Time to Regroup: Rethinking Section 15 of the Charter

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In this article, the author advocates a group-based approach to analysis under section 15 of the *Canadian Charter of Rights and Freedoms*. Such an approach was first presented by L'Heureux-Dubé J. in *Egan v. Canada*. There, L'Heureux-Dubé J. argued that the emphasis on enumerated and analogous grounds in equality jurisprudence detracts from a more "effects" or "impact"-based assessment of discrimination.

L'Heureux-Dubé J. relinquished her position in the later Supreme Court of Canada decision of *Law v. Canada (Minister of Employment and Immigration)*, where the unanimous Court retained the requirement that differential treatment be based on one of the enumerated or analogous grounds in section 15. The *Law* decision, which at the time represented a compromise to different approaches to section 15, has badly fractured in recent equality decisions (*Lavoie v. Canada* and *Gosselin v. Quebec (A.G.)*).

The author argues that reconsideration of L'Heureux-Dubé J.'s group-based focus in *Egan* will address some of the weaknesses in the *Law* framework that have lead to its demise. Through an examination of both the Supreme Court's decision in *Trociuk v. British Columbia (A.G.)* and the Ontario Court of Appeal's decision in *Falkiner v. Ontario (Ministry of Community and Social Services)* (which is slated to be heard by the Supreme Court in 2004), the author supports L'Heureux-Dubé J.'s *Egan* framework as a more meaningful way to consider equality claims. In particular, the author argues that such a group-based approach allows for a more sophisticated understanding of gender equality challenges and offers the courts an easier methodology for assessing claims of complex discrimination.

Dans cet article, l'auteur plaide en faveur d'une approche fondée sur les groupes dans l'analyse sous l'article 15 de la *Charte canadienne des droits et libertés*. Une telle approche avait d'abord été présentée par la juge L'Heureux-Dubé dans *Egan c. Canada*. Dans cette décision, la juge L'Heureux-Dubé avait soutenu que l'emphase sur les motifs énumérés et analogues que l'on retrouve dans la jurisprudence en matière de droit à l'égalité s'éloignait d'une évaluation de la discrimintation fondée sur ses effets ou ses impacts.

La juge L'Heureux-Dubé a abandonné cette position dans la décision subséquente de la Cour suprême du Canada de *Law c. Canada (Ministre de l'emploi et l'immigration)*, dans laquelle la Cour a unanimement retenu l'exigence selon laquelle un traitement différencié doit être basé sur l'un des motifs énumérés ou analogues de l'article 15. L'arrêt *Law*, qui représentait à l'époque un compromis entre différentes approches relatives à l'article 15, a été lourdement fracturé dans certaines décisions récentes en matière de droit à l'égalité (*Lavoie c. Canada* et *Gosselin c. Québec (P.G.)*).

L'auteur soutient qu'une reconsidération de l'approche fondée sur les groupes telle que développée par L'Heureux-Dubé dans *Egan* pourrait permettre d'adresser certaines faiblesses du cadre d'analyse utilisé dans l'arrêt *Law* ayant mené à son abandon. Par un examen de la décision de la Cour suprême dans *Trociuk c. British Columbia (P.G.)* et de celle de la Cour d'appel de l'Ontario dans *Falkiner v. Ontario (Ministry of Community and Social Services)* (laquelle devrait être entendue par la Cour suprême en 2004), l'auteur considère que le cadre d'analyse de L'Heureux-Dubé dans *Egan* est une manière plus appropriée de considérer les revendications en matière de droit à l'égalité. L'auteur affirme en particulier que cette approche fondée sur les groupes permet une compréhension plus sophistiquée des défis posés par l'égalité des sexes et qu'elle offre aux tribunaux une méthodologie plus facile à appliquer lorsque vient le temps de considérer les plaintes plus complexes de discrimination.

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To be cited as: (2003) 48 McGill L.J. 627
Mode de référence : (2003) 48 R.D. McGill 627

Introduction

In 1999, the Supreme Court delivered a unanimous judgment in *Law v. Canada (Minister of Employment and Immigration)*,[1] setting out guidelines on the appropriate framework for equality analysis under section 15 of the *Canadian Charter of Rights and Freedoms*.[2] Iacobucci J., writing for the Court, acknowledged prior disagreements in section 15 jurisprudence and crafted a synthesis that tried to weave together the diverse strands. Only four years later, the *Law* compromise has badly fractured, with a final collapse perhaps indicated in the Court's recent decisions in *Lavoie v. Canada*[3] and *Gosselin v. Quebec (A.G.)*.[4] *Lavoie* comprised four sets of reasons while *Gosselin* required five separate judgments. The many decisions were more than just interpretive differences; instead, each represented siguificant problems with the *Law* framework. In this article, I echo those who argue that *Law*'s cohesion was illusory and its test unworkable.[5] In my view, equality rights stand at a precipice as the Supreme Court's section 15 jurisprudence shows the strain of a lack of vision on the meaning and values that are accorded equality in Canada. It is ironic, and disheartening, that the only recent equality decision to garner unanimity is the Court's decision in *Trociuk v. British Columbia (A.G.)*,[6] a case that upheld a male claimant's challenge on the ground of sex discrimination.

This article will argue that the Court should reconsider its section 15 framework, and revisit, in particular, the position advanced by L'Heureux-Dubé J. in *Egan v. Canada*.[7] She advocated a de-cmphasis on the enumerated and analogous grounds in favour of a more purposive approach to equality. Dignity was L'Heureux-Dubé J.'s touchstone, and she implicated it in her contextual analysis of whether the claimant belonged to a group that had suffered historic disadvantage and whether that disadvantage was exacerbated by the impugned legislation. She was suspicious of claims from members of historically advantaged groups, arguing that section 15 be directed at ameliorating the lives of the oppressed.[8]

L'Heureux-Dubé J. was unable to persuade her colleagues in *Egan*, but Iacobucci J.'s efforts to reach a compromise in *Law* did incorporate her emphasis on human dignity, fashioning it into a third step in assessing section 15 violations. The *Law*

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[1] [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1 [*Law*].

[2] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), c. 11 [*Charter*].

[3] [2002] 1 S.C.R. 769, 210 D.L.R. (4th) 193, 2002 SCC 23 [*Lavoie*].

[4] [2002] 4 S.C.R. 429, 221 D.L.R. (4th) 257, 2002 SCC 84 [*Gosselin*].

[5] See *e.g.* David L. Corbett, Karen Spector & Jonathan Strug, "Section 15 Jurisprudence in the Supreme Court of Canada in 2000" (2001) 14 S.C.L.R. (2d) 29; Peter Hogg, *Constitutional Law of Canada* (Toronto: Thomson Canada, 2002), s. 52.7(b); June Ross, "A Flawed Synthesis of the Law" (2000) 11:3 Constitutional Forum 74.

[6] (2003), 226 D.L.R. (4th) 1, 14 B.C.L.R. (4th) 12, 2003 SCC 34 [*Trociuk*].

[7] [1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609 [*Egan*].

