Gosselin v. Quebec: *Back to the Poorhouse ...*

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The case of *Gosselin v. Quebec (A.G.)* made its way to the Supreme Court of Canada based on a claim that the social assistance regulations in Quebec during the 1980s were discriminatory: single individuals under the age of thirty, who were considered employable, received only one third of the assistance granted to their older counterparts. The Court's divergent judgments and its narrow five-to-four split reflect the range and complexity of issues raised by this case.

This comment focuses on the Court's treatment of the discrimination analysis under section 15 of the *Canadian Charter of Rights and Freedoms*. Through a comparison of the varied decisions to previous equality jurisprudence, the authors raise four criticisms of the section 15 analyses taken by the judges in *Gosselin*. First, the case highlights how evidentiary requirements can be used as a barrier to equality. Second, repeated references to *Law v. Canada (Minister of Employment and Immigration)* suggest a regressive trend in the Court's definition of equality. Third, an insufficient consideration of intersectionality is identified as a distorting factor in the Court's the equality analyses. Finally, the authors point to certain assumptions underlying the judgments in *Gosselin*, which serve to perpetuate stereotypes regarding social assistance that have impaired the human dignity of those living in poverty.

Recommendations to enhance future equality analyses are offered in conclusion, including: instituting clear evidentiary requirements for claimants; maintaining a precise and conservative use of judicial notice for facts in section 15(1) cases that operate to the detriment of a claimant; applying the section 15(1) test established in *Law* in both a thorough and contextual manner; avoiding the rigid categorization of claimants; and appointing judges from diverse backgrounds combined with educating judicial decision-makers about the stereotypes and the barriers to attaining substantive equality in our society.

L'arrêt *Gosselin c. Québec (P.G.)* a été entendu par la Cour suprême du Canada en réponse à la prétention selon laquelle les règlements régissant l'aide sociale au Québec pendant les années 80 étaient discriminatoires : les personnes âgées de moins de 30 ans, vivant seules et considérées aptes au travail recevaient seulement le tiers des prestations accordées aux bénéficiaires de 30 ans et plus. Les jugements divergents exprimés par la Cour et sa décision serrée de cinq juges contre quatre reflètent bien l'ampleur et la complexité des enjeux soulevés par cette cause.

Ce commentaire accorde une attention particulière au traitement que la Cour fait de l'analyse en matière de discrimination sous l'article 15 de la *Charte canadienne des droits et libertés*. Par une comparaison des diverses décisions antérieures portant sur le droit à l'égalité, les auteurs formulent quatre critiques à l'encontre des analyses effectuées par les juges sous l'article 15 dans l'arrêt *Gosselin*. Premièrement, l'arrêt met en évidence comment les exigences en matière de preuve peuvent être utilisées comme barrières au droit à l'égalité. Deuxièmement, les constantes références à *Law c. Canada (Ministre de l'emploi et l'immigration)* laissent supposer une régression dans la manière dont la Cour définit le droit à l'égalité. Troisièmement, le manque de considération accordée à l'approche intersectionnelle est identifié comme étant un facteur de distorsion dans les analyses que la Cour fait du droit à l'égalité. Finalement, les auteurs identifient certaines présomptions sous-jacentes aux jugements rendus dans l'arrêt *Gosselin*, lesquelles ont pour effet de perpétuer des stéréotypes relatifs à l'aide sociale qui portent atteinte à la dignité humaine de ceux qui vivent dans la pauvreté.

En conclusion, certaines recommandations sont proposées dans le but d'améliorer les futures analyses en matière de droit à l'égalité : instituer des exigences claires aux requérants sur le plan de la preuve ; maintenir une utilisation précise et conservatrice de la connaissance d'office pour les faits étant an détriment du requérant dans les causes intentées en vertu de l'article 15 ; appliquer le test de l'article 15 tel que dévcloppé dans l'arrêt *Law* d'une manière à la fois rigoureuse et contextuelle ; éviter une catégoriation rigide des requérants ; et nommer des juges provenant de différents milieux en combinaison avec une sensibilisation des décideurs judiciaires aux stéréotypes et aux barrières à l'atteinte d'une égalité réelle dans notre société.

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Introduction

The Supreme Court of Canada released its decision in the highly anticipated ease of *Gosselin v. Quebec (A.G.)* on 19 December 2002.[1] The reason for the unusually long delay in the release of the judgment is apparent in the final result: a slim five-to-four split, with four separate dissenting judgments and highly divergent positions taken by the two factions of the Court.

The basis of this judicial debate was the court challenge by Louise Gosselin to Quebec's social assistance regulations of the 1980s. Under section 29(a) of the *Regulation respecting social aid*,[2] social assistance recipients were treated differentially on the basis of age and employability. Single individuals under thirty years old, who were considered employable ("under thirty"), were given approximately one third the assistance of their counterparts thirty years and over ("thirty and over"): only 170 dollars per month.

The case raises innumerable issues ranging from the technical, such as the interpretation of section 45 of the Quebec *Charter of Human Rights and Freedoms*[3] and section 33 of the *Canadian Charter of Rights and Freedoms*,[4] to the legal, such as the proper scope of section 7 of the *Charter* and the justiciability of "economic" rights. Underpinning all of these, however, are the more nebulous normative issues which touch the highly contested field of economic and social rights. These normative issues include the extent to which a nation-state should be compelled to provide for the basic necessities of its residents, and the reliability and legitimacy of the judicial perspective in assessing right claims of the young and impoverished.

We are not so ambitious as to address all, or even most, of these difficult issues. Rather, this case comment focusses on the Court's section 15 discrimination analysis and asks whether it serves the commitment to substantive equality that the Court has repeatedly invoked in its equality jurisprudence. Following a brief history of the case, we will discuss four criticisms of the section 15 analysis undertaken by the judges both in majority and dissent. First, we critique the use of evidentiary requirements as a barrier to equality. We then question the legitimacy of the repeated comparisons of this case to *Law v. Canada (Minister of Employment and Immigration)*,[5] exposing the seemingly regressive steps taken by the majority in its understanding of equality. Third, we critique the inadequacy of the analyses in accounting for the intersections

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[1] [2002] 4 S.C.R. 429, 221 D.L.R. (4th) 257, 2002 SCC 84 [*Gosselin*]. The appeal was heard a year earlier on 29 October 2001.

