more active state process" that constitutes "treatment" under section 12.[50]

Mactavish J also agreed with the applicants that the IFHP cuts were "cruel and unusual" within the meaning of section 12. She regarded the changes made to the IFHP in 2012 of "limited social value," seeing as there was insufficient evidence that showed these changes serving the government's objectives of cost savings, refugee fraud deterrence, and elimination of unfairness between Canadians and refugees.[51] Considering the government's aim of discouraging unmeritorious refugee claims, Mactavish J was especially troubled by refugee children's meagre health-care coverage under the 2012 IFHP since children normally lack any control over where they live. At the same time, a substantial body of evidence before her indicated that the IFHP

[47] *Canadian Doctors*, *supra* note 15 at para 571.
[48] *Ibid* at para 585.
[49] *Ibid* at para 587 [emphasis in original].
[50] *Ibid* at para 609.
[51] *Ibid* at para 620.

cuts were opposed by a sizeable segment of the population, encompassing refugee services providers, health professionals, opinion leaders, and politicians of various stripes. Taking everything into account, Mactavish J found the IFHP retrenchment a cruel and unusual treatment, "particularly, but not exclusively, as it affect[ed] children who [had] been brought to this country by their parents."[52] Insofar as the IFHP cuts "jeopardize[d] the health, and indeed the very lives, of these innocent and vulnerable children in a manner that shock[ed] the conscience and outrage[d] our standards of decency," they were held in breach of section 12.[53]

Concerning section 15 equality rights, two arguments were advanced by the applicants, both directed at the substance of the 2012 IFHP rather than the cuts to the program. First, they submitted that the 2012 IFHP was discriminatory on the basis of national origin. This was so because the program distinguished between refugee claimants from countries designated by Canada as unlikely to produce genuine refugees and those from other countries, while extending lesser health-care coverage to the former. Second, to the extent that refugees and refugee claimants on a whole received fewer health-care benefits under the 2012 IFHP than other Canadian residents did through Medicare, the applicants contended that the 2012 IFHP improperly differentiated people based on immigration status, which they claimed to be an analogous ground of discrimination prohibited by section 15.

Mactavish J dismissed the applicants' second claim under section 15, finding herself bound by precedents from the Federal Court of Appeal that had rejected immigration status as an analogous ground.[54] However, she agreed with the applicants that the 2012 IFHP discriminated on the ground of national origin. Specifically, the inferior health-care coverage afforded to refugee claimants who were from designated countries of origin was said to disadvantage these refugee claimants by undermining their well-being, if not their lives. In addition, given the government's explicit reliance on the 2012 IFHP to deter fraudulent refugees, such inferior IFHP coverage "perpetuate[d] the stereotype that refugee claimants from [designated] countries [were]

[52] *Ibid* at para 691.
[53] *Ibid* at paras 11, 691, 1080.
[54] For a criticism of the Canadian judiciary's rejection of immigration status as an analogous ground under section 15 of the *Charter*, see Donald Galloway, "Immigration, Xenophobia and Equality Rights" (2019) 42:1 Dalhousie Law Journal 17. See also YY Brandon Chen, "The Xenophobic Gap in the Charter's Equality Guarantee" in Jena McGill et al, eds, *Critical Conversations in Canadian Public Law* (Ottawa: University of Ottawa Press, 2025) 273.

queue-jumpers, 'bogus' claimants and cheats who [were] only here to take advantage of Canada's social benefits and its generosity."[55]

Furthermore, the 2012 IFHP's contraventions of sections 12 and 15 of the *Charter* were found by Mactavish J to be unjustified in a free and democratic society. Insofar as the IFHP cuts were intended to ensure health-care parity, thus fairness, between the IFHP's beneficiaries and Canadians who were entitled to Medicare, Mactavish J ruled that this was not a pressing and substantial government objective. The former IFHP, according to Mactavish J, recognized refugees' and refugee claimants' economic disadvantage and therefore furnished them with a basket of health-care benefits comparable to what low-income Canadians received under provincial and territorial social assistance programs. This arrangement placed refugees and refugee claimants on par with similarly situated Canadians and, in Mactavish J's view, "[t]here was nothing unfair about this."[56]

As for the government's submission that the IFHP cuts were aimed at containing public spending and discouraging abuse of Canada's refugee protection system, Mactavish J ruled that the government had not proven that the cuts would "in fact contribute in a material way to the realization of *any* of these goals."[57] Rather than being aimed at cost saving, evidence tendered by the applicants suggested that the IFHP cuts would simply cause federal expenditure to be downloaded to the provinces and territories, which were left to absorb unpaid health-care costs incurred by uninsured refugee claimants. Concerning the rationale of refugee fraud deterrence, Mactavish J observed that the government had offered no evidence showing either that health-care entitlement would incentivize abuse of Canada's refugee system or that health-care disentitlement would have the opposite effect.

