Women, Social Assistance and the Supreme Court of Canada

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Les auteures assurent que le récent jugement de la Cour Suprême dans le cas de Louise Gosselin renforce et crée des entraves dans le système judiciaire qui veut remédier à la discriminatiuon contre les bénéficiaires de la sécurité sociale dont plusieurs sont des femmes. L'article examine les cas récents de Gosselin, Kimberley, Rogers et Falkiner vs Ontario qui dénoncent publiquement l'intrusion de l'intimité et de la dignité ainsi que la volonté de « discipliner » et de contraindre les bénéficaires, qui sont à la base des assomptions stéréotypées de la Cour suprême du Canada. Cet article met en lumière l'incompréhension de la Cour qui ne reconnaît pas la nature des recoupements et des éléments liés aux désavantages socio-économiques de ceux qui sont les moins aptes à se défendre.

As the labour market continues to shift to a paradigm of "non-standard" work, women are disproportionately slotted into positions of part-time, casual, contract, or shift work, with little security, fewer benefits, and minimal professional advancement. Given the prospect of low-paying and irregular waged work, while continuing to shoulder the preponderance of child-rearing and other unpaid "domestic" responsibilities, social assistance has become a necessary reality in many women's lives.[2] Perhaps contrary to popular (mis)conceptions of free-riding, this assistance comes at a *price*. For many social assistance recipients, it permits heightened surveillance and regulation over their private activities, both at the state and societal levels. For instance, recipients of social assistance are often subject to scrutiny regarding spending habits, lifestyle, and other normally private choices. Underlying this is the pervasive implication that once public funds ("*our*" tax dollars) are used, what is "bought" becomes public property. Or, at the very least, recipients of social assistance should feel indebted to the generosity of the state. Under this understanding, social assistance is neither a right nor a remedy, but simply a benevolent gesture of goodwill, with poorly defined and arbitrarily enforceable rights against the grantor.

These themes are starkly highlighted in a recent judgment from the Supreme Court of Canada, which considered whether certain distinctions made under the Quebec social assistance laws violated the human rights of Louise Gosselin. With a narrow five-four majority, it was held that Ms. Gosselin's rights under the *Canadian Charter of Rights and Freedoms* were not violated.[3] The majority held that the Quebec government's decision to reduce the monthly benefits of single social assistance recipients under thirty to one-third the normal rate—a mere $170 per month—was neither an infringement of the security of the person nor discriminatory. Ms. Gosselin had framed her case as a class action, claiming on behalf of the class of social assistance recipients affected by the regulations from 1985 to 1989. Due to constraints of space, we confine our remarks to reviewing the latter determination that Ms. Gosselin's right to equality under section 15 of the *Charter*[4] was not violated by the Quebec social assistance regime.[5] The decision (particularly the majority judgment) lacked a nuanced evaluation of the social context of social assistance recipients and recognition of the disproportionate impact poverty has on women.[6] This disregard led to three primary difficulties with the legal analysis: (1) failure to account for the actual experience of recipients and the consequent use of stereotypes as a substitute for evidence; (2) an impoverished understanding of the intersectionality of discrimination; and (3) the reinforcement of underlying stereotypes about the poor.

Failing to Account for the Social Context of Social Assistance Recipients

Among the many issues discussed by the Supreme Court of Canada in *Gosselin* one of the most contentious was the evidence required to support Ms. Gosselin's[7] claims. In considering the evidence, the Court arguably misapplied the standard established in previous jurispru-

dence. In the absence of what it viewed as appropriate evidence, the majority seemed to resort to the use of stereotypical generalizations to underpin its legal argument. These stereotypes are problematic, not only because they went unacknowledged in the judgment and are incorrect, but also because they have been effectively cemented through the legal mechanism of judicial notice, which allows the court to rely on certain widely accepted facts without proof. Thus judicial notice, in addition to the reliance on legal precedent, allows these stereotypes to be reapplied unquestioned as presumed facts. Thus they will now be difficult to challenge.

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A Differential Standard of Proof for Social Assistance Recipients?