[8] *Ibid.* at paras. 31-102, L'Heureux-Dubé J., dissenting.

formulation, however, retained the requirement of differential treatment on the basis of listed or analogous grounds. I have argued elsewhere that this synthesis is unworkable.[9] In this article, I further my claim with an analysis of the splintering of the *Law* framework in *Lavoie* and *Gosselin* and a consideration of the unfortunate result in *Trociuk.* I conelude that the Supreme Court has a chance to revise its approach in hearing the appeal for *Falkiner v. Ontario (Ministry of Community and Social Services).*[10] The Ontario Court of Appeal's decision in that case is unanimous and well reasoned, and Laskin J.A.'s sensitive and contextual approach to the claims is reminiscent of L'Heureux-Dubé J.'s position in *Egan. Falkiner* provides an opportunity for the Court to revisit its commitment to the enumerated and analogous grounds and to reconsider how those grounds interact with an analysis focussed on dignity.

I. L'Heureux-Dubé's Purposive "Human Dignity" Approach in *Egan*

We begin with a brief discussion of L'Heureux-Dubé J.'s judgment in *Egan. Egan* was one-third of the so-called trilogy of section 15 decisions released in 1995.[11] Prior to the trilogy, the Court followed the direction set out in its inaugural section 15 decision of *Andrews v. Law Society of British Columbia,*[12] which Sheilah Martin has described as a "human rights approach".[13] The *Andrews* framework focussed attention on group disadvantage and rejected a distinction between reasonable and unreasonable discrimination.[14] In the 1995 trilogy, thc Court's approach splintered. McLachlin, Cory, Iacobueci and Sopinka JJ. continued the *Andrews* approach and emphasized the importance of historic disadvantage in the analysis. Lamer C.J. along with Gonthier, LaForest and Major JJ. took section 15 in a new direction, asking whether the law was based on irrelevant personal characteristics (the "relevance test").[15]

L'Heureux-Dubé J. developed her own approach, minimizing the role of the enumerated or analogous grounds. She was concerned that the Court was not cohesive in its vision of what equality means and outlined a vision for giving full effect to the ideal of equality: the Court should consider "human dignity" as the

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[9] See Daphne Gilbert, "Unequaled: L'Heureux-Dubé J.'s Vision of Equality and Section 15 of the *Charter*" (2003) 15:1 C.J.W.L. [forthcoming].

[10] (2002), 59 O.R. (3d) 481, 212 D.L.R. (4th) 633 (C.A.), leave to appeal granted, [2002] S.C.C.A. No. 297 (QL) [*Falkiner*].

[11] The "trilogy" includes *Egan* (*supra* note 7), *Thibaudeau v. Canada* ([1995] 2 S.C.R. 627, 124 D.L.R. (4th) 449), and *Miron v. Trudel* ([1995] 2 S.C.R. 418, 124 D.L.R. (4th) 693).

[12] [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1.

[13] Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" (2001) 80 Can. Bar Rev. 299 at 315.

[14] *Ibid.* at 310-11.

[15] See Donna Greschner, "Does *Law* Advancc the Cause of Equality" (2001) 27 Queen's L.J. 299 at 306-307 for a summary of the critique of the relevancy test.

definitional objective of equality, as reflected in questions of whether a person is treated with equal concern, respect, and consideration. While not restricting the availability of section 15, she insisted that equality analysis should focus on those individuals who belong to groups that have suffered historic disadvantage.

The imposition of any such limits or presumptions in section 15 analysis has been controversial in both judicial and academic considerations of equality. For instance, in *R. v. Hess*,[16] McLachlin J. (as she then was) explicitly rejected the idea that men (a historically advantaged group) could not bring claims of sex discrimination, arguing: "There is no suggestion ... that men should be excluded from protection under s. 15 because they do not constitute a 'discrete and insular minority' disadvantaged independently of the legislation under consideration."[17] Diana Majury notes that the argument that section 15 should apply only to subordinated or disadvantaged groups has not been made explicitly but, "feminists have certainly argued against the symmetrical application of the equality guarantee."[18]

A problem with restricting the availability of section 15 to the powerless or oppressed is the identification of such subordinated groups, a task that is not always obvious.[19] One way to address this issue might be to take a contextual and individualized approach in each case, since it might not be accurate to draw the categorical conclusion, for instance, that men as a group can never advance a sex equality claim. A consideration of whether the claimant belongs to a group that has suffered historic disadvantage under the circumstances of a given case might go a long way toward avoiding the problems encountered in *Trociuk*, which we will discuss shortly.

L'Heureux-Dubé J.'s primary concern in *Egan* was protecting those who are members of socially vulnerable *groups* (her alternative to "grounds").[20] Citing *Weatherall v. Canada*[21] and *Hess*, she argued that it is merely "admitting reality" to acknowledge that members of advantaged groups (e.g., men) are less sensitive to and less likely to suffer from discrimination than members of marginalized groups.[22]

A further refinement of section 15 presented by L'Heureux-Dubé J. in *Egan* is the de-emphasis on the enumeratcd and analogous grounds. She called the grounds an "imperfect vehicle" that failed to give full effect to the purpose of section 15.[23] In her

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[16] [1990] 2 S.C.R. 906, 73 Man. R. (2d) 1 [*Hess* cited to S.C.R.].

[17] *Ibid.* at 943-44.

[18] Diana Majury, "The *Charter*, Equality Rights, and Women: Equivocation and Celebration" (2002) 40 Osgoode Hall L.J. 297 at 310.

[19] *Ibid.*, n. 47.

[20] *Egan, supra* note 7 at paras. 59, 61.

[21] [1993] 2 S.C.R 872, (*sub nom. Conway v. Canada)* 105 D.L.R. (4th) 210.

[22] *Egan, supra* note 7 at para. 58.

[23] *Ibid.* at paras. 47-54.

view, the grounds were a means to an end, relevant markers instrumental to finding discrimination, but not the end itself:[24]

> By looking at the grounds for the distinction instead of at the *impact* of the distinction on particular *groups*, we risk undertaking an analysis that is distanced and desensitized from real people's real experiences. To make matters worse, in defining the appropriate categories upon which findings of discrimination may be based, we risk relying on conventions and stereotypes about individuals within these categories that, themselves, further entrench a discriminatory *status quo*.[25]

In de-emphasizing the enumerated grounds, L'Heureux Dubé J. focussed instead on socially vulnerable groups. She had the overarching aim of "putting discrimination first".[26] In the end, her test required an individual to demonstrate (1) a legislative distinction that (2) resulted in the denial of one of the four equality rights on the basis of the rights claimant's membership in an identifiable group and that (3) was "discriminatory" within the meaning of section 15.[27] L'Heureux-Dubé J. did not convince her colleagues in *Egan*, and the requirement that claimants show differential treatment based on one of the enumerated or analogous grounds remains.

A. *Integration of the "Human Dignity" Focus in* Law

In 1999, the Court in the *Law* decision came to unanimous agreement on its approach to section 15. L'Heureux-Dubé J. signed on to the decision despite its focus on enumerated and analogous grounds.[28] In the compromise judgment, the Court adopted part of her *Egan* framework, which was the emphasis on violation of human dignity as the hallmark of discrimination. The result in *Law* was a three-part test: (1) did the impugned law make a distinction (or fail to take account of disadvantage); (2) was the differential treatment based on an enumerated or analogous ground; and (3) did the differential treatment burden a claimant based on a stereotype that

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[24] *Ibid.* at para. 48.

[25] *Ibid.* at para. 53.

[26] *Ibid.* at paras. 55-69.

[27] *Ibid.* at para. 55.