Even assuming that the IFHP cuts would further these government objectives, Mactavish J held that they failed to do so in a way that impaired *Charter* rights as little as reasonably possible. With respect to the cost containment objective, Mactavish J noted that the government could have limited its spending on the IFHP, not by paring down what the program covered but, rather, by shortening the amount of time that individuals would remain eligible for coverage. For instance, the government could speed up the refugee determination process by more adequately

[55] *Canadian Doctors*, *supra* note 15 at para 837.
[56] *Ibid* at para 920.
[57] *Ibid* at para 1074 [emphasis in original].

staffing the Immigration and Refugee Board. It could also expedite the removal of unsuccessful refugee claimants from Canada. The latter, according to Mactavish J, could also be a less rights-infringing option available to the government to deter unmeritorious refugee claimants. Thus, on balance, Mactavish J concluded that the salutary impact of the IFHP cuts was not proportionate to their "profoundly deleterious effects."[58]

Principle of Non-Retrogression in International Law

The Federal Court's dismissive approach to the applicants' section 7 claim in *Canadian Doctors* was unfortunate. This is especially so considering the court's treatment of the applicants' section 12 and section 15 *Charter* arguments in the same case. Whereas Mactavish J continued the Canadian judiciary's hesitancy to recognize positive socio-economic obligations under section 7, she had no problem imposing essentially the same duties on the government based on section 12 and a narrower set of duties under section 15. In fact, Mactavish J went so far as to take the unprecedented step of applying section 12 outside the criminal justice context, finding it engaged by a state decision concerning a health-care benefit. The fact that Mactavish J justified her section 12 reasoning based on the "unusual circumstances of this case,"[59] but failed to consider whether the same special circumstances warranted a novel interpretation of section 7, represented a missed opportunity to advance section 7 case law in a principled manner. I argue that the factual situation in *Canadian Doctors*—where a deliberately retrogressive socio-economic measure of the government threatens individuals' rights to life, liberty, or personal security—calls out for courts to recognize a positive section 7 state obligation.

Interpreting section 7 to include a protection against government backsliding on socio-economic rights will bring Canada in line with its duties under international human rights law. The Supreme Court of Canada has stated repeatedly that "the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified."[60] Moreover, "[t]he content of Canada's international human rights obligations is … an important indicia of the meaning of 'the

[58] *Ibid*.
[59] *Ibid* at paras 590, 610, 690.
[60] See e.g. *Quebec (AG) v 9147-0732 Québec inc*, 2020 SCC 32 at para 31 [*Quebec (AG)*].

full benefit of the *Charter*'s protection'."[61] It is well established in international law that the guarantee of all human rights, including socio-economic rights, imposes both negative and positive duties on state actors.[62] Not only are state actors required to respect socio-economic rights by refraining from interfering with individuals' enjoyment of such rights, but they are also expected to protect people from third parties' infringement of their rights and to "fulfil the rights of those who otherwise cannot enjoy their … rights."[63]

Concerning the right to health specifically, authoritative interpretation of international human rights treaties that are binding on Canada requires governments to "refrain[] from denying or limiting equal access for all persons, including … detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services."[64] At the same time, governments bear a duty to take positive actions to fulfill the right to health by, among other things, facilitating people's access to health care, promoting health-care systems' cultural competence and responsiveness to the needs of marginalized populations, as well as providing publicly funded health coverage to individuals who cannot afford health care privately.[65] This holistic understanding of socio-economic rights challenges Canadian courts' insistence on a dichotomy between negative and positive rights under section 7. And it has formed the basis of Jackman's staunch support for a broader reading of section 7 that is more closely aligned with international human rights law.[66]

Notably, under international law, socio-economic rights are subject to progressive realization. For instance, article 2(1) of the *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*) commits state parties, including Canada, to working individually and jointly "to the maximum of [their] available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means."[67] On the one hand, the concept of progressive realization acknowledges such realities as resource constraints and the governance challenges facing some states that hinder the efficient use of

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[61] *Ibid* at para 32.
[62] See Veronika Bílková, "The Nature of Social Rights as Obligations of International Law: Resource Availability, Progressive Realization and the Obligations to Respect, Protect, Fulfil" in Christina Binder et al, eds, *Research Handbook on International Law and Social Rights* (Cheltenham, UK: Edward Elgar, 2020) 19.
[63] *Ibid* at 38.
[64] UNCESCR, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Art 12 of the Covenant)*, 22nd Sess, UN Doc E/C.12/2000/4 (11 August 2000) at para 34 [UNCESCR, *General Comment 14*].
[65] See generally *ibid*.
[66] Jackman, "Legacy of Gosselin", *supra* note 14.
[67] 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

available resources.[68] In this way, it serves as "a necessary flexibility device" that permits governments to meet their obligations respecting socio-economic rights over time.[69] On the other hand, the same concept underscores the need for governments to take tangible actions to realize socio-economic rights "as expeditiously and effectively as possible."[70] As the United Nations Committee on Economic, Social and Cultural Rights (CESCR) has clarified, "while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the [*ICESCR*'s] entry into force. … Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the [*ICESCR*]."[71]

As a part of governments' responsibilities *vis-à-vis* progressive realization, deliberate backsliding on socio-economic gains previously attained is strongly discouraged. In its general comment on the right to health, the CESCR explained this presumption of non-retrogression as follows:

> As with all other [socio-economic] rights, … there is a strong presumption that retrogressive measures taken in relation to the right to health are not permissible. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced, after the most careful consideration of all alternatives, and that they are duly justified by reference to the totality of the rights provided for in the [*ICESCR*], in the context of the full use of the State party's maximum available resources.[72]

These remarks make it clear that deliberately retrogressive measures taken by governments in relation to socio-economic rights are presumptively impermissible under international law and must be adequately justified.