Chief Justice McLachlin in her decision for the majority of the court held that the claimant had not adduced sufficient evidence to ground her claim. This position was made clear throughout her decision beginning with her reference to the lack of "direct evidence of any other young person's experience with the government programs" provided by Ms. Gosselin.[8] This was seen again in the majority's concern for making inferences about the program's ability to respond to the needs of a particular group "absent concrete evidence."[9] McLachlin C.J. expressed further concern with the mode of evidence adduced by the plaintiff, pointing out that Ms. Gosselin "alone provided first-hand evidence and testimony as a class member,"[10] and that there was "no indication that Ms. Gosselin [could] be considered representative of the [under thirty] class."[11]

These judicial dicta are troubling for the following reasons. First, McLachlin C.J. appears to have applied a higher standard of evidence to the social assistance recipient-claimant in this case than has generally been required in section 15 equality challenges. In the highly influential earlier case of *Law v. Canada*, Iacobucci J., speaking for the Court, expressly warned against imposing too heavy a burden on claimants and clarified that claimants would not be required to adduce social science evidence or other data "not generally available, in order to show a violation of the claimant's dignity or freedom." Rather, they should be allowed, if appropriate, to rely on judicial notice and logical reasoning to establish their claims.[12]

Second, although it appears that the majority did not explicitly ask for the claimant to adduce data or social science evidence, this palliative does not withstand closer inspection. The majority complained that Ms. Gosselin had not adduced sufficient evidence of the problems faced by other members of the class of social assistance recipients she claimed to represent and implied that she might not be representative of the class. This begs the rhetorical question of how many claimants would be required to prove that Ms. Gosselin is representative of a class.[13] We think it unlikely that the testimony of four (0.005 per cent of participants), 15 (0.02 per cent) or even 100 (0.1 per cent) participants in a program of 75,000 participants would have been adequate or rigorous enough to meet this elusive standard of representativeness. Ultimately the evidentiary requirements to demonstrate discrimination against even a minute fraction of participants could become an extensive research exercise in social science data collection. This burden of proof seemed particularly onerous since Ms. Gosselin's claim of the existence of the group "harmed by facts deriving from a common origin"[14] had already been proved in the authorization as a class action; as the authorization was not a live issue in the appeal, there was no legal requirement that Ms. Gosselin provide extra proof that she represented the class. On the level of principle, a claimant's decision to organize the claim as a class action should not jeopardize her case, particularly since it discourages the use of collective action to seek a judicial remedy for a social problem faced by a group.

Third, the inadequacy of Ms. Gosselin's evidence, as held by the majority, seemed to have affected the finding of discrimination in her particular case. Discrimination against even one claimant, however, should be sufficient to found a Charter violation. As Bastarache J. accurately pointed out in his dissent, "it would be a departure from past jurisprudence for this Court to refuse to find a Canadian Charter breach on the basis that the claimant had not proven disadvantage to enough others."[15] Stringent evidentiary requirements on claimants to show discrimination, means that they consequently shoulder a large part of the evidentiary burden that should procedurally (and properly) rest on the government to defend its actions.

The fourth major problem is the barrier this decision creates for socio-economically deprived claimants who may wish to challenge the allocation of benefits by the government. Placing such a high standard of evidence on claimants may put these challenges out of reach of such parties, both in terms of the investment required to generate the data for these cases as well as the difficulty of contacting people who live in poverty. Those living in poverty are often transient due to insecure accommodations and employment, potentially with limited access to technology and other resources.[16] Further, such individuals may be reluctant to respond to any demands for information to avoid jeopardizing the benefits they currently receive.

Finally, the seemingly heightened burden on this particular group of claimants, and in particular on Ms. Gosselin as the representative of the group, leads to the possible inference that the evidence provided by someone in poverty is somehow less worthy of being believed. As we will see in the following section, the idea that the credibility of those receiving social assistance is somehow impaired, especially in the context of claiming benefits, is derived from particular stereotypes of youth living in poverty.

The Use of Stereotypes

The heightened threshold for evidence presented by claimants may lead courts to rely more heavily on assumptions or stereotypes about the classes of claimants before them. Although McLachlin C.J. explicitly rejected this approach, it was arguably central to the majority's analysis. First, McLachlin C.J. repeatedly rested arguments in her judgment on the stereotype of the enhanced employability of younger people. She stated, for example that "young adults as a class do not seem especially vulnerable or undervalued."[17] She continued by stating that to believe that young adults may be subject to "negative preconceptions" would be a "counter-intuitive" proposition,[18] adding that "[i]f anything, people under 30 appear to be advantaged over older people in finding employment."[19] These comments were based on a belief that youth are more flexible and have more modern skills than older people.[20]

A second stereotype underpinning the majority judgment (and workfare programs generally) was that youth must be forced through financial desperation to pursue work-training opportunities.[21] Further stereotyping in *Gosselin* posited that younger people do not respond as well as older people to the incentive programs created by the government.[22]