[28] After the *Law* decision was released, L'Heureux-Dubé J. wrote: "It is now fair to say that the Court has adopted the view I advanced in *Egan* v. *Canada*: that 'at the heart of section 15 is the promotion of 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'" (The Honourable Claire L'Heureux-Dubé, "The Legacy of the 'Persons Case': Cultivating the Living Tree's Equality Leaves" (2000) 63 Sask. L. Rev. 389 at 394-95 [footnotes omitted]). Dianne Pothier notes, however, that L'Heureux-Dubé J. conceded an important part of her vision of equality in the *Law* decision and explains her compromise as based on the recognition that "she was out of step with her colleagues" (Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13 C.J.W.L. 37 at 49).

promoted the view of her or him as less capable or less worthy of recognition as a human being or as a member of Canadian society.[29]

This last step has become known as the "human dignity step" and has proven problematic in subsequent decisions, engendering significant criticism.[30] The criticism is well placed. A test that requires claimants to show a ground of discrimination *and* a violation of their human dignity is onerous, vague, and beset by significant judicial subjectivism. As Donna Greschner recently argued, the concept of dignity is a loaded one, as "'human dignity' underlies the entire *Charter*, and therefore cannot serve to differentiate equality rights from other *Charter* rights."[31] It is "unseemly" to ask claimants to prove that a distinction violates their dignity:

> Draping an allegation of discrimination in dignity language deeply personalizes it and brings it to the very heart of an individual's sense of self-worth. This makes the allegation more emotion-laden, and thus more rhetorically powerful. But can we say convincingly that every discriminatory act involves attacks of this magnitude on the individual's sense of self-wroth? Moreover, do we want to do so?[32]

B. Distinguishing Law's "Human Dignity" Step from a Group-Based "Dignity Analysis"

In my view, the difficulty stems not from the human dignity requirement per se but rather from the combination of dignity and *grounds* in the addition of human dignity as a third requirement in the test. L'Heureux-Dubé J.'s framework in *Egan* combined dignity with *groups*, producing an entirely different theoretical and practical outcome. She conceived of equality as grounded in the human dignity of socially vulnerable groups. Thus, her group-based approach does not translate into an additional hurdle requiring claimants to show that their dignity was violated.

The main strength of a group-focussed approach is its particularity. A claimant is allowed to self-identify with the group that most aptly reflects the individual's lived experience.[33] The enumerated grounds might be relevant in assisting the claimant and

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[29] *Law*, *supra* note 1 at para. 88.

[30] See *e.g.* Corbett, Spector & Strug, *supra* note 5; Roger Gibbins, "How in the World Can You Contest Equal Human Dignity?: A Response to Professor Errol Mendes' 'Taking Equality into the 21st Century: Establishing the Concept of Equal Human Dignity'" (2000) 12 N.J.C.L. 25; Martin, *supra* note 13; Ross, *supra* note 5.

[31] Greschner, *supra* note 15 at 312.

[32] *Ibid.* at 313.

[33] In *Granovsky v. Canada (Minister of Employment and Immigration)* ([2000] 1 S.C.R. 703, 186 D.L.R. (4th) 1, 2000 SCC 28 at paras. 45-52), the Court re-characterized the claimant's chosen comparator group. The claimant, who was temporarily disabled with a back injury, asked to be compared to able-bodied or "ordinary" workers. Binnie J., writing for the Court, concluded that a more apt comparator was with permanently or severely disabled workers. Binnie J. noted that claimants are given some latitude in defining comparator groups but ultimately held that it was up to the Court to make the final decision. The claimant's arguments failed once his chosen comparator was

the court to identify a main characteristic of the group (e.g., as gendered or racialized), but the focus is on identifying a group with whom the claimant shares a history of marginalization or social vulnerability. A pragmatic result of a group-based approach to equality is a shift from the neutrality of grounds to a contextualization of groups. Under L'Heureux-Dubé J.'s *Egan* formulation, it would be difficult for a historically-advantaged member of a ground (men, for example, under the ground of sex) to successfully advance a discrimination claim: men as a group do not share a history of disadvantage and are not an "identifiable group".

Another strength of a group-based approach to equality is its subtlety. A focus on the affected group enhances the dignity of individuals within the group in its recognition that people and problems are not easily categorized. Compound and complex discrimination claims are much easier to uncover when one focusses on groups, as the group can be described as narrowly and with as many contours as necessary.[34] This subtlety is lost in the starkness of the enumerated and analogous grounds.

It must be emphasized at this point that L'Heureux-Dubé J.'s description of a group-based approach did not rise to the level of a legal requirement where claimants must identify the particular sub-group within a ground to which they belong. In this way, her approach can be aligned with the recent description of grounds and groups undertaken in *B. v. Ontario (Human Rights Commission)*.[35] That decision was concerned with the definition of marital and family status under the *Ontario Human Rights Code*[36] and whether those grounds were broad enough to encompass discrimination based on the specific identity of one's spouse or family. The majority held that the grounds were broad and offered the following discussion on grounds and groups:

> Enumerated grounds correspond to groups of individuals who share similar personal characteristics ... In this sense, the grounds enumerated in the Code encapsulate many groups of persons who may be exposed to prohibited conduct. This sociological fact, however, does not translate into a requirement that the complainant identify a particular group that has suffered or may potentially suffer the same discrimination. While the search for a group is a convenient means of understanding and describing the discriminatory action, it does not rise to the level of a legal argument. In the context of the equality

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disregarded. Arguably, similar problems could arise in a claimant's definition of his or her chosen group. In my view, the more specific the group definition permitted, the less likely it is that disagreement will arise, unless a personal characteristic of the claimant is in doubt or dispute.

[34] For elaborations on the problems and complexities of intersecting grounds of discrimination, see Nitya Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1994) 19 Queens L.J. 179; Denise G. Réaume, "Of Pigeonholes and Principles: A Reconsideration of Discrimination Law" (2002) 40 Osgoode Hall L.J. 113.

[35] (2002), 219 D.L.R. (4th) 701, (*sub nom. Ontario (Human Rights Commission) v. A.*) 166 O.A.C. 1, 2002 SCC 66 [*B. v. Ontario*].

[36] R.S.O. 1990, c. H.19, ss. 5(1), 10(1).

> guarantee in the *Charter*, this Court has stated clearly that group membership is not a necessary precondition to finding discrimination.[37]

L'Heureux-Dubé J.'s group-based approach in *Egan* did not demand this requirement of claimants either, except in so far as she endorsed the idea that section 15 was aimed at those who have been historically oppressed. Given the Court's recent insistence that section 15 is not restricted in application, L'Heureux-Dubé J.'s group-based focus only de-emphasizes the grounds as a mechanistic and simplistic step in the process. In the *Law* case itself, for example, the Court proceeded in its analysis based on the ground of age, with little focus on the fact that the claimant was also a woman, a young widow, and self-employed. L'Heureux-Dubé J. would not have required Nancy Law to "create" a group that illustrates her oppression but rather would have allowed her to describe her life-story in a manner that illuminated for the Court *all* of the facets of her life. The Court could then have considered the ways that those facets interacted to demonstrate the historic disadvantage that she, and others like her, might have faced. Such an interpretation does not contradict the assertion in *B. v. Ontario* that claimants should not have to demonstrate membership in a group made up of only those suffering the particular manifestation of discrimination. The great advantage of L'Heureux-Dubé J.'s approach is its specificity and intimacy with the claimant.