Admittedly, what constitute "deliberately retrogressive measures" has not yet received a definitive answer under international human rights law. Commentators, however, generally agree

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[68] Bílková, *supra* note 62.
[69] UNCESCR, *General Comment No 3: The Nature of State Parties' Obligations (Art 2, Para 1, of the Covenant)*, 5th Sess, UN Doc E/1991/23 (14 December 1990) at para 9.
[70] *Ibid.*
[71] *Ibid* at para 2.
[72] UNCESCR, *General Comment 14*, *supra* note 64 at para 32.

that the concept refers to intentionally backward government conducts as opposed to measures deliberately taken by governments that are unintentionally retrogressive.[73] Furthermore, commentators have identified at least two dimensions that may be embedded in the concept of retrogression. One of these dimensions focuses on the effects of government measures and captures any "de facto, empirical backsliding in the effective enjoyment of the rights."[74] Based on this view, policy stagnation that fails to keep up with increasing socio-economic needs in society—for example, flatlining social assistance rates that do not keep pace with inflation—is considered a retrogressive measure. A second aspect of retrogression "concerns steps backwards in terms of legal, de jure guarantees."[75] While some commentators have more narrowly interpreted this second dimension of retrogression to include only curtailment in law concerning certain socio-economic benefits, others have suggested a broader understanding that encompasses backward steps taken by governments that are policy, budgetary, administrative, or programmatic in essence.[76]

Depending on which of these two dimensions one emphasizes, the scope of the non-retrogression principle, as well as evidence required to establish retrogression, can differ. As Ben Warwick explains, "[f]ocus too closely on backwards effects of a policy measure, and human rights actors must sit back and wait for damage to manifest before they can act. A more pre-emptive approach which predicts retrogression on a paper-based analysis can be a blunt tool and push retrogression into highly technical territory."[77] That is, while an effects-based understanding of retrogression is potentially more inclusive, the evidence required to prove retrogressive effects may need to emerge over time, and it may require sophisticated analysis of data that may or may not exist. On the other hand, the evidentiary burden for proving retrogression as a matter of reduction in socio-economic entitlements may be lower. But this latter understanding of retrogression leaves out many instances where governmental measures may appear progressive, or at least non-regressive, on paper but, indeed, have the effect of eroding pre-existing socio-economic protections, such as the above example of stagnate social assistance rates. This more

[73] See Ben TC Warwick, "Unwinding Retrogression: Examining the Practice of the Committee on Economic, Social and Cultural Rights" (2019) 19 Human Rights Law Review 467.
[74] Aoife Nolan, Nicholas J Lusiani & Christian Courtis, "Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic and Social Rights" in Aoife Nolan, ed, *Economic and Social Rights after the Global Financial Crisis* (Cambridge, UK: Cambridge University Press, 2014) 121 at 123.
[75] *Ibid*.
[76] See Warwick, *supra* note 73.
[77] *Ibid* at 471.

conservative take on retrogression risks turning the concept into "predominantly an exercise in legal argumentation" as it overlooks people's lived experiences.[78]

Notwithstanding these conceptual ambiguities, at a minimum, the principle of non-retrogression under international law applies to government measures that are retrogressive both in terms of the nature of the measures taken and in effect. The changes made by Canada in 2012 to the IFHP exemplified such a prototypical "deliberately retrogressive measure." Normatively, the 2012 IFHP policy introduced a program that was more restrictive than its predecessor in terms of eligibility and benefits provided. Empirically, the factual record accepted by the Federal Court in *Canadian Doctors* revealed that the IFHP cuts had a deleterious impact on refugees' and refugee claimants' access to health care. The cuts created much confusion among health-care providers and placed an extra administrative burden upon them to verify clients' IFHP eligibility, which made many reluctant to take on refugees and refugee claimants as patients.[79] The 2012 IFHP was also shown to "have had a serious impact on the physical health and psychological well-being of numerous individuals."[80] Therefore, the IFHP cuts were undeniably a step backward in Canada's realization of refugees' and refugee claimants' right to health, and such backsliding was by government design, as Mactavish J confirmed.[81]

In light of the presumption of conformity between the *Charter* and Canada's binding obligations under international law, I argue that the *Charter* ought to protect individuals from deliberate government retrogressions of the same ilk as the IFHP cuts.[82] In particular, I submit that this protection necessitates section 7 of the *Charter* to be interpreted as prohibiting socio-economic retrogressions that undermine individuals' life, liberty, or security interests and also as imposing positive responsibilities on governments to restore the socio-economic benefits in question.