Not only did the Court base its decisions on stereotypical assertions regarding youth employment, it also denied that it was engaging in this exercise. Bastarache J. pointed out that even though the legislature might have had positive intentions in differentiating between the over and under thirty groups, doing so was based on the "unverifiable presumption that people under 30 had better chances of employment and lower needs."[23] McLachlin C.J. refuted this argument in saying that Bastarache J.'s point seemed "to place on the legislator the duty to verify all its assumptions empirically, even when these assumptions are reasonably grounded in *everyday experience and common sense.*"[24]

Although not touched on by the Court, many more considerations can underpin youth employability.[25] The problems with the "fact" of youth employability upon which the majority relies are both theoretical and empirical. Theoretically, youth are not necessarily at an advantage. Youth are burdened by the assumption that they can find jobs easily if they look for them and that they are not "family breadwinners" with whom older employers may identify. Both these (mis)perceptions may make it easier for an employer to terminate a young person's employment or decide not to hire her in the first place. Further, youth may be thought to be unreliable, transient, rebellious, and resourceful such that they will find a way to survive with less money. By contrast, older claimants may be particularly advantaged by the fact that they have more job and life experience, greater awareness of available training programs and opportunities, longer track records, greater knowledge of the system, and larger networks of contacts. Also, older claimants may inspire greater commitment from employers as they share certain contextual commonalities.

These misperceptions about younger claimants, and potentially more favourable conditions for older claimants, are supported by the empirical evidence. The most recent Statistics Canada data for 2001 (easily accessible and accurate data available through the internet) demonstrate that the perception that youth may be more able to find and maintain employment is incorrect.[26] The group facing the highest rates of unemployment is that of 15 to 19-year-olds (16.6 per cent); the lowest rate is held by 45 to 54-year-olds (5.4 per cent). Even between groups with relatively similar participation rates, younger people fare worse than older people: 23 to 34-year-olds have a 6.9 per cent unemployment rate whereas 45 to 54-year-olds have a 5.4 per cent unemployment rate. These statistics are paralleled by the data available for Quebec in the census years 1981, 1986, 1991, and 1996, which show 20 to 24-year-olds as having unemployment rates of 16.3 per cent, 18.4 per cent, 17.2 per cent and 17.1 per cent in those years and 25 to 54-year-olds (with relatively similar participation rates in the labour market) as having unemployment rates of 8.0 per cent, 10.8 per cent, 10.8 per cent and 10.6 per cent.[27] Unemployment rates for younger people in Quebec have consistently been over five per cent higher than those of older people.

Contrary to popular (mis)conceptions of free-riding, this assistance comes at a *price*. For many social assistance recipients, it permits heightened surveillance and regulation over their private activities, both at the state and societal levels.

Finally, McLachlin C.J. justified her conclusions by noting that "the idea that younger people may have an easier time finding employment than older people" was not an "arbitrary and demeaning stereotype"[28] and, therefore, was unproblematic. This ignores the majority's own warning that paternalistic intentions for a group's "own

good" can still be discriminatory when based on presumed or stereotypical characteristics of a group.[29] The idea that younger people, simply because they are young, are more capable than those 30 and over of finding employment if they only make the effort to do so, is such an unsupported assumption.[30] This assumption effectively acts as an unquestioned standard that young people receiving social assistance are required to meet, or, in other words, a stereotype incorporated into the analysis to justify the finding of no discrimination. Although not demeaning in the strict sense, it is still an arbitrary generalization. Despite having recognized earlier in its judgment that the market conditions were largely responsible for disproportionately high rates of youth unemployment, the majority used "everyday experience and common sense" to validate the generalization that "younger people may have an easier time finding employment than older people."[31] By using the government's non-malicious intent as an analytical tool for masking the discriminatory assumptions underlying that intent, the majority allows these assumptions to be perpetuated, endorsed, and left unquestioned.