The dignity analysis, as L'Heureux-Dubé J. described it in *Egan*, requires courts to consider whether an individual, as a member of his or her group, has been treated with equal "concern, respect, and consideration" as other members of society.[38] When the relationship between individual, group, and society is explored under the dignity analysis, the interplay between subjectivity and objectivity becomes more evident. The subjective feelings of the claimant aid in assessing whether the claimant feels demeaned or devalued, while the objective examination of the group and its history and status help to determine whether the group suffers discrimination by a distinction that negatively differentiates it from others in society.

II. Limitations of the *Law* Formulation

L'Heureux-Dubé J.'s group-based dignity analysis thus required claimants to show (1) differential treatment that (2) led to a denial of equality based on the claimant's membership in an identifiable group. A third step required claimants to show "that [the] distinction was 'discriminatory' within the meaning of s. 15."[39] The complexity of this kind of framework—a purposive one aimed at remedying historic group disadvantage—was lost in the *Law* formulation, which was much more individualistic. While incorporating the dignity element from L'Heureux-Dubé J.'s judgment in *Egan*, the *Law* test narrowed the definition of discrimination by adding

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[37] *B. v. Ontario*, *supra* note 35 at para. 55.

[38] *Egan*, *supra* note 7 at para. 39.

[39] *Ibid.* at para. 55.

another mechanistic step for claimants. In *Egan*, L'Heureux-Dubé J. described human dignity not as a required element of a discrimination claim (as was the case in *Law*) but rather as the protective purpose or goal of section 15.[40] Since *Law*, however, claimants have had to show differential treatment based on membership within an enumerated or analogous ground (neutrally defined in section 15) *and* that their dignity has been demeaned by the distinction. The group to which the claimant belongs becomes meaningless in the case, for example, where the claimant is a historically advantaged member of an enumerated ground. The analysis thus turns on the individual's own dignity claim, losing social context in the process. Such weaknesses of the *Law* framework have affected subsequent Supreme Court decisions, causing divisions to appear soon after the cohesive framework was set out.[41] This is most apparent in the two recent decisions of *Lavoie* and *Gosselin*.

A. *The Fracture in* Lavoie

In *Lavoie*, the appellants challenged a federal statutory provision that gave preferential treatment in federal public service employment to Canadian citizens.[42] The appellants were foreign nationals, disadvantaged by the preference in hiring opportunities. Bastarache J. (with Gonthier, Iacobucci and Major JJ.) wrote the majority decision and found a violation of section 15 that could be justified under section 1. McLachlin C.J. and L'Heureux-Dubé J. (with Binnie J.) wrote jointly in dissent, agreeing with and endorsing the position of the majority on section 15, but disagreeing on the application of section 1. Arbour and LeBel JJ. each wrote separately, concluding there was no violation of section 15.

The majority set out the three inquiries defined in *Law*, noting that the third was the "most challenging" but also key for its restriction of section 15 claims to cases of genuine discrimination.[43] In contrast to L'Heurcux-Dubé J.'s *Egan* framework that captured a greater number of claims through a group-based analysis (focussing on the dignity issue), Bastarache J. treated the third inquiry as a further burden on claimants to prove a dignity violation, beyond the *Andrews* requirement of establishing a discriminatory distinction on an enumerated or analogous ground. Bastarache J. argued that the *Law* methodology required a "*contextualized* look" at how the non-citizen claimant (in the *Lavoie* case) legitimately felt in face of the enactment in

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[40] *Ibid.* at paras. 33-39. Compare *Law*, *supra* note 1 at para. 88.

[41] See *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, 173 D.L.R. (4th) 1; *Dunmore v. Ontario (A.G.)*, [2001] 3 S.C.R. 1016, 207 D.L.R. (4th) 193, 2001 SCC 94 (section 15 considered by L'Heureux-Dubé J., concurring in the result, and Major J., dissenting); *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 199 D.L.R. (4th) 1, 2001 SCC 31; *Lavoie supra* note 3; *Sauvé v. Canada (Chief Electoral Officer)* (2002), 168 C.C.C. (3d) 449, 294 N.R. 1, 2002 SCC 68 (section 15 considered by Gonthier, Major, Bastarache, and L'Heureux-Dubé JJ., dissenting); *Gosselin*, *supra* note 4.

[42] *Public Service Employment Act*, R.S.C. 1985, c. P-33, s. 16(4)(c). See *Lavoie*, *supra* note 3.

[43] *Lavoie*, *ibid.* at para. 38.

question.[44] This approach, however, requires the Court to question the legitimacy of a claimant's feelings and is yet another problem with a test that places independent emphasis on dignity: "The problem with feelings is that no one can argue against them."[45] The dignity inquiry, as understood by Bastarache J., has both subjective and objective clements. Claimants must prove their own feeling that their dignity has been violated, while the Court engages in the awkward task of assessing the objective legitimacy or reasonableness of that feeling.

Both the majority and the dissenting judgments found that section 15 was violated in this case. The appellants were legitimately (i.e., objectively and subjectively) burdened by the fact that while Canada was their home, their employment opportunities were stifled by the citizenship preference. Employment was deemed vital to one's livelihood and self-worth, and there was no apparent link between one's abilities and citizenship.[46] Furthermore, the legislative distinction could be traced to stereotypical assumptions about loyalty and patriotism. Bastarache J. found, however, that the discrimination was reasonable under section 1, because it was reasonable for the federal government to encourage residents to become Canadian citizens through federal hiring preferences.

Arbour J. wrote a concurring opinion, but found no section 15 violation. She concluded that the claimants were unable to satisfy the third step of the *Law* test. Her point of departure from the majority was her objeetivc assessment of the dignity violation. Arbour J. felt that a reasonable person in the claimants' position would not have felt that the hiring preference offended their essential human dignity. According to Arbour J., Bastarache J. applied a purely subjective test to the dignity component and thereby diminished the third *Law* inquiry (a *Charter* challenge in and of itself demonstrates a claimant's subjective feelings of discriminatory treatment).[47] Despitc the way Arbour J. differentiates her position, it is difficult to read the two judgments as anything other than a disagreement between judges over how the claimants legitimately felt about their situation. *Lavoie* illustrates Greschner's concern that judicial discussions on human diguity are loaded.[48] Given that claimants will always feel subjectively demeaned, anything other than judieial unanimity reads in an uncomfortable way. Judges are often far removed from the experiences of equality claimants, and judicial pronouncements on the legitimacy or reasonableness of a claimant's feelings can be patronizing, at best.

Arbour J. used *Lavoie* to make a significant contribution to the continuing evolution of section 15 jurisprudence away from the cohesion of *Law.* She took an approach to equality rights that favoured a balaneing of interests within the discrimination analysis. Hcr analysis included some balancing of individual and state

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[44] *Ibid.* at para. 46.

[45] Greschner, *supra* note 15 at 313.

[46] *Lavoie, supra* note 3 at para. 52.

[47] *Ibid.* at paras. 79-81.

[48] See text accompanying notes 31, 32, above.

concerns at the rights-definition stage. While acknowledging that this blurred the line between section 15 and section 1, Arbour J. insisted that this was inevitable given the already inherent limitation within section 15: the differenee between permissible legislative distinctions and discrimination.[49] In her view, section 15 violations should be difficult to justify, the equality guarantee being "sacrosanct".[50] This incorporation of a limitation within section 15 (akin to that expressly stated in section 7 for example) was a major departure from the majority in *Lavoie* and created a more onerous burden for claimants, already facing new obstacles after *Law*.