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[78] *Ibid* at 473.
[79] *Canadian Doctors*, *supra* note 15 at paras 133–47.
[80] *Ibid* at para 250.
[81] *Ibid* at para 608 (the IFHP cuts found a "deliberate action of the state … in order to make the lives of a vulnerable, poor and disadvantaged group even more difficult").
[82] In *Quebec (AG)*, *supra* note 60, the majority of the Supreme Court of Canada affirmed the presumption of conformity when interpreting *Charter* rights that are protected by comparable provisions in international legal instruments binding on Canada. Given that the possibility of interpreting section 7 of the *Charter* as encompassing positive socio-economic rights was acknowledged by the Supreme Court of Canada in *Gosselin* and that binding international human rights treaties like the *ICESCR* similarly protects these rights, the presumption of conformity is arguably engaged. It follows that when government's positive obligations under section 7 are eventually recognized, judicial interpretation thereof should have regard to how analogous duties are understood by the United Nations Committee on Economic, Social and Cultural Rights, including the requirement of progressive realization.

Canada's duty under international law to avoid deliberate retrogression concerning socio-economic rights, however, is not absolute. According to the CESCR, deliberately retrogressive measures taken by governments are permissible to the extent that they can be duly justified. Proper justification in this context requires governments to demonstrate, among other things, that the rationales underlying their retrogressive measures are reasonable; that they have thoroughly explored the alternatives; that their decision-making process has meaningfully engaged groups that are affected; that the retrogression will not have sustained or unreasonable impact on the full realization of the socio-economic right at issue; and that the retrogressive measures are subject to an independent review.[83] Furthermore, the CESCR opines that "[i]n the extreme circumstances under which retrogressive measures may be inevitable, States must ensure that such measures are only temporary, do not disproportionately affect disadvantaged and marginalized individuals and groups, and are not applied in an otherwise discriminatory manner."[84]

Such a justificatory requirement can readily be accommodated within the *Charter*'s existing analytical framework under sections 7 and 1. This further evidences the alignment between Canada's international legal obligations and my proposed application of section 7 of the *Charter* to cases involving socio-economic retrogression. To make out a *prima facie* section 7 breach, *Charter* claimants must demonstrate that a government's limit on their rights to life, liberty, or security of the person fails to comport with the principles of fundamental justice. With both procedural and substantive elements, as Jackman contends, this analysis offers the judiciary an opportunity to evaluate "whether decision-making is transparent, participatory and informed, or instead whether it is arbitrary or driven by private rather than public interests."[85] Likewise, under section 1 of the *Charter*, courts are called upon to scrutinize the government's objectives behind its retrogressive measures as well as whether these objectives are met in a proportionate fashion, as the Federal Court did in *Canadian Doctors*. Between these two mechanisms, governments are granted ample opportunity to defend its retrogression in socioeconomic entitlements.

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[83] UNCESCR, *General Comment No 19: The Right to Social Security (Art 9)*, 39th Sess, UN Doc E/C.12/GC/19 (23 November 2007) at para 42.
[84] UNCESCR, *General Comment No 22 (2016) on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/GC/22 (2 May 2016) at para 38.
[85] Martha Jackman, "Charter Review of Health Care Access" in Joanna Erdman, Vanessa Gruben & Erin Nelson, eds, *Canadian Health Law and Policy*, 5th ed (Toronto: LexisNexis, 2017) 51 at 84.

Legitimacy of Judicial Review in Cases of Socio-Economic Retrogression

Besides conformity with Canada's obligations under international law, recognizing positive section 7 socio-economic rights in cases of deliberate government retrogression tracks the wordings of section 7 and respects the judiciary's institutional role and competence. A common concern about imposing positive socio-economic duties on governments pursuant to section 7 stems from the supposed lack of textual support for such duties.[86] In particular, the reference in section 7 to "the right not to be deprived" of life, liberty, and security of the person is often trotted out as suggesting this *Charter* provision merely protects people from active state interference.[87] In her dissenting decision in *Gosselin*, Justice Louise Arbour rejected this reading of section 7. Noting that the *Oxford Dictionary* "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*'," she concluded that "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."[88] Although the majority of the Court in *Gosselin* neither endorsed nor refuted Arbour J's reasoning, their openness to eventually recognizing positive section 7 rights implicitly presumed that such a broader interpretation of section 7 is not precluded by its text.

Even if one adopts a more modest reading of section 7, I agree with the applicants in *Canadian Doctors* that there is an appreciable difference between complete government inaction and a government measure that is both normatively and empirically retrogressive. Whereas the assertion of positive rights in the former context is sometimes criticized for being abstract and "conceptually confused,"[89] in the latter scenario, the rights holders (that is, beneficiaries of the antecedent program), the duty bearer (that is, the government), and the content of the right (that is, the continued enjoyment of the socio-economic benefit at issue at a previously set level) are all sufficiently clear. There is an identifiable government intervention, whose deleterious impact on affected individuals' lives, liberty, or security, when compared with the *status quo ante*, can be ascertained. This renders government retrogression akin to deprivation in the sense of "active taking away, divesting, or dispossession." Indeed, on several occasions in *Canadian Doctors*,

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[86] Da Silva, *supra* note 14.
[87] *Charter*, *supra* note 1.
[88] *Gosselin*, *supra* note 2 at para 321 [emphasis in original].
[89] Da Silva, *supra* note 14 at 681.