Quite apart from a question of whether a minimum level of assistance should be a governmental obligation, discriminatory treatment within a social assistance scheme is particularly egregious because its purpose purports to be highly complementary to greater equality goals

Failure to Account for the Intersectional and Subtle Nature of Discrimination

In the past, the legal analysis of section 15 focused largely on slotting claimants into discrete grounds (such as sex, sexual orientation, race, ability, and so on) which resulted in claimants whose identities traversed more than one of the judicially-defined watertight compartments (e.g. a lesbian woman of colour) being forced to distort their identities in order to gain legal recognition.[32] In the process, the more nuanced and contextual aspects of the discrimination they faced were ignored, marginalized or misunderstood. Recently, in the *Law case,* the Court appeared to try to address this rigidity and its consequences by acknowledging a more holistic approach:

> [I]t is open to a claimant to articulate a discrimination claim under more than one of the enumerated and analogous grounds. If the court determines that recognition of a ground or confluence of grounds as analogous would serve to advance the fundamental purpose of s. 15(1), the ground or grounds will then be so recognized.
>
> There is no reason in principle, therefore, why a discrimination claim positing an intersection of grounds cannot be understood as analogous to, or as a synthesis of, the grounds listed in s. 15(1).[33]

However, the judicial drive to categorize, and more specifically, to work within traditionally recognized categories, is apparent in *Gosselin,* where each of the judges unquestioningly accepted that the distinction faced by Ms. Gosselin was based on the ground of age. To be fair, this was how the claimant framed her section 15 claim. We would argue, however, that this is, if not wrong, then inaccurate and created four problematic issues for the analysis in this case.

First, a Court is required to account for "the claimant's already disadvantaged position ... resulting in substantively different treatment ..."[34] in assessing whether she has suffered discrimination. In this case, the claimant's status as either a person living in poverty, an unemployed person, a recipient of social assistance, or all three, has placed her in an already disadvantaged position under the regulation. This disadvantage was exacerbated by the lower social assistance rates she received as a person under 30. Therefore, a truly contextual and purposive analysis cannot exclude consideration of her socio-economic status.

Although the legislative distinction in Gosselin was formally one of age, it was the claimant's socio-economic status and her dependence on social assistance that made this distinction possible. It has been recognized that the poor, and especially those on social assistance, are disproportionately susceptible to state-sanctioned invasions of privacy,[35] regulation of personal lifestyle,[36] and discrimination.[37] By summarily deciding, as the majority did in Gosselin, that the prohibited ground is one of age alone, there can only be a fragmented and partial understanding of how age and socio-economic status interact to discriminate against the claimant. The granting and withholding of resources for basic human necessities should be the distinction at issue. Recognizing this distinction (either combined with age or as a primary ground) would allow for a more accurate, realistic, and contextual approach to a claim of discrimination. The following comment made by former Justice La Forest as chair of the Canadian Human Rights Act Review Panel, which recommended the inclusion of "social condition" as a prohibited ground

of discrimination to address the claims of discrimination of those living in poverty, is apposite:

> Some barriers related to poverty could be challenged on one or more of the existing grounds. However, these cases have rarely been successful. They are difficult to prove because they do not challenge the discrimination directly.... [I]f a policy or practice adversely affects all poor people or all people with a low level of education, *a ground-by-ground consideration of the issue can be seen as a piecemeal solution that fails to take into account the cumulative effect of the problem.* [emphasis added][38]

Second, in both the majority and dissent, poverty was understood as an externality. None of the justices was willing to consider poverty as a possible ground, in itself or in combination with another ground, so long as the finding that the claimant had been subject to differential treatment could be based on an enumerated ground (in this case, age). The majority characterized poverty as the product of the lack of individual effort to become employed. The dissent, written by Bastarache J. situated poverty as a precursor of discrimination, to be considered merely as a background factor.[39] In the words of McLachlin C.J. writing for the majority:

> Given the lack of pre-existing disadvantage experienced by young adults, Ms. Gosselin attempts to shift the focus from age to welfare, arguing that all welfare recipients suffer from stereotyping and vulnerability. However, this argument does not assist her claim. The ground of discrimination upon which she founds her claim is age.... Re-defining the group as welfare recipients aged 18 to 30 does not help us answer that question, in particular because the 30-and-over group that Ms. Gosselin asks us to use as a basis of comparison also consists entirely of welfare recipients.[40]

Although the majority was willing to compare those over 30 to those under 30 at the level of generality in determining pre-existing disadvantage, it refused to evaluate differences between social assistance recipients because they constituted a disadvantaged group as a whole. This "minus one" approach to evaluating discrimination is rigid and unrealistic. It only allows single deviations from the societal norm: young versus old; affluent versus poor; employed versus unemployed. This sort of dichotomous thinking can (and should) be avoided if substantive equality is to be achieved.