[2] R.R.Q. 1981, c. A-16, r. 1, s. 29(a), adopted under the *Social Aid Act*, R.S.Q., c. A-16, as re-en. by *An Act respecting income security*, R.S.Q., c. S-3.1.1, as re-en. by *An Act respecting income support, employment assistance and social solidarity*, R.S.Q., c. S-32.001.

[3] R.S.Q., c. C-12, s. 45 [*Quebec Charter*].

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

[5] [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1 [*Law*].

of various identity markers. Finally, we extract the assumptions that underlie some aspects of the judgments. We conclude with recommendations that will hopefully avoid some of the pitfalls we have discussed.

I. *Gosselin v. Quebec (A.G.)*

A. *Background*

As noted above, the *Regulation respecting social aid* limited the amount of social assistance payable to recipients under thirty to one-third of what was available to recipients thirty and over. The regulation did, however, make it possible for those under thirty to increase their payments to the level of social assistance paid to recipients thirty and over if they participated in one of three programs: On-the-Job-Training, Community Work, or Remedial Education.[6] Ms. Gosselin brought the case as a class action on behalf of all social assistance recipients subject to the differential regime from 1985 to 1989,[7] arguing that the differential regime violated sections 15 and 7 of the *Charter* and section 45 of the *Quebec Charter*. The claim failed on all three grounds at all levels of court.

With respect to the section 15 claim, Reeves J. held at trial that the claim was not supported by the evidence and that the distinction made under the *Regulation respecting social aid* was not discriminatory under section 15(1) of the *Charter*.[8] At the Quebec Court of Appeal, two of the judges found a section 15(1) violation based on age, but only Robert J.A. (as he was then) held that the violation was not justified under section 1.[9] Mailhot J.A. found no violation at all.

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[6] See *Regulation to amend the Regulation respecting social aid*, O.C. 872-84, 5 April 1984, G.O.Q. 1984.II.1687, s. 2, as am. by O.C. 1347-84, 6 June 1984, G.O.Q. 1984.II.2399. Note that participation in the first two programs raised social assistance benefits up to the base amount available to those thirty and over. Participation in Remedial Education only raised social assistance payments to within 100 dollars of the base amount payable to those thirty and over. The *Regulation respecting social aid* was in force from 1984 until 1989, when it was replaced by legislation that does not make age-based distinctions.

[7] Calculated by the appellants to be 75,000 individuals (though unnamed in the appellant's submissions). See *Gosselin*, *supra* note 1 at para. 8.

[8] *Gosselin c. Québec (Procureur Général)* [1992] R.J.Q. 1647 (C.S.).

[9] *Gosselin c. Québec (Procureur Général)* [1999] R.J.Q. 1033 (C.A.). Mailhot J.A. dismissed the case on the basis that it was indistinguishable from *Law* and that the scheme in its entirety and in context did not violate the appellant group's dignity or liberty (*ibid.* at para. 9). Baudouin J.A. held that the social assistance scheme violated section 15(1) as age discrimination that imposed economic disadvantage on those under thirty. He found, however, the infringement to be justified under section 1 of the Charter, because the government should be accorded a high level of deference in the allocation of scarce economic resources (*ibid.* at paras. 17, 31). Robert J.A., in the minority, would have found a violation of section 15(1) that was not justifiable by section 1, but would have dismissed the remedy of damages as inappropriate. Ms. Gosselin had asked that the Quebec government be ordered to pay

B. The Supreme Court of Canada's Decision on Section 15(1)

The Supreme Court of Canada held, by a slim majority of five to four, that the social assistance scheme established by the *Regulation respecting social aid* did not infringe section 15(1) of the *Charter*. The majority judgment was written by McLachlin C.J. and was concurred in by Gonthier, Iacobucci, Major, and Binnie, JJ. The dissenting judgments held that the regulation violated section 15(1) of the *Charter* and that the infringement was not justified under section I.

The main area of conflict between the majority and the minority was the application of the *Law* section 15(1) test, in particular, the four contextual factors to be considered under the third branch of the test. Since it will be referred to throughout this piece, the *Law* test for discrimination is reproduced here:

> [A] court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries:
>
> (A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
>
> (B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?
>
> and
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> (C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?
>
> ...
>
> Some important contextual factors influencing the determination of whether s. 15(1) has been infringed are, among others:
>
> (A) Pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue. The effects of a law as they relate to the important purpose of s. 15(1) in protecting individuals or groups who are vulnerable, disadvantaged, or members of "discrete and insular minorities" should always be a central consideration. ...

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almost 389 million dollars in benefits plus the interest accrued since 1985 (*Gosselin, supra* note 1 at para. 4).

> (B) The correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others. ... [I]t will generally be more difficult to establish discrimination to the extent that the law takes into account the elaimant's actual situation in a manner that respects his or her value as a human being or member of Canadian society, and less difficult to do so where the law fails to take into account the claimant's actual situation.
>
> (C) The ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society. An ameliorative purpose or effect which accords with the purpose of s. 15(1) of the Charter will likely not violate the human dignity of more advantaged individuals wherc the exclusion of these more advantaged individuals largely corresponds to the greater need or the diffcrent circumstances experienced by the disadvantaged group being targeted by the legislation. ...
>
> and
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> (D) The nature and scope of the interest affected by the impugned law. The more severe and localized the consequences of the legislation for the affected group, the more likely that the differential treatment responsible for these consequences is discriminatory within the meaning of s. 15(1).[10]

McLachlin C.J., writing for the majority, concluded, after an examination of the four factors from *Law*, that there was no support for a finding that there had been discrimination and a denial of human dignity to constitute a violation of section 15(1). First, she held that young people, as a group, had not suffered from historical disadvantage and age distinctions were common and necessary for ordering society. Second, she observed that there was a correspondence between the scheme and the actual circumstances of the social assistance recipients: the provision of education and training provided incentives for young people to work and affirmed their potential and did not undermine their dignity. Third, she noted that the ameliorative purpose factor was neutral in this case since the *Regulation respecting social aid* was not designed to improve the condition of another group (e.g., recipients who are thirty and older). McLachlin C.J. concluded that the impugned law did not adversely affect the appellant's dignity and that any adverse short-term effects were outweighed by the legislation's attempt to improve the self-reliance and dignity of the group.[11]

In dissent, Bastarache J. (Arbour and L'Heureux-Dubé JJ. concurring in the section 15(1) analysis) applied the *Law* criteria to different effect. First, he argued that the majority mischaracterized the group (i.e., young people) and should have

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[10] *Law*, *supra* note 5 at para. 88.