Mactavish J described the impugned government conduct in this manner. Notably, when dismissing the government respondent's characterization of the 2012 IFHP as an ameliorative program under section 15 of the *Charter*, she recalled that "the government action at issue in this case is the decision of the [federal government] to modify the IFHP to *take away* the health insurance coverage that was previously available to refugee claimants."[90] Given such resemblance to negative rights cases, accepting the justiciability of section 7 *Charter* challenges of socio-economic retrogression does not stray far from existing section 7 jurisprudence, and it heeds the Supreme Court of Canada's direction "to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*."[91]

Applying section 7 to cases involving retrogression likewise does not overstep the boundaries of *Charter*-based judicial review, a concern frequently raised about permitting courts to impose positive socio-economic duties on governments. As Arbour J explained in *Gosselin*, "the general assertion [is] 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."[92] Entangled here are two worries about institutional boundaries. The first relates to judicial competence, to wit, whether courts could dictate government spending on socio-economic needs given their skill sets. The second has to do with judicial function—namely, whether courts should interfere with socio-economic decisions taken by the democratic branches of government.

The charge of judicial incompetence in this context is typically premised on the need for certain benchmarks in positive rights adjudication, against which government duties are measured: "For, unless we … know what is required, or how much expenditure is needed, in order to safeguard the [positive] right, it will usually be difficult to know whether the right has been violated."[93] Rightly or wrongly, the determination of such benchmarks, insofar as it dictates how resources in society should be (re)allocated, is often considered the domain of the executive and the legislature, which supposedly are "uniquely epistemically positioned to deal with

[90] *Canadian Doctors*, *supra* note 15 at para 798 [emphasis in original].
[91] *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 188, quoted with approval in *Gosselin*, *supra* note 2 at para 82.
[92] *Gosselin*, *supra* note 2 at para 330.
[93] *Ibid* at para 333.

relevant social concerns."[94] A contrast is thus made between the capacity of the executive and the legislature to consider matters "in a more all-things-considered way" and judicial decision-making that is "constrained by legal texts and precedents."[95] Supreme Court of Canada Justices Ian Binnie and Louis LeBel expressed this sentiment in *Chaoulli v Quebec (Attorney General)*, when they resisted the majority's readiness to weigh in on the constitutionality of a provincial health-care policy.[96] While acknowledging the ills of Quebec's public health-care system, they stressed that "[t]his does not mean that the courts are well placed to perform the required surgery. The resolution of such a complex fact-laden policy debate does not fit easily within the institutional competence or procedures of courts of law."[97]

However, not all jurists have agreed with this assessment of judicial competence. In reply to the dissent's concern in *Chaoulli*, Chief Justice Beverley McLachlin and Justice John Major cautioned: "The fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for *Charter* compliance when citizens challenge it."[98] Jackman and Bruce Porter are similarly critical of the allegation of judicial ineptitude. They argue that if existing judicial rules or processes indeed fall short, instead of accepting the status quo, we need to "insist[] that the judicial system be reformed or transformed to realize the expectations inherent in the social rights paradigm."[99] The same stance can be adopted in defence of the justiciability of my proposed section 7 protection against retrogression.

That said, the defensibility of my proposal arguably does not hinge on the outcome of the debate about judicial competence. Unlike a claim for a positive socio-economic right writ large,

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[94] Da Silva, *supra* note 14 at 681. See also Lawrence David, "A Principled Approach to the Positive/Negative Rights Debate in Canadian Constitutional Adjudication" (2014) 23:1 Constitutional Forum Constitutionnel 41. But see David Wiseman, "The Charter and Poverty: Beyond Injusticiability" (2001) 51:4 University of Toronto Law Journal 425 at 448, which criticizes the judiciary for too readily accepting its supposed incompetence in examining socioeconomic issues without adequately assessing whether alternative institutions, such as the legislature, in fact have greater capacity to address these matters.

[95] David Dyzenhaus, "What Is a 'Democratic Culture of Justification'?" in Murray Hunt, Hayley Hooper & Paul Yowell, eds, *Parliaments and Human Rights: Redressing the Democratic Deficit* (Oxford: Hart Publishing, 2015) 425 at 429.

[96] *Chaoulli*, *supra* note 16.

[97] *Ibid* at para 164.

[98] *Ibid* at para 107.