Apparent analytic disagreement in the Court is one problematic outcome of *Lavoie*. A further weakness of *Lavoie* is a glaring omission that more directly indicates the difficulties of a combined grounds and dignity approach: the Court completely ignored any gender issues that might have shaped the particular claims in question. All three appellants were women and all three applied for fairly low-level clerical work with the federal government and were disqualified by their citizenship.[51] All of the judgments found the claim to be squarely and solely centred on the analogous ground of citizenship. There was no mention of how citizenship might intersect with other grounds, like race or sex, to the particular detrimcnt of a sub-group of claimants. One wonders, however, whether the citizenship requirement operates to bar more women than men immigrants. The statutory provision in question represented a preference for hiring Canadian citizens but was not an absolute bar to applications. The preference operated at the referral stage in open competitions, when the Public Service Commission would refer qualified candidates to requesting departments with open job opportunities. If qualified citizens were available, they were given preference. If not, non-citizen applications could be considered. It is possible that men did not equally suffer under the preference, given that more women than men work in lower-paid and lower-skilled clerical work. It is also entirely possible that many male immigrants possessed skills that were more highly sought after, or applied for more management or skilled positions for which there might be less competition than the lower classified jobs. Given the already disadvantaged

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[49] *Lavoie, supra* note 3 at para. 92.

[50] *Ibid.* at para. 85.

[51] *Ibid.* at paras. 25-27. The appellant Janine Bailey, a Dutch citizen, was appointed for a three-month term as a shift clerk with Canada Employment and Immigration. Her employment was extended through a series of short-term contracts, but she was denied any chance at promotion either because of laek of relevant experience or because of her citizenship. At thc time of trial, she held a position classified as an Immigration Examining Officer. The appellant Elizabeth Lavoie, an Austrian citizen, had a short-term contract with the Department of Supply and Services. She was unable to fill the position permanently because of the citizenship requirement. The appellant Jeanne To-Thanh-Hien, a French citizen born in Vietnam, obtained temporary work with several government departments. At trial, and having obtained Canadian citizenship, she worked as a project coordinator with the Employment Equity Branch of Human Resourccs Development Canada. In the process of looking for work, however, Ms. To-Thanh-Hien had been informed that assistance from the Public Service Commission's Employment Services for Visible Minorities Program was unavailahle for her until she became a Canadian citizen.

position of women immigrants in Canada, it is at least arguable that this facially neutral provision had in fact a more negative impact on women. Yet none of the judgments raised this question.

The possibility was certainly argued before the Court. As intervenor, the Center for Research-Action on Race Relations ("CRARR") argued that the preference operated in a particularly invidious way with respect to women.[52] CRARR noted that many women kept foreign citizenship for easier returns to their country of origin as caregivers for elderly parents. A woman's decision not to take Canadian citizenship could thus not be viewed as a lack of loyalty to Canada but rather as a practical decision based on the caregiving burden on daughters. All of the judgments of the Court focussed entirely on the neutrality of "citizenship" without any contextualized consideration of the three claimants as women.

Applying L'Heureux-Dubé J.'s group-based approach in *Egan* would have allowed for more context, incorporating the history and social situation of the claimants and allowing the individual to define the group in a more complex manner. This approach would have brought gender issues into the *Lavoie* discussion, allowing for an examination of the ways in which the hiring preference operated to the detriment of women immigrants more than to the detriment of their male counterparts.

B. *Divisions in* Gosselin

The limits of a grounds-based analysis is particularly apparent in the *Gosselin* decision, which also confirms the deep divisions in the Court on section 15 cases. There were five sets of reasons in *Gosselin,* with disagreement on sections 15 and 7. The claimant challenged a provincial welfare regulation that reduced benefits to individuals under the age of thirty if they did not participate in training or education programs (individuals over the age of thirty did not face the same penalty). Louise Gosselin challenged the regulation as discriminatory based on the enumerated ground of age. McLachlin C.J. wrote for the majority and found no section 15 violation. She argued that the regulations actually promoted the dignity of the claimant by treating her as more employable and, hence, as more worthy of training and education than older adults.[53]

Bastarache J. wrote in dissent and found an equality violation that could not be saved by section 1. In his view, the regulations drew an arbitrary bright line at the age of thirty, without sufficient evidential foundation. He concluded that the government could not justify inferior differential treatment along an enumerated or analogous ground by saying that the legislation in question was "for [the group's] own good."[54] Arbour J. and Lebel J., each writing separately, agreed with Bastarache J.'s reasons on

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[52] Center for Research-Action on Race Relations, Intervenor Factum in *Lavoie, ibid.*

[53] *Gosselin, supra* note 4 at para. 33.

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

section 15, though Lebel J. added a more pointed perspective: "By trying to combat the pull of social assistance, for the 'good' of the young people themselves who depended on it, the distinction perpetuated the stereotypical view that a majority of young social assistance recipients choose to freeload off society permanently ... "[55]

L'Heureux-Dubé J. also wrote in dissent and returned to her *Egan* decision as the preferred approach to section 15. While framing her judgment in terms of *Law* (still the authoritative deeision on section 15), she referred extensively to her dissent in *Egan* and again de-emphasized the enumerated and analogous grounds: "I remain convinced that a discrimination claim should be evaluated primarily in terms of an impugned distinction's effects ... The point of departure should *not* lie in abstract generalizations about the nature of grounds."[56] She insisted that the focus of the section 15 analysis must be "individuals' *experience* of discrimination".[57]

Her judgment was the only one that addressed the poverty factor from an equality standpoint (Arbour J. did so in her section 7 analysis, with which L'Heureux-Dubé J. concurred), and even then, the discussion was brief: "The reasonable claimant would have perceived that as a result of her deep poverty, she had been excluded from full participation in Canadian society."[58] In considering whether the legislature adequatcly addressed the needs of the group in question (young adults), she argued that a scheme that exposed only members of one group to "severe povcrty" clearly did not take into account the needs of the members of that category.[59]

It is interesting that in reverting to her *Egan* framework, L'Heureux-Dubé J. did not in fact undertake the layered group analysis that her approach in *Egan* required. She de-emphasized the enumerated grounds in *Gosselin* in response to McLachlin C.J.'s argument that age was not strongly associated with discrimination and was thereby a special or different enumerated ground. L'Heureux-Dubé J. did not, however, engage in an examination of the group that best fit Louise Gosselin. As a result, the section 15 analysis proceeded on an age basis, with poverty only alluded to as one consequcnce of the legislative distinction. No members of the Court addressed, from an equality standpoint, Ms. Gosselin's economic and social status, her gender, or her history of psyehological and addiction problems. All of these factors were extremely relevant in defining the group to whom she was best affiliated, and an examination of the inter-relatedness of these factors would have illuminated thc particular way in which the legislation discriminated against her and others in her group.

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[55] *Ibid.* at para. 407.
[56] *Ibid.* at para. 111.
[57] *Ibid.* at para. 145.
[58] *Ibid.* at para. 132.
[59] *Ibid.* at para. 135.