[11] *Gosselin*, *supra* note 1 at para. 74.

considered the special vulnerability of *social assistance recipients* under thirty. Second, he held that there was a lack of correspondence between the differential social assistance scheme and the actual needs, capacities, and circumstances of social assistance recipients under and over thirty. Third, Bastarache J. rejected the ameliorative purpose factor in this case and found that the scheme had a severe effect on an extremely important interest to the claimant by knowingly placing her and others in a precarious and unliveable situation.

Bastarache J. (with the concurrence of LeBel J. in full and Arbour J. in part) then found that the infringement was not justified under section 1 of the *Charter*. Although he aecepted that a certain level of deference should be paid to government in reviewing this type of legislation, he held that this does not give the government carte blanche to limit rights. Bastarache found the objectives—to facilitate the integration of youth into the workforce and to "avoid *attracting* them to social assistance"—[12] to be pressing and substantial and also found a rational connection between those objectives and some differential treatment of the under thirty recipients. Bastarache J. concluded, however, that the measures enacted by the government were not minimally impairing of the appellant's rights and suggested less impairing alternatives to achieve the government's goals. He further found that there was no proportionality between the detrimental effects on the appellant's self-worth and equality and the government's objectives.

Arbour J. concurred with this minimal impairment analysis, and further argued that there was no rational connection between denying social assistance recipients the basic means of subsistencc and promoting their dignity and liberty.

LeBel J. also dissented from the majority, holding that the differential legislative treatment between social assistance recipients was based on stereotypes of youth and discriminated against young recipients for no valid reason.

Finally, L'Heureux-Dubé J. held that the Court should not consider the legislature's good intentions in determining whether the impugned legislation violated section 15(1) and held that discrimination bascd on age did not operate only in relation to old age. She found that the legislative distinction was discriminatory, in part, because of the harm to Ms. Gosselin's fundamental interests in physical and psychological integrity, as a result of both a personal characteristic that could not be changed and the pre-existing disadvantage of some members of the group.

[12] *Ibid.* at para. 263 [emphasis added], quoting from Robert J.A.'s judgment in the Court of Appeal.

II. Critique of the Section 15 Equality Analysis

A. Evidence

1. Problems with the Evidentiary Standard Required

Among the many issues discussed by the Supreme Court of Canada in *Gosselin* one of the most contentious was the evidence required to support the appellant's claims. In considering the evidence, the Court arguably misapplied the standard established in *Law* and previous jurisprudence. 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 codified through judicial notice, and will now be difficult to challenge.

McLachlin C.J. 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"[13] provided by Ms. Gosselin. It was seen again in her concern for making inferences about the program's ability to respond to the needs of a particular group "absent concrete evidence."[14] 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"[15] and that there was "no indication that Ms. Gosselin [could] be considered representative of the [under thirty] class."[16]

These dicta are troubling for the following reasons. First, McLachlin C.J. appears to have applied a higher evidentiary standard to the claimant in this case than is generally required in section 15 challenges. In *Law*, 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."[17] Rather, they should be allowed, if appropriate, to rely on judicial notice and logical reasoning to establish their claims.[18]

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

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

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

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

[17] *Law*, *supra* note 5 at para. 77.

[18] *Ibid.* at para. 78, citing cases such as *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) [*Andrews* cited to S.C.R.]; *R. v. Turpin*, [1989] 1 S.C.R. 1296, 96 N.R. 115; *Weatherall v. Canada (A.G.)*, [1993] 2 S.C.R. 872, 105 D.L.R. (4th) 210. We could also add to this list

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 eloser inspection. The majority complained that Ms. Gosselin had not adduced sufficient evidencc of the problems faced by other members of the class and implied that she might not be representative of the class.[19] This begs the rhetorical question of how many claimants would be required to prove that Ms. Gosselin is representative of a class. We think it unlikely that the testimony of four (0.005 percent of participants), fifteen (0.02 percent) or even one hundred (0.1 percent) 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 exercise of social science data collection. As pointed out by Bastarache J. in dissent, this burden of proof seemed particularly onerous since Ms. Gosselin's claim of "the existence of a group of persons harmed by facts deriving from a common origin"[20] 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.

Third, a claimant's decision to organize the claim as a elass action should not jeopardize her case. Had Ms. Gosselin presented her claim without the class action, and had the Court found in her favour, it would have undoubtedly considered the fact that 75,000 other potential plaintiffs existed and that Ms. Gosselin was a member of a "class". The Court could then have walked the "fine line between fulfilling [the] judicial role of protecting rights and intruding on the legislature's role"[21] and mitigated the plaintiff's demands through remedial provisions. Applicable rcmedial provisions were outlined by Bastarache J. in dissent[22] and remedial strategies for similar situations have been suggested or used in other constitutional cases, such as *Schachter v. Canada*[23] and *Egan v. Canada*.[24]

Fourth, 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 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."[25] Stringent evidentiary requirements on plaintiffs under the first stage of the

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Moge v. Moge, [1992] 3 S.C.R. 813, 99 D.L.R. (4th) 456, L'Heureux-Dubé J. [*Moge*]; *Mossop v. Canada*, [1993] 1 S.C.R. 554, 100 D.L.R. (4th) 658, L'Heureux-Dube J. [*Mossop*].

[19] *Gosselin, supra* note 1 at para. 33.

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

[21] *Ibid.* at para. 292, Bastarache J., dissenting. See also *Sauvé v. Canada (Chief Electoral Officer)*, [2002] S.C.R. 98, C.R.R. (2d) 1, 2002 S.C.C. 68.

[22] *Gosselin, supra* note 1 at paras. 291-99.

[23] [1992] 2 S.C.R. 679, 93 D.L.R. (4th) 1.

[24] [1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609, Iacobucci J., dissenting [*Egan* cited to S.C.R.].

[25] *Gosselin, supra* note 1 at para. 249.

section 15 analysis, such as those applied by the majority in this case, force plaintiffs to shoulder a large part of the evidentiary burden that should properly rest on the government in the section 1 analysis.