[99] Bruce Porter & Martha Jackman, "Introduction: Advancing Social Rights in Canada" in Martha Jackman & Bruce Porter, eds, *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) 1 at 15. See also Wiseman, *supra* note 94 ("institutional capacity is not inherent in the nature of an institution but, rather, is a function of experience and effort" at 448).

a successful section 7 *Charter* challenge of retrogression does not require courts to independently formulate the content of governments' obligations, such as a basic level of living standards that they must ensure. In cases of socio-economic retrogression, the yardstick for governments' positive duties is set by either the executive or the legislature. What the judiciary is invited to do in this instance is to evaluate whether a government measure provides certain socio-economic benefits or protection to the same extent as it previously did. To borrow the words of Aoife Nolan, Nicholas J Lusiani, and Christian Courtis, "judges and/or lawyers … will generally find it relatively easy to compare prior and subsequent norms and to consider whether the latter broadens, reduces or eliminates rights or entitlements granted by the former."[100] If it is determined that the impugned government conduct is retrogressive, the judiciary is further tasked with deciding whether the measure threatens one's life, liberty, or security in ways that are contrary to the principles of fundamental justice and unjustified in a free and democratic society. This type of analysis, again, falls well within courts' area of expertise.

Assuming the judiciary indeed possesses the competence to adjudicate claims for positive section 7 rights, some argue that it should nevertheless refrain from doing so as a matter of principle. Underlying this position is the concern that, if allowed to adjudicate positive rights, unelected judges will be drawn into social policy debates, which are subjects traditionally reserved for the contemplation of the representative branches of the government. As Peter Hogg once decried, "[positive rights adjudication] involves a massive expansion of judicial review, since it would bring under judicial scrutiny all of the elements of the modern welfare state. … [T]hese are the issues upon which elections are won and lost."[101] Jamie Cameron has likewise chided the *Gosselin* Court, including both the majority and the dissent, for downplaying or even outright ignoring "the boundary which separates judicial and democratic functions," in accepting the possibility of section 7 imposing positive obligations on governments.[102]

The CESCR, however, has criticized this demand for judicial restraint as perpetuating an untenable dichotomy, which assigns the role of protecting civil and political rights to the judiciary and that of socio-economic rights to the other government institutions. It opines:

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[100] Nolan, Lusiani & Courtis, *supra* note 74 at 127.
[101] Peter Hogg, *Constitutional Law of Canada*, 2nd ed (Toronto: Carswell, 1985) at 44-12.1, cited in *Gosselin*, *supra* note 2 at para 330.
[102] Jamie Cameron, "Positive Obligations under Sections 15 and 7 of the Charter: A Comment on *Gosselin v Québec*" (2003) 20 Supreme Court Law Review 65 at 87.

> While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that [all] human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.[103]

Neither a comprehensive discussion nor a fulsome resolution of such disagreement over judicial function *vis-à-vis* other branches of the government is within the scope of this article. As my arguments are predicated on *Gosselin*, I take the *Gosselin* Court's openness to broadening the interpretation of section 7 as given as well as its implied acceptance of judicial competence and legitimacy in enforcing a positive state obligation. In other words, my focus in this article is on what kind of positive rights cases are among the most compelling for courts to review under section 7 as a step towards full recognition of positive section 7 rights instead of whether such judicial review should be carried out at all. In this spirit, I offer three responses to the concern about blurring institutional boundaries.

Foremost, any incursion into the jurisdiction of the executive and the legislature stemming from judicial recognition of positive section 7 rights in cases of retrogression is arguably modest. The safeguard against retrogression, as mentioned, does not require the democratic branches of the government to (re)distribute resources according to some standards laid down by the judiciary alone. All that is demanded is when the executive or the legislature scales back certain socio-economic benefits or protection that it had previously made available, it adequately justifies the decision. This justificatory requirement finds its legitimacy in a free and democratic society by contributing to a culture "in which leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at

[103] UNCESCR, *General Comment No 9: The Domestic Application of the Covenant*, 19th Sess, UN Doc E/C.12/1998/24 (3 December 1998) at para 10. For a similar criticism, see Porter & Jackman, *supra* note 98.

its command."[104] It also does so by providing a process of discussion, which enhances the responsiveness of the executive and the legislature to individuals that stand to be affected by their decisions.[105]

Moreover, as the CESCR points out, in the realm of civil and political rights, judicial imposition of positive state duties with resource implications is commonplace. Section 7 of the *Charter*, for example, has been interpreted by the Supreme Court of Canada as affording every parent the right to a fair hearing in the child welfare context, which in some situations necessitates "the government to provide the parent with state-funded counsel."[106] Beyond section 7, positive obligations have been placed on governments even for the realization of socio-economic rights. In *Eldridge v British Columbia (Attorney General)*, provincial failure to provide publicly funded sign language interpretation in hospitals was ruled an unjustifiable breach of deaf persons' section 15 equality rights.[107] More striking still is the Federal Court's finding in *Canadian Doctors* that the IFHP cuts violated sections 12 and 15, effectively imposing positive obligations on the federal government despite Mactavish J's reluctance to do the same under section 7. Such case law underscores the arbitrariness, if not disingenuity, of Canadian courts' reticence to recognize positive section 7 socio-economic rights on the grounds of separation of powers.