C. Trociuk: *The Failure of Grounds*

The Supreme Court's equality jurisprudence of late suffers from a simplistic attachment to grounds, a fate that L'Heureux-Dubé J. foreshadowed in *Egan*: "The effect of the 'enumerated or analogous grounds' approach may be to narrow the ambit of s. 15, and to encourage too much analysis at the wrong level."[60] This is evident in the Court's most recent section 15 decision in *Trociuk*, in which it decided unanimously that provisions of the British Columbia *Vital Statistics Act*[61] violated a father's equality rights under the *Charter*. It is dishcartening, to say the least, that the only recent gender analysis under section 15 took place entirely in the context of a man's claim to sex discrimination. It is even more discouraging that the Court ignored all of the evidence and argument detailed by the majority decision of the British Columbia Court of Appeal in favour of the provisions. The Court's judgment did not even summarize the appellate decisions, referring to them only in passing and mostly in support of the dissenting judgment of Prowse J.A. In contrast, under L'Heureux-Dubé J.'s group-based approach in *Egan*, Mr. Trociuk's claim would have been suspect from the beginning, since he belonged to the historically advantaged male sex. Given that the mother in the case, Reni Ernst, was a member of the historically disadvantaged group of single mothers (in this case, raising triplets), the Court's failure to address the very legitimate reasons for the lcgislativc distinction in registering births is depressing.

1. Critique of the Supreme Court Ruling

The claimant in *Trociuk*, the father of the triplets, challenged the *Vital Statistics Act* which allowed the child's mother to register the birth of her children and to declare the father "unacknowledged" cven when he was, in practice, recognizcd by her and others as the biological father. The legislation also allowed the mother to choose the surname of the children. In this case, the mother chose her own surname while the father wanted a hyphenated surname.

Deschamps J., writing for the Court, declared that the impugned legislation was unconstitutional as a brcach of the father's equality rights that could not be saved by section 1. The first two steps of the *Law* test were easily satisfied: the legislation explicitly drew "a distinction on an enumerated ground, and the claimant was subject to differential treatment on the basis of that ground."[62] On this point she was in agreement with thc appellate decision. Her point of departure was in her assessment of the third step, "whether, from the perspective of the reasonable claimant, the present differential effects constitute[d] a violation of dignity."[63] She concluded that they did.

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[60] *Egan, supra* note 7 at para. 52.

[61] R.S.B.C. 1996, c. 479, ss. 3(1)(b), 3(6)(b), 4(1)(a). See *Trociuk, supra* note 6.

[62] *Trociuk, ibid.* at para. 9.

[63] *Ibid.* at para. 13.

In addressing the respondent-mother's claim that the effects of the legislation were insignificant since the father could still parent in a substantive sense, Deschamps J. disagreed for two reasons: first, including one's particulars on a birth registration was an important means of participating in the life of a child as it evidenced "the biological tie between parent and child,"[64] and second, contributing to the process of determining a child's surname was an act that held great significance for many in our society.[65] The exclusion of fathers from these acts was deemed to be "arbitrary" and "significant".[66]

Deschamps J. then dismissed the mother's argument that the father's section 15 claim was weakened because he did not belong to a historically disadvantaged group: while the Court in *Law* recognized historical disadvantage as "the most compelling factor" in finding differential treatment to be discriminatory, it was "ill-founded as a matter of logic and law" to deduce the opposite conclusion in the absence of the same factor.[67] It would be reasonable for a father to perceive that the legislature was saying that his relationship with his children was less worthy of respect than that between the mother and her children. This was especially apparent to the Court given that the legislation offered mothers three reasons for excluding a father's particulars from birth registrations: (1) an arbitrary unacknowledgment; (2) an unacknowledgment for valid reasons, such as rape or incest; and (3) an unacknowledgement of fathers who were incapable or unknown. Deschamps J. concluded: "A father who belongs to the first category would reasonably perceive that the legislature considers his relationship with his children to be similar to the relationship of fathers in other categories. Such an association is pejorative."[68]

With regards to the proposed ameliorative purposes of the legislation, a point on which the Court of Appeal deliberated at length, Deschamps J. determined that despite any ameliorative effects the provisions might have on the accurate recording of births and the certainty afforded mothers that a father's identity would not be revealed against her wishes, a reasonable father might still perceive that his significant interest in participating in his children's lives was "superfluously sacrificed".[69]

Moving then to the saving provision of the *Charter*, Deschamps J.'s section I analysis was aided by recent provincial amendments to the legislation at issue. The amendments provided that the father's particulars must be included in the registration if the application is accompanied by a paternity order, unless a court orders otherwise. Thus, alterations to the birth record are permitted in some circumstances, showing that the old legislation was not minimally impairing. Deschamps J. extended the

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[64] *Ibid.* at para. 16.
[65] *Ibid.* at para. 17.
[66] *Ibid.* at para. 19.
[67] *Ibid.* at para. 20.
[68] *Ibid.* at para. 23.
[69] *Ibid.* at para. 29.

reasoning behind the amendments to conclude that a process allowing a judge in chambers to make a decision, based on affidavit evidence, as to whether a father has been unjustifiably excluded would satisfy a legislative desire to control negative effects on mothers. She argued that a mother would not be reasonable in falsifying a birth registration simply to protect her privacy and "to avoid having to confront in court a man who has harmed her."[70] As a result, the legislation at issue was declared invalid, with the Court suspending the declaration for twelve months to allow the legislature to remedy its process of birth registrations accordingly.

2. Reflections on the Appellate Judgments

Whatever conclusions one might draw about the legislation unfairly discriminating against Mr. Trociuk, Deschamps J.'s judgment is troubling in a broader sense. She paid very little (arguably no) attention to the legitimate interests of mothers as reflected in the legislature's choices regarding registration. The full force of her judgment was concerned with the rights of fathers and her assessment that they would feel demeaned by the legislation. In contrast, the Court of Appeal decision was rich in its treatment of the historic and current evidence supporting the government's policies. Not only did Deschamps J. ignore that evidence, she virtually ignored the reasoning of the Court of Appeal. It is thus worth considering how a majority of the British Columbia Court of Appeal reached the opposite conclusion, thereby illustrating the weaknesses of Deschamps J.'s approach.

The majority of the British Columbia Court of Appeal did not find a violation of section 15(1). Southin J.A. held that the appellant was not, as a matter of law, "situated differently from any other father".[71] The statute provided that no father had the "right" to be acknowledged in birth registrations. If a mother chose to, she could include the father in the process, but the legislature decreed that it was the mother's choice. Southin J.A. engaged in an extensive review of the legislative and legal history relating to the adoption and use of a surname. In her view, such a legal review aided in determining how the law once was and how it arrived at its current position. Furthermore, in defining "discrimination" she would have to, at some level, refer back to the "world of the framers of the *Charter*."[72] Southin J.A.'s review of the legal history led her to conclude that since 1872 the legislature had deprived fathers of the right to be acknowledged and registered, and that this decision was related to the desire to remedy any stigma still attached to illegitimacy.[73] She concluded that the legislation simply took away a "right" accorded by custom to fathers married to the

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[70] *Ibid.* at para. 38

[71] *Trociuk v. British Columbia (A.G.)* (2001), 200 D.L.R. (4th) 685 at para. 80, 83 C.R.R. (2d) 74, 2001 BCCA 368.

[72] *Ibid.* at para. 29 ("[w]ould they have thought that this complaint of the appellant was a complaint of "discrimination"? To what extent, if at all, does the ancient maxim "*de minimis non curat lex*" apply to allegations that certain governmental action is worthy of a *Charter* remedy?").