The fifth major problem is the barrier this creates for socio-economically deprived claimants who may wish to challenge the allocation of benefits by the government. Placing such a high evidentiary standard 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.[26] 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, could lead to the 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, derives its force in part from discriminatory assumptions and prevalent stereotypes.

2. The Use of Stereotypes

The presumed lack of evidence may lead courts to rely more heavily on assumptions or stereotypes about the classes of claimants before them. Although McLachlin C.J. 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."[27] She continued by stating that to believe that young adults may be subject to "negative preconceptions" would be a "counter-intuitive" proposition,[28] adding that "[i]f anything, people under 30 appear to be advantaged over older people in finding

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

[27] *Gosselin, supra* note 1 at para. 33.

[28] *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*.

employment."[29] These comments were based on a belief that youth are more flexible and have more modern skills than older people.[30]

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.[31] Further stereotyping in the case posited that younger people do not respond as well as older people to the incentive progmms created by the government.[32]

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."[33] McLaehlin C.J. refuted this argument by 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*."[34] She further held that "the idea that younger people may have an easier time finding employment than older people" was not an "arbitrary and demeaning stereotype" and it was, therefore, unproblematic.[35]

Although not touched on by the Court, many more considerations underpin youth employability. These are often understood through the lens of common misperceptions that can be refuted by empirical fact.[36] The problems with the "fact" or stereotype 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 presumption 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 presumptions may make it easier for an employer to terminate a young person's employment. Further, youth may be thought to be unreliable, transient, rebellious (particularly if they have piercings or body art), 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

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

[30] *Ibid.*, citing *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, 76 D.L.R. (4th) 545 at para. 92 [*McKinney* cited to S.C.R.].

[31] See *e.g.*, *Gosselin*, *ibid.* at para. 60. See also *ibid.* at para. 250, Bastarache J. This will be discussed more fully in Part II.D, below.

[32] *Ibid.* at para. 250, Bastarache J.

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

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

[35] *Ibid.*

[36] *Ibid.* at para. 250, Bastarache J.

contacts. Also, older claimants may inspire greater commitment from employers as they share certain contextual commonalities.

These common 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 fact that youth may be more able to find and maintain employment is incorrect.[37] The group facing the highest rates of unemployment is that of fifteen to nineteen year olds (16.6 percent); the lowest rate is held by forty-five to fifty-four year olds (5.4 percent). Even between groups with relatively similar participation rates, younger people fare worse than older people: twenty-three to thirty-four year olds have a 6.9 percent unemployment rate whereas forty-five to fifty-four year olds have a 5.4 percent unemployment rate. These statistics are paralleled by the data available for Quebec in the census years 1981, 1986, 1991, and 1996, which show twenty to twenty-four year olds as having unemployment rates of 16.3 percent, 18.4 percent, 17.2 percent and 17.1 percent in those years and twenty-five to fifty-four year olds (with relatively similar participation rates in the labour market) as having unemployment rates of 8.0 percent, 10.8 percent, 10.8 percent and 10.6 percent.[38] Unemployment rates for younger people in Quebec have consistently been over five percent higher than those of older people.

3. The Problem of Judicial Notice

A lack of evidence may lead courts to rely more heavily on, as Iacobucci J. foreshadowed in *Law*, non-evidentiary tools; in particular, "[a] court may often, where appropriate, determine on the basis of judicial notice and logical reasoning alone whether the impugned legislation infringes s. 15(1)."[39] In *Gosselin* the majority

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[37] 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 economie 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.

[38] 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>.

[39] *Law*, *supra* note 5 at para. 77.

relied on Iacobucci J.'s finding in *Law* that "the increasing difficulty with which one can find and maintain employment as one grows older is a matter of which a court may appropriately take judicial notice," particularly since the Court has "often recognized age as a factor in the context of labour force attachment and detachment."[40]

This assertion and its adoption by the majority in *Gosselin* poses three major problems. First, to qualify as a fact worthy of judicial notice, the fact must be either "(a) so notorious as not to be the subject of dispute among reasonable persons, or (b) capable of immediate and aecurate demonstration by resorting to readily accessible sources of indisputable accuracy."[41] Judicial notice of the fact that younger people more easily find and maintain work than older people violates both these conditions: it is the subject of dispute among reasonable persons, as Justice Bastarache's dissent clearly establishes,[42] and as noted above, it cannot even be confirmed immediately and accurately by Canada's readily accessible and reliable source of statistical data, Statistics Canada. As a result, an unverified hypothesis that is not the subject of agreement amongst reasonable people is transformed into an indisputable fact supported by the weight of precedent that can determine the just allocation of government benefits.

Second, taking judicial notice in this case directly contradicts Iacobucci J.'s warning in *Law* that caution must be exercised in the equality analysis such that "one should not unwittingly or otherwise use judicial notice to invent stereotypes or other social phenomena which may not or do not truly exist."[43]

Lastly, taking judicial notice of the proposition that there is increasing difficulty in finding and maintaining employment as one grows older is problematic because of the imprecise nature of this statement. This imprecision has huge implications for its application by both the Supreme Court of Canada and lower courts in the future. The terms "older" and "younger" are so relative and vague as to be meaningless, especially when one asks *who* is older and younger and in *what* job market. This can be demonstrated by the fact that the Court has applied this same reasoning to a shifting age standard that depends on the case at hand—in *McKinney v. University of Guelph*[44] the Court drew the line between young and older persons at forty-five years

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[40] *Ibid.* at para. 34. Iaccobucci J. cited the following judgments as supportive: *McKinney* (*supra* note 30 at para. 92, La Forest J.: "[b]arring specific skills, it is generally known that persons over 45 have more difficulty finding work than others. They do not have the flexibility of the young, a disadvantage often accentuated by the fact that the latter are frequently more recently trained in the more modern skills"); *Machtinger v. HOJ Industries Ltd.* ([1992] 1 S.C.R. 986, 91 D.L.R. (4th) 491, Iacobucci and McLachlin JJ.); *Moge* (*supra* note 18, McLachlin J.).

[41] John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1999) at 1055.

[42] *Gosselin*, *supra* note 1 at paras. 150-304.

[43] *Law*, *supra* note 5 at para. 79.

[44] *Supra* note 30.

of age, in *Law* it was thirty-five years, and in *Gosselin* it was thirty years.[45] If employability based on age is to be used as a fact, it ought to be precisely defined or delimited to prevent its abuse.