To be sure, I do not suggest that the Federal Court ought to have rejected the applicants' positive rights claims under sections 12 and 15 in *Canadian Doctors*. Nor do I mean to minimize the significance of the *Canadian Doctors* decision as a rare instance in which *Charter* claimants succeeded in overturning cuts to publicly funded socio-economic benefits. Rather, my point is that, whereas all positive socio-economic rights claims presumably invite questions about judicial competence and jurisdictional boundaries, courts' insistence on the injusticiability of such claims under section 7 out of these institutional concerns appears unprincipled when contrasted with their willingness to examine, and, at times, allow, analogous claims under other *Charter* provisions. While this section 7 exceptionalism did not ultimately determine the

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[104] Etienne Mureinik, "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10:1 South African Journal on Human Rights 31 at 32.
[105] See generally Paul Daly, "*Vavilov* and the Culture of Justification in Contemporary Administrative Law" (2021) 100 Supreme Court Law Review 279 ("[a] culture of justification requires or at least provides for the possibility of the 'continuous process of discussion' which is the lifeblood of the unwritten constitutional principle of democracy" at 307). See also Dyzenhaus, *supra* note 95.
[106] *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at para 55.
[107] *Eldridge*, *supra* note 16.

outcome in *Canadian Doctors*, its systemic impact on disadvantaged populations reverberates beyond the case itself. This brings me to the third comment that I will make concerning the demand of separation of powers in the section 7 context.

At first glance, the availability of positive socio-economic claims under sections 12 and 15 of the *Charter* might be thought to obviate the need for their recognition under section 7. However, these alternative avenues are not always available, especially for individuals facing some of the greatest structural disadvantage. Recall that Mactavish J's finding of a section 12 violation in *Canadian Doctors* rested on her conclusion that the impugned policy had an "express purpose of inflicting predictable and preventable physical and psychological suffering" on the affected groups.[108] By distinguishing this from cases involving "a neutral decision taken by the [government] that has only incidentally had a negative impact on historically marginalized individuals,"[109] Mactavish J signaled that section 12 offers only narrowly circumscribed protection against socio-economic retrogression. Similarly, for some equality-seeking groups, existing case law significantly limits the availability of section 15 as an avenue for enforcing governments' positive socio-economic duties. As exemplified by Mactavish J's reasoning in *Canadian Doctors* regarding the applicants' immigration status-based equality claim, Canadian courts have interpreted what constitute protected grounds under section 15 in an unduly restrictive manner. Besides immigration status, poverty and homelessness are among the characteristics that have been rejected as constitutionally prohibited grounds of discrimination.[110]

As a result, judicial decisions that categorically deny positive section 7 state obligations, even in cases of socio-economic retrogression, disproportionately affect the poor and other marginalized populations, who rely most heavily on publicly funded socio-economic programs while simultaneously have less recourse to section 12 or section 15 when those programs are cut. The judiciary's strict adherence to separation of powers in this context heightens the charge of legal formalism, which, as Joshua Sealy-Harrington and colleagues observe, perpetuates "the fiction of scientific legal reasoning that, at the first layer, reassures the public of a neutral order, but at the second layer, ensures that the existing unequal order remains undisturbed—at least,

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[108] *Ibid* at para 587.
[109] *Ibid*.
[110] See Terry Skolnik, "Expanding Equality" (2024) 47:1 Dalhousie Law Journal 195; Joshua Sealy-Harrington, "Assessing Analogous Grounds: The Doctrinal and Normative Superiority of a Multi-Variable Approach" (2013) 10 Journal of Law & Equality 37.

undisturbed by law."[111] Any assessment of the legitimacy of *Charter* review of positive socio-economic rights claims, I submit, must take seriously the risk of such judicial complicity in structural inequality if the status quo is maintained.

Conclusion

I have suggested that deliberately retrogressive measures taken by governments, which harm individuals' rights to life, liberty, or security of the person, should be reviewable by courts under section 7 of the *Charter*, despite these being understood as positive rights cases. I am alive to the limitations of this proposal. For one thing, by focusing on retrogression, what I propose offers no relief for individuals who face no rights curtailment but nonetheless require governments' positive assistance. Among these individuals are some of the most marginalized in society, including those without any legal status in Canada, who are persistently denied socio-economic entitlements outright.[112] Even when it comes to retrogression, I have chosen to define it stringently such that it captures only instances where backsliding in both conduct and effect is established. This imposes a relatively high evidentiary burden on litigants, and it leaves out certain government measures that may be broadly understood as being backward in nature, such as policy stagnation. Given the Canadian courts' preference for incremental changes,[113] I accept these shortcomings as necessary trade-offs for minimizing judicial resistance. By ensuring that my proposal aligns with Canada's international legal obligations, adheres to the wordings of section 7, respects judicial competence, and limits its trespass on what some consider to be exclusive jurisdiction of the executive and the legislature, I hope to finally move the needle on judicial recognition of positive section 7 rights.