[73] *Ibid.* at para. 68.

mothers of their children, a "right" that fathers of illegitimate children never had. Accordingly, the legislation placed all fathers on the same footing. Her *Charter* analysis, only nine paragraphs long, easily dismissed Mr. Trociuk's section 15 claim, arguing that a finding in favour of the claimant might seriously diminish the rights of mothers and constitute discrimination against them.

Newbury J.A. concurred with Southin J.A. and added a more detailed examination of the section 15 factors (with which Southin J.A. concurred). She acknowledged that the claim passed the first two *Law* factors (there is a distinction and it is based on an enumerated ground), but the human dignity of fathers was not affected by the legislation. Fathers were not viewed by the legislative distinction as less worthy of recognition as human beings or as members of Canadian society. Rather, "[i]f anyone has been historically regarded as 'less worthy', it is single mothers, who until recently were treated as 'fallen women', and their children, who were stigmatized as illegitimate or worse. ... The terminology employed by the Court in *Law* is simply not apt to describe fathers in Mr. Trociuk's situation."[74] Even so, she agreed to assume that the legislaton violated section 15 and proceeded with a section 1 analysis, reasoning that the father's rights were impaired only minimally as he was not prevented from parenting in a substantive sense. She concluded that the legislation may have been unfair to fathers like the claimant, "who could not share in his children's name," but in striking down the legislation "the consequences for children and mothers (and the Director of Vital Statistics) would be far more serious."[75]

Prowse J.A. dissented for basically the same reasons as elaborated by Deschamps J. at the Supreme Court, finding a violation of section 15(1) that could not be justified by section 1. She reached her conclusion despite acknowledging that fathers, and men generally, are not a historically disadvantaged group.[76] Upon determining that the Director of Vital Statisties would not have adopted a position in favour of the legislation if it had excluded women from registering births, Prowse J.A. argued, "While I acknowledge the analogy is not perfect because it is mothers who carry and give birth to children, and because women do belong to a historically disadvantaged group... if these rights are significant to mothers surely [they are] equally significant to fathers."[77] Prowse J.A. pointed out that the legislation put fathers who were acknowledged and providing support to their children in the same position as those who were "little more than 'sperm donors', or who impregnated the mother as a result of sexual assault or incest or in the course of an abusive relationship."[78] This determination ignores the fact that legislation offering three categories of fathers whose particulars could be excluded does not indicate, even from a traditional approach to statutory interpretation, that the categories are related to each other in a

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[74] *Ibid.* at para. 179.
[75] *Ibid.* at para. 186.
[76] *Ibid.* at para. 144.
[77] *Ibid.* at para. 145.
[78] *Ibid.* at para. 136.

substantive sense: fathers who are "unacknowledged" are not the same as fathers who are "unknown", "incapable", or "unacknowledged for valid reasons"—if they were all the same, different categories would not be required. It was this factor, however, that seemed to sway Prowse J.A. and the Supreme Court, in finding a demeaning attitude that devalued the importance of a participatory father. Prowse J.A. concluded that the violation of section 15 could not be justified under section 1, as the impugned provisions allowed "the mother to be the ultimate arbiter of the rights of the father ... "[79]

The varied decisions in *Trociuk* again demonstrate some of the problems with a human dignity standard when combined with grounds. The first problem is the vagueness of the standard, which provides very little direction to courts. The second problem is revealed by the Court of Appeal and Supreme Court's disagreement as to whether fathers are demeaned by the legislation. Deschamps J. (and Prowse J.A. at the Court of Appeal) expressly stated that section 15 is available to all claimants. She did not address the historic discrimination faced by single mothers (or women in general). That kind of solution significantly increases the risks faced by an already vulnerable and marginalized group (single mothers). Requiring a mother to give reasons for why the father is "unacknowledged" could further stigmatize her or her child and could contribute to increased difficulty between the parents if the father disagrees with the reasons given. Deschamps J.'s decision to view the simple (or, as she described it, "arbitrary") unacknowledgment of fathers as pejorative failed to capture the very real concerns and sensitivities of single mothers facing the decision of how best to protect themselves and their children from fathers that for whatever reason they do not want to officially register with the government. This failure to assess the legitimate historic and present concerns of mothers is striking: all concern is directed to the dignity of men and, as in *Lavoie* and *Gosselin,* a gender analysis from the perspective of the women claimants is missing.

At the Court of Appeal, Newbury J.A.'s approach best illustrates the difference between a ground-based and a group-based analysis. While Southin J.A. came to the same result as Newbury J.A. in the section 15 analysis, Southin J.A. found no distinction at issue because all fathers were similarly situated, reflecting a formalistic approach that does not address the essence of the appellant's claim. Newbury J.A.'s decision was more complex and evocative of L'Heureux-Dubé J.'s group-based dignity analysis. She compared a father's claim to the historic oppression suffered by single mothers—a group that might be made even more vulnerable if forced to identify fathers on birth registrations. While she did not explicitly say so, the tenor of her judgment suggested that she did not favour section 15 claims from members of advantaged or privileged groups (in this case, men). Under the ground-based approach, the father's claim has merit as sex discrimination. Under the group-based approach, a court can look at the group in question (fathers) and consider whether it has faced historic disadvantage or oppression, such that the legislation further

[79] *Ibid.* at para. 153.

demeans its dignity. Fathers, as a group, have not been historically oppressed. Mothers have been. Protecting the rights of mothers over fathers can further equality goals in some circumstances, as Newbury J.A. acknowledged in her judgment.

III. Remedial Opportunity in *Falkiner*

Falkiner is another case that centers on gender discrimination in a complicated way.[80] The Supreme Court has granted leave to appeal the decision and will hear the case in the spring of 2004. Given its recent record on section 15, and especially in light of the *Gosselin* decision on social welfare discrimination, a certain sense of anxiety and foreboding pervades the Court's decision to hear the appeal. Meanwhile, the unanimous decision of the Ontario Court of Appeal in *Falkiner* reveals the empowering potential of a group-based focus. Laskin J.A., writing for that court, struggled to define a "ground" for the discrimination that would adequately capture the "lived reality" of the claimants. Despite the "ground-based" terminology, the *Falkiner* judgment employs a nuanced consideration of gender and economic status to create a new analogous ground and thereby applies an analysis that comes much closer to the group-based approach favoured by L'Heureux-Dubé J. in *Egan*.

In *Falkiner*, the appellants are unmarried mothers, each living with a man for less than a year in what was described as a "try-on relationship". Before 1995, each received social assistance as a single mother. In 1995, a regulation under the *Family Benefits Act*[81] was amended to redefine "spouse" to include persons of the opposite sex living in the same residence who had an agreement or arrangement regarding financial affairs and a relationship that amounted to "cohabitation". More dramatically, the amendment established a presumption that when people of the opposite sex lived together, they were spouses (the colloquially known "spouse in the house" rule). As a result of the new definition, each appellant lost her social assistance. The appellants argued that the definition amounted to sex discrimination. They also argued that the definition disadvantaged them on the basis of the analogous ground of social assistance recipients, generally, and of single mothers on social assistance, specifically.