The notion of "finding employment"[46] offers another demonstration of the vagueness of the facts that were given judicial notice. Must employment be maintained for a given period of time? Does "finding" mean "securing" or merely "discovering" employment? How can one be sure that the underlying concept will not be altered and misrepresented in subsequent judicial decisions? Legislative facts should be proven by the testimony of experts in the relevant field of knowledge, precisely delimited, and adapted to the contextual facts of a case.[47] It is admirable that the impetus in taking judicial notice of facts and using logical reasoning was to limit the evidentiary burden of data and social science evidence on claimants and respondents. However, it serves neither party's interests if judicial notice is taken of incorrect facts or of imprecise concepts that ultimately serve to perpetuate disadvantage and misinformation.

B. Contrast with Past Equality Jurisprudence

Throughout its judgment in *Gosselin*, the majority used *Law* as justification for many of its pronouncements due to the "striking similarity"[48] of the two cases. At least three major differences between the cases demonstrate, however, that heavy reliance on *Law* may in fact have been a misapplication of *Law*'s holdings. Similarly, the majority judgment took jurisprudential licence with previous section 15 cases of the Court. In particular, this includes the revitalization of the idea of "relevant" distinctions from *Miron v. Trudel*[49] and *Egan*, and the consideration of "ameliorative purposes" from *Lovelace v. Ontario*.[50] As a consequence, the judgment appears to be making regressive steps in the equality record that the Supreme Court of Canada had previously set, arguably undermining and contradicting its recent pronouncements on the substantive equality standard.[51]

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[45] While giving some margin to the special nature of the ground of "age" as compared to other immutable grounds like race (see *e.g. Gosselin*, *supra* note 1 at para. 225; Peter Hogg, *Constitutional Law of Canada*, looseleaf (Toronto: Carswell, 1999) at 52-54), to take an example at the extremes, there is a big difference in the employability of a teenager and a 44 year old, though arguably judicial notice may have been taken of the fact that their employability is the same. This highlights the meaninglessness and malleability of this assumed fact to suit the purposes of judicial reasoning, if not justice.

[46] *Gosselin*, *ibid.* at para. 56.

[47] This echoes Bastarache J.'s concern (*ibid.* at para. 235).

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

[49] [1995] 2 S.C.R. 418, 23 O.R. (3d) 160 [*Miron*].

[50] [2000] 1 S.C.R. 950, 188 D.L.R. (4th) 193, 2000 SCC 37 [*Lovelace*].

[51] See *e.g. Eldridge v. British Columbia (A.G.)*, [1997] 3 S.C.R. 624, 151 D.L.R. (4th) 577 [*Eldridge*]; *Vriend v. Alberta*, [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385.

1. Comparison between *Gosselin* and *Law*

In addition to providing judicial notice of convenient facts, the majority relied on *Law* to support a number of its holdings, at one point explicitly stating that "[i]n many respects, the case before us is strikingly similar to *Law*."[52] With respect, this reliance may be misplaced, since the cases are distinctly different. As Bastarache J. commented, "The fact that a certain legislative provision which limited the benefits to those under a certain age was found to be constitutional in one case does not necessarily lead to the same conclusion here."[53] Overemphasis on the holdings in *Law* not only produces the problematic results related to stereotyping and judicial notice, discussed above, but also raises the following issues.

First, the Canada Pension Plan ("CPP") benefits at issue in *Law* were related to marital status and age and were provided regardless of financial need while in *Gosselin*, social assistance was a program of last resort allocated to meet basic needs. Unlike the beneficiaries in *Law*, the beneficiaries in *Gosselin* uniformly had no other sources of income or employment and clearly required the payments to live. Drawing a parallel between the two cases reflects an underlying assumption that social assistance recipients *choose* to receive soeial assistance.[54] As such, comparing the government's consideration of "long-term needs" in both cases, as the majority did in *Gosselin*,[55] overlooks the urgency of the short-term needs of social assistance recipients in *Gosselin* and generally misrepresents the different circumstances of the two kinds of claimants.[56]

Second, the CPP payments in *Law* did not iinpose training or educational requirements on the recipients, demonstrating that the allocation of those benefits came with a much lighter burden on the recipients in *Law* than in *Gosselin*. As well, the legislation in *Law* did not draw a bright line between those over and under thirty, and in fact provided a scheme of gradually decreasing payments for widows between thirty-five and forty-five.

Finally, "[i]n *Law* ... Iacobucci J. held that a piece of legislation might be less harmful to a group's dignity if its purpose or effect is to help a more disadvantaged person or group in society."[57] This argument worked in that case to justify the government's actions because the legislative purpose was to aid elderly widows (as

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[52] *Gosselin, supra* note 1 at para. 73.

[53] *Ibid.* at para. 233.

[54] See Part II.D, below.

[55] *Gosselin, supra* note 1 at para. 44.

[56] *Ibid.* at para. 252. As Bastarache J. argues:

> The difference in the nature and importance of the interest affected—provision for basic needs immediately as opposed to over the long term—is one of the crucial distinctions between the present case and *Law*. ... A genuine contextual approach will appreciate this distinction and will not find the result determined by the apparent similarities in that both cases address an age distinction for a government benefit.

[57] *Ibid.* at para. 250, Bastarache J.

opposed to the disadvantaged young widow claimants). Conversely, in *Gosselin*, the legislation's purpose was to help the very group it disadvantaged. As we will examine in the next sections, the majority's treatment of this purpose in the same way as the ameliorative purpose in *Law* compromises its section 15 equality analysis.