By way of conclusion, I wish to briefly address two additional counter-arguments to my proposition. The first concerns legal precedents. A line of case law has denied *Charter* protection

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[111] Joshua Sealy-Harrington et al, "Introduction" in Jena McGill et al, eds, *Critical Conversations in Canadian Public Law* (Ottawa: University of Ottawa Press, 2025) 1 at 9.
[112] See Lilian Magalhaes, Christine Carrasco & Denise Gastaldo, "Undocumented Migrants in Canada: A Scope Literature Review on Health, Access to Services, and Working Conditions" (2010) 12 Journal of Immigrant and Minority Health 132.
[113] See generally *R v Salituro*, [1991] 3 SCR 654 ("while complex changes to the law with uncertain ramifications should be left to the legislature, the courts can and should make incremental changes to the common law to bring legal rules into step with a changing society" at 666). But see Sealy-Harrington et al, *supra* note 111 at 8–9, for a critique of incrementalism as a legal norm.

against state retrogression by drawing on constitutional principles like parliamentary sovereignty and democracy to underline the legislature's "right to make or unmake any law whatever."[114] In *Ferrel v Ontario (Attorney General)*, for instance, the Ontario Court of Appeal dismissed a section 15 *Charter* challenge of a provincial law that repealed an employment equity statute.[115] Refusing to acknowledge any legal distinction having been created by the repeal, the Court reasoned: "If there is no constitutional obligation to enact [the employment equity legislation] in the first place, … it is implicit, as far as the requirements of the constitution are concerned, that the legislature is free to return the state of the statute book to what it was before."[116] The same appellate court affirmed this principle in a subsequent case concerning Ontario's plan to reduce service provision at Hôpital Montfort, the only primarily francophone hospital in the province.[117] Although ultimately finding against Ontario, the court reiterated that, "in the absence of a constitutional right that requires the government to act in the first place, there can be no constitutional right to the continuation of measures voluntarily taken, even where those measures accord with or enhance *Charter* values."[118] These precedents were cited by Mactavish J in *Canadian Doctors* as support for her ruling with respect to the section 7 claim. They also helped to explain why the section 15 success in that case rested not on the effects of the IFHP cuts per se but, rather, on the resultant IFHP's stratification of health-care coverage being partly based on the national origin of the refugee claimants.

Such jurisprudence undoubtedly presents some headwinds for my argument. However, asking courts to break from established precedents, which perpetuate an ill-founded aversion to recognizing *Charter* protection of positive socio-economic rights, is precisely the point of my project. Ultimately, the hope is for the *Charter* to be interpreted as imposing a duty on governments to take proactive measures to progressively realize socio-economic rights as it is obligated to do under international law. But, for now, my modest proposal is, at minimum, to have courts accept that, while governments may lack a proactive positive duty, once they have chosen to put certain socio-economic benefits or protection in place, any subsequent decisions to backslide should incontestably attract *Charter* scrutiny. This position arguably finds resonance in

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[114] *R v Chouhan*, 2021 SCC 26 at para 138 [*Chouhan*], citing AV Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (London: Macmillan, 1959) at 39–40.
[115] [1998] OJ No 5074, leave to appeal to SCC refused, 27127 (9 December 1999) [*Ferrel*].
[116] *Ibid* at para 36.
[117] *Lalonde v Ontario (Commission de restructuration des services de santé)*, [2001] OJ No 4767.
[118] *Ibid* at para 94.

Justice Malcolm Rowe's concurrent decision in *R. v Chouhan*, notwithstanding contextual differences.[119] While agreeing with his Supreme Court of Canada's colleagues that Parliament's abolition of peremptory challenges during the jury selection process was *Charter* compliant, he observed: "Of course, repeal or modification of statutory provisions can raise issues of *Charter* compliance. But, that is not because the statutory provisions themselves are constitutionally protected. Rather it is because their repeal or modification gives rise to unconstitutional effects."[120]

The second counter-argument to my proposal relates to the fear of chilling effects. Case in point, the appellate court in *Ferrel* warned that a *Charter* protection against retrogression "could have an inhibiting effect on legislatures enacting tentative, experimental legislation in areas of complex social and economic relations."[121] In response to this concern, it bears emphasizing that my proposed interpretation of section 7 does not prevent governments from adopting retrogressive measures completely. All it does is require governments to adequately justify such measures insofar as they threaten individuals' lives, liberty, or security. As I have argued, this demand feeds into a culture of justification consonant with the values of a free and democratic society. Among other things, it ensures that, even when retrogressive measures enjoy popular support, the means by which they are adopted are proper, and the interests of marginalized groups are meaningfully considered and safeguarded in the process.

As the Supreme Court of Canada notes about democracy as a constitutional principle: "[A political] system must be capable of reflecting the aspirations of the people. But there is more. Our law's claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the 'sovereign will' or majority rule alone, to the exclusion of other constitutional values."[122] Thus, governments that decline to advance socio-economic rights on the basis of supposed chilling effects, when all that is required of them is justification, should expect to answer to concerns about their democratic legitimacy. Ultimately, subjecting deliberately retrogressive measures affecting life, liberty, or personal security to meaningful *Charter* review honours

[119] *Chouhan*, *supra* note 114.
[120] *Ibid* at para 145.
[121] *Ferrel*, *supra* note 115 at para 37.
[122] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 67.

Canada's constitutional commitments, and it ensures that the protection of society's most vulnerable does not depend on the happenstance of legislative generosity.