This leads to a third problem: while the Court forewarned us in an earlier decision not to encourage a "race to the bottom" of competing disadvantages,[41] the decision in *Gosselin* to focus on the single enumerated ground of age only highlights the lacuna in the jurisprudence regarding intersectionality and equality rights—particularly as they relate to discrimination claims based on socio-economic status. There was evidence before the Court in *Gosselin* of multiple intersecting grounds: that women in poverty were more susceptible to abuse, harassment, and sexual exploitation;[42] that persons with disabilities, racialized persons, Aboriginal persons, and single parents disproportionately live in poverty;[43] and, as we have seen, that age and geography are also markers of poverty for both youth and seniors. Clearly, a claim based on numerous characteristics should not delegitimize or preclude the claims of those who suffer discrimination on fewer grounds or on a single ground. At the same time, an additive or compounding approach to the intersectionality of discrimination does not further the cause of substantive equality but rather devolves it into a formalistic calculus.[44] Unfortunately, all the judgments in *Gosselin*, for the most part, glossed over intersectionality and opted instead for the more simplistic, but necessarily incomplete approach of focusing on the single enumerated ground of age.

Underlying Stereotypes

People living in poverty or of low socio-economic status face a host of barriers and discrimination. Earlier we argued that differential standards of proof for social assistance recipient claimants may lead to reliance on stereotypes by the court, which are then entrenched through judicial notice and precedent. Here, we will highlight the more insidious stereotypes that may have influenced the decision in *Gosselin* and which could erect roadblocks to achieving substantive equality in future cases. The following comment of the majority is one example:

> *Simply handing over a bigger welfare cheque* would have done nothing to help welfare recipients under 30 escape from unemployment and its potentially devastating social and psychological consequences above and beyond the short-term loss of income. A young person who relies on welfare during this crucial initial period is denied those formative experiences which, for those who successfully undertake the transition into the productive work force, lay the foundation for economic self-sufficiency and autonomy, not to mention self-esteem. The longer a young person stays on welfare, the more difficult it becomes to integrate into the work force at a later time. In this way, reliance on welfare can contribute to a vicious circle of inability to find work, despair, and increasingly dismal prospects. [emphasis added][45]

This kind of statement fails to recognize that dependence on social assistance offers neither a liveable existence nor a valued status in our society. It ignores that the effort involved in simply surviving on only $170 per month could be an all-consuming job in itself. Daily trials would include finding enough food when access to food banks is limited and restricted; finding reasonable

accommodations when rents are high, when landlords are unwilling to rent to social assistance recipients, and when public housing is scarce; finding employment without the expected attire and tools for job interviews; and maintaining employment, or even accepting promotion, when the amount of any extra revenue or cost-saving measure is "clawed-back" by social assistance as an offset to the deemed amount of needs.[46] For women in particular, there is also often the added burden of childcare, the higher incidence of discrimination in hiring and in pay, and the heightened exposure to sexual harassment or exploitation. In this light, a greater amount of assistance or "a bigger welfare cheque" could, in fact, be more conducive to employability because it would enable people to have a small measure of security and time to assess their options and opportunities.[47]

In addition to failing to account for the simple realities of those living in poverty, the paternalistic undertones of the passage above would seem to be based on underlying stereotypes of the poor and the young as being unemployed by choice, lack of motivation, or laziness. Clearly the majority did not intend to invoke stereotypes, but its subtle assumptions (combined with the lack of proof or discussion of their veracity) are reflective of the insidious discrimination faced by the poor in society generally. Jean Swanson provides an evocative account of such discrimination:

> Somewhat surprisingly, moral explanatory accounts of poverty were more common and powerfully perceived causes of poverty: lack of responsibility, effort or family skills were universally cited explanations.... Most secure participants [in a political focus testing study] see children as deserving and their parents as less so [possibly unwitting agents of their children's misfortune] ... Welfare recipients are seen in unremittingly negative terms by the economically secure. Vivid stereotypes [bingo, booze, etc.] reveal a range of images of SARs [Social Assistance Recipients] from indolent and feeble to instrumental abusers of the system. Few seem to reconcile these hostile images of SARs as authors of their own misfortune with a parallel consensus that endemic structural unemployment will be a fixed feature of the new economy.[48]

Such blatant contradictions between group characteristics and societal realities are recurring indications that stereotypes are at play. As discussed above, this is reflected in the majority judgment where evidence mitigating a finding of discrimination was cited (as to the unemployment rates of youth in Quebec at the time), but subsequently disregarded in favour of "common sense" assumptions that youth, if they just tried hard enough, could become "productive" members of society. There was no discussion that the scheme itself may have created or perpetuated barriers to employment. For instance, the social assistance claw-back, which is still a strong aspect of our current social aid schemes, was completely ignored. Thus, it was open to the majority to freely assume that social assistance was simply an income supplement:

> [There is no] evidence of the actual income of under-30s who did not participate; clearly "aid received" is not necessarily equivalent to "total income."[49]

"Welfare recipients are seen in unremittingly negative terms by the economically secure. Vivid stereotypes [bingo, booze, etc.] reveal a range of images of Social Assistance Recipients from indolent and feeble to abusers of the system."