2. Comparing *Gosselin* to *Miron* and *Egan*: Relevant Distinctions and Legislative Purpose

Throughout the dissenting judgments in *Gosselin*, a recurring criticism of the majority decision was the use of legislative purpose in the third step of the *Law* analysis to incorporate section 1 justification concerns. The criticism was two-fold: that the inclusion distorted the analysis of every previous *Charter* case by not keeping the violation and justification inquiries distinct;[58] and that a positive legislative purpose was not an appropriate consideration at the section 15 stage of the analysis.[59] Both of these concerns can be traced to a deeper criticism that the methods of analysis used by the majority employ concepts which, although introduced in past decisions by the Court, have since been refuted by its own jurisprudence. The first such concept is the consideration of relevant distinctions and the second is the blurring of the two concepts of discriminatory intent (as opposed to discriminatory effect) and legislative purpose. Inextricably linked, one derives analytical strength from the other. Both were introduced in the twin cases of *Miron* and *Egan*.[60] We examine each concept separately below.

a. Relevant Distinctions versus Irrelevant Personal Characteristics

The idea that "relevant" distinctions could be considered in the section 15 inquiry was supported by the same four justices in both *Miron* and *Egan*.[61] Finding against the expansion of the definition of spouse to include either common-law or same-sex spouses in those cases, these justices reformulated the section 15 analysis, as originally stated in *Andrews*, to include a third step of "whether the distinction made by Parliament is relevant [considering] 'the nature of the personal characteristic and its relevancy to the functional values underlying the law.'"[62]

This subtle reformulation transforms the accepted analytical step of determining whether a distinction is based on an "irrelevant personal characteristic" to the very different exercise of determining whether the distinction being made is relevant to the "functional values" of the law.[63] As becomes clear through the judgments, the term "functional values" connotes a positively perceived legislative purpose. In *Miron* and

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[58] *Ibid.* at para. 103, L'Heureux-Dubé J.

[59] *Ibid.* at para. 243, Bastarache J.

[60] *Miron*, *supra* note 49 at para. 13; *Egan*, *supra* note 24 at paras. 42-48.

[61] Lamer C.J. and La Forest, Gonthier, and Major JJ.

[62] *Egan*, *supra* note 24 at para. 13. See also *Miron*, *supra* note 49 at paras. 14-15.

[63] *Egan*, *ibid.*

Egan, that purpose was the support of marriage as a heterosexual institution: "The distinction adopted by Parliament is relevant, indeed essential, to describe the relationship in the way the statute does so as to differentiate the couples described in the statute from all couples that do not serve the social purposes for which the legislature has made the distinction."[64]

Other cases that followed, including the *Law* restatement of section 15, have affirmed that the balancing and policy considerations allowed by an examination of relevant distinctions are not appropriate to the section 15 discrimination determination, although these considerations may have force under section 1.[65] The only so-called relevant distinction is the one being assessed; that is, the legislative distinction defined in the first stage of the *Law* analysis is only *relevant* because it is being challenged as discriminatory. In the same vein, the personal characteristic, defined in the second part of the *Law* analysis will be *irrelevant* simply because the legislative distinction is derived from stereotypes or assumptions about a person based on the characteristic. In this way, enumerated and analogous grounds are irrelevant personal characteristics when used as "an illegitimate proxy for merit ... or ability,"[66] although the distinction may not necessarily result in a finding of discrimination under the third part of the section 15 test. The use of (ir)relevance to reflect determinations intrinsic to the analysis should not act as a door to inappropriate balancing of interests or justifications of legislative purpose.

Unfortunately, the majority judgment in *Gosselin* has revived the inquiry into relevant distinctions under the third part of the analysis. This is especially apparent in its application of the second contextual factor enumerated in this part of the *Law* test: the correspondence, or lack thereof, between the ground on which the claim is based and the actual need, capacity, or circumstances of the claimant.[67] The original motivation for considering this factor is clear. Given our benchmark of substantive over formal equality, we have recognized that in certain circumstances, true equality may require that different people are treated differently. Therefore, when government action responds to the need for substantive equality, this should mitigate against a finding of discrimination. To the contrary, the majority in *Gosselin* used the analysis of needs, capacities, and circumstances to embark on an inquiry reminiscent of the proportionality analysis of section 1 to determine the reasonableness of the legislative purpose:

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[64] *Egan*, *ibid.* at para. 27.

[65] See *e.g. Eldridge*, *supra* note 51. Somewhat surprisingly, the *Eldridge* case was neither mentioned by the majority nor were its principles incorporated. Considering that the challenges of addressing underinclusiveness do not even arise in this case, the simple idea articulated by the full Court in *Eldridge* (that once a benefit is given it should not be given in a discriminatory manner) should be uncontroversial at this stage of our equality jurisprudence. For a good discussion, see also *Collins v. Canada*, [2002] 3 F.C. 320, 285 N.R. 359 (C.A.) (Factum of the Appellant at paras. 72-77).

[66] *Gosselin*, *supra* note 1 at para. 226, Bastarache J.

[67] See *Law*, *supra* note 5 at paras. 69-71.

> A final objeetion is that the selection of 30 years of age as a cut-off failed to correspond to the actual situation of young adults requiring social assistance. However, all age-based legislative distinctions have an element of this literal kind of "arbitrariness". That does not invalidate them. *Provided that the age chosen is reasonably related to the legislative goal*, the fact that some might prefer a different age—perhaps 29 for some, 31 for others—does not indicate a lack of sufficient correlation between the distinction and actual needs and circumstances. Here, moreover, there is *no evidence that a different cut-off age would have been preferable to the one selected.*[68]

This blurring between the violation and justification analyses is closely related to the second branch of our critique: the use of purpose as a justificatory proxy for discriminatory intent.

b. Legislative Purpose versus Discriminatory Intent

Most of the foundational section 15 equality jurisprudence has centered around a dichotomy influenced by rulings regarding statutory human rights codes: direct discrimination (emanating from discriminatory intention) and indirect discrimination (resulting from an adverse effect).[69] Recent human rights codes jurisprudence has moved away from this dichotomy in favour of a more holistic approach that better targets the effects of discrimination inbred into entrenched standards, systems, and institutions. This more nuanced approach to the statutory equality analysis was explained by McLachlin J. (as she then was) in her judgment for the Court in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*:[70]

> Under the eonventional analysis, if a standard is classified as being "neutral" at the threshold stage of the inquiry, its legitimacy is never questioned. The focus shifts to whether the individual claimant can be accommodated, and the formal standard itself always remains intact. The conventional analysis thus shifts attention away from the substantive norms underlying the standard, to how "different" individuals can fit into the "mainstream", represented by the standard.
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> ...
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> Interpreting human rights legislation primarily in terms of formal equality undermines its promise of substantive equality and prevents consideration of the effects of systemic discrimination ...[71]

We have seen very little of this sort of analysis transferred, however, into the section 15 arena, particularly with what appear to be regressive steps being taken by the majority in the *Gosselin* case.

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[68] *Gosselin*, *supra* note 1 at para. 57 [emphasis added].