In his section 15 analysis, Laskin J.A. accepted the appellants' argument that their discrimination was complex and no single comparative group sufficed to illustrate their plight. One appropriate comparison, for example, was to single people not on social assistance. They were free to have "try-on relationships" without any adverse, state-imposed consequences, while those on social assistance were limited. In considering the gender implications, Laskin J.A. contended that while the legislation was facially neutral, the evidence "unequivocally demonstrate[d] that women and single mothers [were] disproportionately adversely affected" by the amended definition of "spouse" in the *Family Law Act*. Indeed, eighty-eight percent of those

[80] *Falkiner*, *supra* note 10.

[81] R.S.O. 1990, c. F.2; R.R.O., Reg. 366, s. 1(1)(d).

whose benefits were discontinued after the amendment were women.[82] He also analyzed whether the appellants were discriminated against on the basis of marital status (as single mothers) and concluded that they were.

Laskin J.A. then foeussed on the third step in the *Law* framework and concluded that the differential treatment was discriminatory:

> Beyond purely financial concerns, more fundamental dignity interests of the respondents have been affected. Being reclassified as a spouse forces the respondents and other single mothers in similar circumstances to give up either their financial independence or their relationship. Many women, including three of the respondents in this appeal, have been victimized by alcoholic or abusive partners. Forcing them to become financially dependent on men with whom they have, at best, try-on relationships strikes at the core of their human dignity.[83]

This finding captures the essence of L'Heureux-Dubé J.'s group-based vision in *Egan.* The dignity of the individual is respected in Laskin J.A.'s description of how it is demeaned by the legislation. The individual's dignity is understood, however, in the context of her group—single mothers, sometimes abused, sometimes financially dependent, struggling to develop lasting relationships. It is only once the group is particularized in this way that the discussion on human dignity becomes revealing. As Laskin J.A. reasoned, the "core of human dignity" was affected because the legislation interfered with "highly personal choices".[84] The legislation violated section 15(1) and could not be saved under section 1.[85]

Falkiner is perhaps the best example of a case applying L'Heureux-Dubé J.'s group-based approach. While Laskin J.A. found discrimination based on the enumerated ground of sex and the established analogous ground of marital status, he also considered the ground of "social assistance recipient". Although he went through the technical steps of finding it to be analogous, it is evident that his focus was on identifying the group to which the appellants subjectively felt they belonged. He acknowledged their argument that they did not fit easily within one or another specific ground, as their claim intersected gender and civil status. Laskin J.A.'s focus on groups, even if phrased as grounds, is reminiscent of L'Heureux-Dubé J.'s wish to concentrate on a claimant's subjective identification with a group that has suffered historic oppression. In fact, the stilted tenor of the discussion of grounds in *Falkiner* illustrates the criticisms leveled by L'Heureux-Dubé J. in *Egan* that too much effort is spent on this step when the central issue should be whether the claimant suffered discrimination. Within the confines of a "grounds" discussion, it is difficult for Laskin J.A. to uncover some of the subtleties of complex discrimination, captured by the

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[82] *Falkiner, supra* note 10 at para. 77.

[83] *Ibid.* at para. 101.

[84] *Ibid.* at para. 103.

[85] It failed all three components of the proportionality test as an over-broad definition (*ibid.* at paras. 106-11).

appellants' membership in the group of single mothers on social assistance, since such a "ground" is difficult to recognize in its specificity as analogous to those listed in section 15.

Conclusion

When the Supreme Court hears the *Falkiner* appeal, L'Heureux-Dubé J.'s framework in *Egan* offers a perspective that may aid in finding a solution to its frustrating equality jurisprudence. While a majority of the Court has remained steadfast to the idea that the enumerated and analogous grounds must matter to the analysis, moving to a group-based approach does not imply ignoring them. L'Heureux-Dubé J. used grounds as initial markers of groups that have suffered discrimination and thereby deepened the meaning of grounds, with the primary focus being on power relationships. Her concern was with the dynamic between advantage and disadvantage and between power and oppression in society. She sought to capture the ways in which this dynamic influences the interaction between the majority and minority cultures of society. For L'Heureux-Dubé, at issue in *Egan* was the question of whether the group had suffered historic oppression. L'Heureux-Dubé J.'s approach promoted human dignity as the purpose of equality, framing dignity as the personal story of the claimant and the social story of the claimant's group. The "discrimination" part of her analysis focussed on social context, tying the group to a history. This contribution to equality rights places the individual's subjective experience of discrimination within the larger context of the group with which she or he identifies. The group can be as narrow as necessary (and comprised of as many attributes as required) to reflect the claimant's attachments and subjective experiences. Taken together, dignity and discrimination illuminate the complex interaction between individual and group that a meaningful equality analysis must address.[86]

The process of examining a group is more layered and complicated than that of finding a ground of discrimination, but once this work is done, the discrimination analysis is made easier. The inquiry into whether the claimant's human dignity has been violated is more meaningful and less patronizing when the individual's subjective feelings are understood by way of a group's history and social context. Looking at the group does not require contextual abandonment. Looking at the ground, however, may require just that, for as in *Trociuk*, there is a danger that advantaged individuals within a ground will have a legitimate claim in discrimination arguments. While it is clear that the legislation at issue in *Trociuk* made a distinction on the basis of sex, what is controversial is whether that distinction was discriminatory. The majority Court of Appeal judgment in *Trociuk* undertook a

[86] It might also alleviate some of the problems associated with comparator groups in section 15 jurisprudence. Narrowing the claimant's group to those characteristics that best reflect the claimant's life situation helps to illuminate a comparator (if one is even necessary—a point I do not concede!), which may also be circumscribed narrowly.

contextual and historically-focussed analysis of the group-based discrimination facing single mothers. In so doing, the court reached the conclusion that the differential treatment was not discriminatory. Such a conclusion was rightly based on both a substantive notion of equality and a purposive approach to section 15.

Focussing on groups should aid in unpacking compound, complex, and intersectional discrimination claims, which will undoubtedly become the primary task of the courts as equality challenges develop. The *Falkiner* case is revealing in this regard. Laskin J.A. noted that "no single comparator group will capture all of the differential treatment complained of in this case."[87] He described the situation as one of an "interlocking set of personal characteristics" that requires a general approach to defining discrimination. This kind of multi-layered predicament is inappropriately simplified by a requirement that claimants associate themselves with a specific ground. If the Supreme Court remains committed to a ground-based approach (which is almost certain), *Falkiner* at least offers an example of a ground-based analysis that is intersecting and complex, with the overarching reality of gender discrimination placed front and centre in the analysis.

In the time between the decision in *Law* and the hearing of *Falkiner,* four new judges will have been appointed to the Court. Despite the fact that *Law* purported to set down guidelines on interpreting section 15 and endeavoured to offer a unified approach to equality jurisprudence, it is clear that it has not been entirely successful in its mission. Given the fundamental importance of equality rights, it is imperative that the Court assess its position on the values and ideals enshrined in section 15 of the *Charter.* Serious divisions in the Court's current section 15 approach are revealed by the multiple judgments in *Lavoie* and *Gosselin.* Both cases display not only differences in framework and analysis but also a failure to consider the very real gender issues at play in the lives of the claimants. *Trociuk* carries on their tradition in its avoidance of a meaningful gender analysis that would capture the perspectives of both men and women. *Falkiner* is an excellent opportunity for the Court to revisit section 15 and renew its commitment to a substantive equality ideal. In the tradition of many great dissenters, L'Heureux-Dubé J.'s judgment in *Egan* provides a framework the Court should reconsider in its effort to remedy individual and group disadvantage.

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[87] *Falkiner, supra* note 10 at para. 71.