Even though receiving income in excess of the maximum level of assistance would be contrary to the Regulation respecting social aid, possibly even criminal,[50] and would perpetuate the stereotype of "welfare cheats" abusing the system, it was the majority's assumption that it occurred that was the basis for finding that no discrimination existed.

Underlying all of these stereotypes—dishonesty, irresponsibility, and laziness, for example—is the latent and lurking conception of social assistance as charity rather than as a societal duty or individual right. So long as social assistance is conceived of as, at best, the benevolent generosity of the majority, and at worst, stealing from the rich to give to the poor, then the human dignity of those living in poverty or those receiving social assistance will always be impaired.

The majority used the term "dignity" freely when supporting its judgment. The concept of dignity, however, is inherently malleable and can be a vessel to be filled by many different concepts, as has been discovered by many common law courts around the world.[51] The majority's conception of dignity in Gosselin is particularly challenging. References to the dignity of work and long-term self-sufficiency regardless of whether it means living with one's parents or being unable to survive demonstrate a lack of consideration for the realities of the class before them: there is no discussion of the "dignity" of being compelled to perform the work no one else wants for minimum wage. Certainly, there is little dignity in the stereotypical assumption that social assistance recipients will not participate in work or training opportunities unless forced through financial deprivation. Fundamentally, the workfare nature of the Quebec legislation re-

moved the choice to work and the right to be free from coercion that should be central to human dignity.[52]

Quite apart from a question of whether a minimum level of assistance should be a governmental obligation, discriminatory treatment within a social assistance scheme is particularly egregious because its purpose purports to be highly complementary to greater equality goals: to promote the equal participation in our society of groups that may be particularly vulnerable to systemic, attitudinal, and other barriers to the realization of their potential or goals as individuals; to promote "a society in which all are secure in the knowledge that they are recognized at law as equal human beings, equally capable, and equally deserving."[53]

Conclusions

As this piece has argued, the recent decision in Gosselin reinforces and creates barriers to the use of the justice system to remedy discrimination against social assistance recipients, many of whom are women. The direct impact of social assistance regimes on women is evident in the recent cases of Kimberly Rogers[54] and *Falkiner v. Ontario.*[55] Both very publicly challenge the infringements of privacy and dignity, as well as the strong impulses to "discipline" and coerce recipients that lies at the root of many of the Supreme Court of Canada's stereotypical assumptions. *Gosselin* could have addressed these problems head-on, but failed to do so and even created tools to justify regressive conclusions. The Court's failure to incorporate the intersecting and textured nature of socio-economic disadvantage in its analysis impoverished the understanding of equality protected by the Charter. The erection of evidentiary barriers, the substitution of stereotypes for reasons and facts and the use of stereotypes as rhetorical props will only enhance this trend. The bounded nature of legal decision-making, through backward-looking doctrines such as precedent and judicial notice, bodes poorly for a radical change in future cases. The promise in section 15 of substantive equality for all Canadians will remain unfulfilled so long as procedural and evidentiary obstacles to collective action are erected and so long as the law fails to acknowledge and critically examine the complex nature of socio-economic disadvantage and discrimination.

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[2]This is highlighted by statistics available from the National Council of Welfare which documents that single-parent mothers and unattached women are over-represented as social assistance recipients in relation to their proportion of the population, as well as forming the majority of social assistance recipients, online: National Council of Welfare <http://www.ncwcnbes.net/>.

[3]*Gosselin v. Quebec,* 2002 SCC 84.

[4]Section 15(1) of the *Charter* provides that: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." In *Gosselin* the Supreme Court primarily relied on the ground of "age" in determining whether discrimination had occurred. Notably, the Charter does not provide explicit protection for discrimination for social condition, socio-economic status or poverty.

[5]For further discussion on the breach of an "economic" right to security of the person, see the judgment of Arbour J.

[6]See N. Kim and T. Piper, "Back to the Poorhouse...: Gosselin v. Quebec" (2004) 38 McGill L.J.

[7] Who will be referred to throughout as either the "appellant" or "claimant."

[8]*Supra* note 1 at para. 8.