[69] This distinction was ennunciated in the landmark human rights code case of *Ontario (Human Rights Commission) v. Simpson-Sears* ([1985] 2 S.C.R. 536 at 551, 23 D.L.R. (4th) 321) and was subsequently acknowledged in *Andrews* (*supra* note 18 at para. 37), the Court's first section 15 case.

[70] [1999] 3 S.C.R. 3, 176 D.L.R. (4th) 1 [*BCGSEU* cited to S.C.R.].

[71] *Ibid.* at paras. 40-41.

The section 15 analysis, above all, is aimed at determining whether, intentionally or by adverse effect, discrimination has occurred. Granted, because legislation, rather than the actions of individuals, is more often at issue, it can perhaps be difficult to speak of a discriminatory "intent".[72] This may have contributed to McLachlin C.J. translating this conceptual step of classifying the type of discrimination into an evaluation of legislative purpose in *Gosselin*, losing the focus on the discriminatory aspect of the purpose in the process. Although the majority still addressed effects, the lack of an overtly malevolent legislative purpose appeared to counterbalance any adverse effects rather than act as an alternative.[73] For example, in evaluating the social assistance scheme at issue, the majority, despite interspersed comments to the contrary, clearly evaluated purpose in a manner beyond determining whether the scheme, by purpose, design, or intent, was discriminatory:

> I emphasize that a beneficent purpose will not shield an otherwise discriminatory distinction from judicial scrutiny under s. 15(1). Legislative purpose is relevant only insofar as it relates to whether or not a reasonable person in the claimant's position would feel that a challenged distinction harmed her dignity. As a matter of common sense, if a law is designed to promote the claimant's long-term autonomy and self-sufficiency, a reasonable person in the claimant's position would be less likely to view it as an assault on her inherent human dignity. ... However, where the legislature is responding to certain concerns, and where those concerns appear to be well founded, it is legitimate to consider the legislature's purpose as part of the overall contextual evaluation of a challenged distinction from the claimant's perspective, as called for in *Law*. This is reflected in the questions Iacobucci J. asked in *Law*: "Do the impugned CPP provisions, *in purpose or effect*, violate essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice?"; "Does the law, *in purpose or effect*, perpetuate the view that people under 45 are less capable or less worthy of recognition or value as human beings or as members of society?"[74]

Arguably, consistent with the legacy of the human rights jurisprudence of the Court, what was meant in the test quoted from *Law*, is to determine whether the provisions, in *intent or effect*, are a violation of substantive equality. This inquiry is qualitatively different from the approach taken by the majority. The latter judgment instead applied an altered criterion of "legislative purpose" and thus found that the government's purpose was beneficial to the claimant group and reasonable in the circumstances.

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[72] See also *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 259, 18 D.L.R. (4th) 321.

[73] Interestingly, this is a similar approach to the one taken by McLachlin J.A. (as she then was) in her Court of Appeal judgment in *Andrews v. Law Society of British Columbia* ((1986) 2 B.C.L.R. (2d) 305, 27 D.L.R. (4th) 600), which was subsequently overturned (*Andrews*, *supra* note 18 at 181-82):

> I would reject, as well, the approach adopted by McLachlin J.A. She seeks to define discrimination under s. 15(1) as an unjustifiable or unreasonable distinction. In so doing she avoids the mere distinction test but also makes a radical departure from the analytical approach to the Charter which has been approved by this Court. In the result, the determination would be made under s. 15(1) and virtually no role would be left for s. 1.

[74] *Gosselin*, *supra* note 1 at para. 27 [emphasis added]

The majority's comments at the section 15 stage were reminiscent of a section 1 proportionality analysis, notably imbued with considerable legislative deference:

> Instead of turning a blind eye to these problems, the government sought to tackle them at their roots, designing social assistance measures that might help welfare recipients achieve long-term autonomy ... Even if one does not agree with the reasoning of the legislature or with its priorities, one cannot argue based on this record that the legislature's purpose lacked sufficient foundation in reality and common sense to fall within the bounds of permissible discretion in establishing and fine-tuning a complex social assistance scheme. Logic and common sense support the legislature's decision to structure its social assistance programs to give young people, who have a greater potential for long-term insertion into the work force than older people, the incentive to participate in programs specifically designed to provide them with training and experience ... [75]

Aside from distorting the section 15 analysis, these conclusions are problematic in two substantive ways: they ignore the majority's own warning that paternalistic purposes for a group's "own good" will still be suspect,[76] and they fail to incorporate the lesson learned in *BCGSEU* that a blunt, bifurcated examination of intent and effect can leave a discriminatory standard or norm unquestioned.

The majority, and to a certain extent Bastarache J.,[77] failed to recognize that good intentions, when based on presumed or stereotypical characteristics of a group, can still be discriminatory.[78] The idea that younger people, simply because they are young, are more capable than those thirty and over of finding employment if they only make the effort to do so, is such an unsupported assumption.[79] 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."[80] 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.

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[75] *Ibid.* at para. 44.
[76] *Ibid.* at para. 27.
[77] *Ibid.* at para. 243 (only a "detrimental" purpose is to be considered).
[78] See also *ibid.* at para. 112, L'Heureux-Dubé J.
[79] See *ibid.* at paras. 403-10, Lebel J.
[80] *Ibid.* at para. 56.

3. *Lovelace*: Affirmative Action and Ameliorative Purpose

The third contextual factor of the third part of the section 15 *Law* test is the "ameliorative purpose or effects of impugned legislation or other state action upon a more disadvantaged person or group in society."[81] As alluded to in *Law* and implicitly confirmed in *Lovelace*, the third factor incorporates into section 15(1) the concerns of section 15(2) of the *Charter* that affirmative action initiatives, which have the furtherance of substantive equality at their foundation, should not be undermined by claims of discrimination by more advantaged groups.[82] Without precluding the independent operation of section 15(2), the Court in *Lovelace* clarified that ameliorative programs or legislation should be "confirmatory and supplementary" to section 15(1) and should not act as a defence or exemption to a violation of equality rights.[83]

In *Gosselin*, the majority found the third factor in the dignity analysis to be neutral since the legislation was not designed to improve the position of another less advantaged group. At the same time, however, it considered the incentive scheme for younger recipients to be aimed at ameliorating their situation and thus a factor for assessing whether the scheme affected their human dignity.[84]

There are three errors in this reasoning. First, as pointed out by L'Heureux-Dubé J. and apparent from the *Law* and *Lovelace* precedents, "the ameliorative purpose must be for the benefit of a group less advantaged than the one targeted by the impugned distinction."[85] Second, by acknowledging that the legislative purpose was ameliorative or by portraying the education programs as some sort of affirmative action for younger recipients, the majority must have implicitly recognized that the group suffered from a pre-existing disadvantage. Yet, the majority found that the recipients in the younger group did not suffer from any pre-existing disadvantage under the first contextual factor of the *Law* dignity test.