[9]*Ibid.* at para. 54.

[10]*Ibid.* at para. 8.

[11]*Ibid.* at para. 47.

[12]*Law v. Canada,* [1999] 1 S.C.R. 497 at paras. 77-78.

[13]*Supra* note 1 at para. 33.

[14]*Ibid.* at para. 249.

[15]*Supra* note 1 at para. 249.

[16]See e.g. Statistics Canada, "Internet use rates, by location of access and household income," online: Statistics Canada <http://www.statcan.ca/english/Pgdb/arts56a.htm>.

[17]*Supra* note 1 at para. 33.

[18]*Ibid.* at para. 32: Concerns about age-based discrimination typically relate to discrimination against people of advanced age who are presumed to lack abilities that they may in fact possess. Young people do not have a similar history of being undervalued. This is by no means dispositive of the discrimination issue, but it may be relevant, as it was in *Law.*

[19]*Ibid.* at para. 34.

[20]*Ibid.*, citing *McKinney v. University of Guelph,* [1990] 3 S.C.R. 229 at para. 92 [*McKinney*].

[21]See *e.g., Gosselin, ibid.* at para. 60. See also *ibid.* at para. 250, per Bastarache J.

[22]*Ibid.* at para. 250.

[23]*Ibid.* at para. 248.

[24]*Ibid.* at para. 56 [emphasis added].

[25]*Ibid.* at para. 250.

[26]Statistics Canada, "Labour Force Characteristics by Age and Sex," online: Statistics Canada <http://www.statcan.ca/english/Pgdb/labor20a.htm>. Bastarache J. reached a similar conclusion on an analysis of the statistics adduced

in *Gosselin, supra* note 1 at para. 235 [emphasis added]: The purpose of undertaking a contextual discrimination analysis is to try to determine whether the dignity of the claimant was actually threatened. In this case, we are not dealing with a general age distinction but with one applicable within a particular social group, welfare recipients. Within that group, the record makes clear that it was not, in fact, easier for persons under 30 to get jobs as opposed to their elders. Thus, the stereotypical view upon which the distinction was based, that the young social welfare recipients suffer no special economic disadvantages, was not grounded in fact; it was based on old assumptions regarding the employability of young people. The creation of the assistance programs themselves demonstrates that the government itself was aware of this disadvantage.

[27]See Statistics Canada, "1981-1996 Census – Labour Force Activity by Sex and Age Groups, Quebec, Both Sexes," online: Statistics Canada <http://www.statcan.ca/english/census96/mar17/labour/table6/t6p24a.htm>.

[28]*Supra* note 1 at 248.

[29]*Ibid.* at para. 27. See also *ibid.* at para. 243, per Bastarache J. (only a "detrimental" purpose is to be considered).

[30]See *ibid.* at paras. 403-10, Lebel J.

[31]*Ibid.* at para. 56.

[32]See Nitya Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19 Queen's L.J. 179, discussing the problems of falling through the cracks or pushing others through the cracks in the context of *Mossop* and *Symes v. Canada* ([1993] 4 S.C.R. 695). See also Nitya Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) 6 C.J.W.L. 25. See also Audrey Macklin, "*Symes v. M.N.R.:* Where Sex Meets Class" (1992) 5 C.J.W.L. 498.

[33]*Supra* note 8 at para. 93-94.

[34]*Ibid.* at para. 88.

[35]See e.g. *Glasgow v. Nova Scotia (Minister of Community Services)* (1999), 178 N.S.R. (2d) 115. A similar reading could be inferred from the result in *Re Privacy Act (Can.),* [2001] 3 S.C.R. 905.

[36]*Falkiner v. Ontario (Minister of Community and Social Services)* (2002), 59 O.R. (3d) 481 (C.A.) and other cases where the "spouse in the house" rule affecting social assistance has been found unconstitutional.

[37]See e.g. *Dartmouth/Halifax County Regional Housing Authority v. Sparks* (1993), 119 N.S.R. (2d) 91 (S.C.); Sheilagh Turkington, "A Proposal to Amend the Ontario Human Rights Code: Recognizing Povertyism" (1993) 9 J.L. and Social Pol'y 134; Martha Jackman, "Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination Under the Canadian Charter and Human Rights Law" (1994) 2 Rev. Const. Stud. 76; Canadian Human Rights Act (CHRA) Review Panel, *Promoting Equality: A New Vision* (Ottawa: CHRA Review Panel, 2000) (Chair: Gérard V. La Forest) [CHRA Review Panel].

[38]CHRA Review Panel, *ibid.* at 108 [emphasis added].

[39]*Ibid.* at para. 238.

[40]*Supra* note 1 at para. 35.

[41]*Lovelace v. Ontario,* [2000] 1 S.C.R. 950 at para. 69. Bastarache J. reiterates this stance in *Gosselin* (*supra* note 1 at 237). Similarly, a contextual and sensitive inquiry at the grounds-definition stage should not mean a substantially heightened burden for the claimant. The test, and the judges applying it, should be receptive to new and complex claims without insisting on strict standards of causation between the ground(s) and discrimination nor perfect proof as to the discreteness or insularity of the group.

[42]See *Gosselin, supra* note 1 (Factum of the Intervenor, National Association of Women and the Law (NAWL), at paras. 5-9), online: PovNet <http://www.povnet.org/gosselin/gosselin_part1.htm> [NAWL Factum].

[43]See CHRA Review Panel, *supra* note 37 at 108; NAWL Factum, *ibid.* See also A. Wayne MacKay, Tina Piper, and Natasha Kim, "Social Condition as a Prohibited Ground of Discrimination under the Canadian Human Rights Act" (Canadian Human Rights Act Review, 2000), online: Canada, Department of Justice, Canadian Human Rights Act Review <http://canada.justice.gc.ca/chra/en/socond2.htm>.

[44]See Iyer, *supra* note 33.

[45]*Supra* note 1 at para. 43 [emphasis added].

[46]*Social Aid Act,* supra note 2, ss. 3, 12; Section VIII of the *Regulation respecting social aid,* supra note 2.

[47]See e.g. NAWL Factum, supra note 43 and *Gosselin, supra* note 1 (Factum of the Intervenor, Charter Committee on Poverty Issues).

[48]Part of a submission by Jean Swanson of End Legislated Poverty obtained from HRDC through an Access to Information request and cited in CHRA Review Panel, *supra* note 37 at 110 [all notes in square brackets except the first in the CHRA report].

[49]*Supra* note 1 at para. 51.

[50]See the case of Kimberley Rogers who died while under house arrest for social assistance fraud. The results of a coroner's inquest into her death included a number of recommendations for changing the operation of the social assistance scheme. Dawn Ontario: Disabled Women's Network Ontario, "Justice With Dignity: Committee to Remember Kimberly Rogers," online: Dawn Ontario <http://dawn.thot.net/Kimberly_Rogers/kria118.html>.

[51] See *e.g. National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs,* [2000] 2 S. Afr. L.R. 1, [2000] 1 B. Const. L.R. 39 (S. Afr. Const. Ct.). See further Errol P. Mendes, "Taking Equality into the 21st Century: Establishing the Concept of Equal Human Dignity" (2000-2001) 12 N.J.C.L. 3. Compare Roger Gibbins, "How in the World Can You Contest Equal Human Dignity?" (2000-2001) 12 N.J.C.L. 25.

[52]Interestingly, the majority noted that one of the motivations for the implementation of a "conditional" scheme was that section 15(3)(a) of the *Canada Assistance*

Plan (R.S.C., c. C-1, as rep. by *Budget Implementation Act,* 1995, S.C. 1995, c. 17, s. 32) did not allow workfare to be compulsory. Portrayed as "one of the major cornerstones of the social security system in Canada," this portion of the *Canada Assistance Plan* reflected the principle set forth in the first paragraph of article 6 of the *International Covenant on Economic, Social and Cultural Rights,* 16 December 1966, 993 U.N.T.S. 3, art. 6, Can. T.S. 1976 No. 46 (entered into force 3 January 1976, accession by Canada 19 August 1976): "The State Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his [or her] living by work which *he [or she] freely chooses or accepts....* " [emphasis added]. See *Gosselin, supra* note 1 at para. 44.

[53]*Egan, supra* note 14. See also *Canadian Human Rights Act,* R.S.C. 1985, c. H-6, s. 2; *Act to combat poverty and social exclusion,* S.Q. 2002, c. 61, Preamble, s. 1.

[54]Supra note 50.

[55]*Falkiner* was on appeal from the Ontario Court of Appeal to the Supreme Court of Canada. The case concerned the constitutionality of the loss of welfare benefits by persons who co-reside with a member of the opposite sex (the spouse in the house rule). Revoked in the late 1980s, it was re-implemented in 1995. Of the thousands cut off from social assistance, 90 per cent were women—many of them single mothers. The Ontario government re-revoked the rule and the appeal was abandoned.