Lastly, this reasoning reflects a recurring discrepancy in the majority's treatment of the legislative scheme. The legislative distinction is portrayed in the judgment as the requirement that those under thirty participate in programs in order to raise their level of assistance. They were distinguished from those thirty and over who did not have to participate to raise their levels of assistance. It is arguable, however, that the distinction at issue, quite apart from the programs available, was simply that of the differential in rates: social assistance recipients under thirty received approximately one-third the amount as those over thirty (170 dollars as compared with almost 500 dollars). This distinction was reflected in the construction of the *Regulation respecting social aid*, where the amounts for ordinary needs were established in

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[81] *Law*, *supra* note 5 at 539.
[82] *Lovelace*, *supra* note 50 at paras. 84-85, 93-108.
[83] *Ibid.* at para. 105.
[84] *Gosselin*, *supra* note 1 at paras. 59-62, 65-66.
[85] *Ibid.* at para. 136.

section 23 as a basic scale and the amounts for single individuals under thirty specified in section 29 as an exception to the general rule. Similarly, these amounts were set out in Section III of the regulation, which determined "Ordinary Needs", while the provisions with regard to the programs were provided for separately in Section IV under "Special Needs".[86] In addition, as noted in the dissenting judgments, (1) participation in programs (and the concomitant increase in assistance) was not limited to those under thirty, (2) access to programs was not universal to the under thirty group, and (3) there was no possible way for participation to consistently raise the level of assistance for those under thirty to that of the thirty and over group. Thus, participation in the programs should have been seen as an extra hurdle or burden for the younger recipients and, if considered in the section 15(1) rather than the section 1 analysis at all, should have been regarded as a disadvantage rather than an advantage.

By portraying the impugned legislative distinction as the creation of an "incentive-based" system[87] for one group as opposed to the other, the majority was able to place an ameliorative spin on what was essentially an asymmetrical workfare system. Perhaps this is because the majority, and the dissents, proceeded directly to the third part of the *Law* test without a directed inquiry at the first stage into what distinction was at issue. Unfortunately, this shortcut allowed an inappropriately defined distinction to taint the whole analysis.

C. *Intersectionality*

As mentioned, all the judges in *Gosselin* proceeded directly to the third step of the *Law* section 15 test. We argue above that the failure to accurately define the impugned distinction at the first step of the test thus distorted the majority's analysis in the third step. In this section, we inquire as to whether the lack of directed inquiry into the second step, "whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment,"[88] similarly resulted in a tainted third step. We conclude that it did by failing to incorporate the level of contextuality that recognizes the manner in which intersections of identity markers can contribute to discrimination.

1. Intersectionality in Past Supreme Court Judgments

Since the inaugural section 15 case of *Andrews*, an "enumerated or analogous grounds" approach has been the analysis favoured over other formulations for determining discrimination, such as the formalistic "similarly situated" or "likes

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[86] *Regulation respecting social aid, supra* note 2, ss. 23, 29.

[87] Interestingly, there were already other "incentives" in the legislative scheme directly related to the rates which appear to be designed to encourage employability in the manner conceived of by the majority. This included a 50 dollar reduction in assistance for six months for those who refused or abandoned employment. See *Regulation respecting social aid, ibid.*, s. 14.

[88] *Law, supra* note 5 at para. 88.

alike" tests for equality.[89] Unfortunately, cases that followed *Andrews* have illustrated that the grounds approach is as susceptible to being reduced to a game of categorization as the similarly situated test, especially when courts are faced with addressing intersecting grounds of discrimination or multiple discrimination. In *Mossop v. Canada*,[90] for example, the majority could not conceive of family status as incorporating a same-sex family and encouraged Mr. Mossop to frame his claim under sexual orientation only.[91] In *Symes v. Canada*, the majority could not accommodate the idea of inequalities *between* women suffering from different types or levels of disadvantage; rather, a claim based on sex required the same disadvantage to *all* women equally.[92] A formalistically applied grounds approach has thus resulted in claimants whose identities may traverse more than one of the discrete boxes of identity vying for recognition between watertight judicially defined compartments.[93] In the *Law* synthesis, the Court appeared to try to address this rigidity 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).[94]

This statement was applied in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*[95] where the Court recognized "Aboriginality-residence"[96] or "off-reserve band member status"[97] as an analogous ground, conforming with the "central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making."[98] L'Heureux-Dubé J., in her reasons, noted that the characteristics that may comprise analogous grounds should be considered in a fluid and contextual manner

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[89] *Andrews*, *supra* note 18 at 168 [references omitted].

[90] *Mossop*, *supra* note 18.

[91] 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, 110 D.L.R. (4th) 470 [*Symes* cited to S.C.R.]). See also Nitya Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) 6 C.J.W.L. 25.

[92] *Ibid.* See also Audrey Maeklin, "*Symes* v. *M.N.R.*: Where Sex Meets Class" (1992) 5 C.J.W.L. 498.

[93] Iyer, *supra* note 91 at 193-203.

[94] *Law*, *supra* note 5 at paras. 93-94 [notes omitted].

[95] [1999] 2 S.C.R. 203, 173 D.L.R. (4th) 1 [*Corbiere*].

[96] *Ibid.* at para. 6, McLachlin C.J. and Bastarache J. for five justices, concurring in the result.

[97] *Ibid.* at para. 62, L'Heureux-Dubé J. for four justices.

[98] *Ibid.* at para. 13, McLachlin C.J. and Bastarache J.

so that concerns of overlapping and intersecting discrimination can be addressed as they arise:

> I should also note that if indicia of an analogous ground are not present in general, or among a certain group in Canadian society, they may nevertheless be present in another social or legislative context, within a different group in Canadian society, or in a given geographic area, to give only a few examples. ... The second stage must therefore be flexible enough to adapt to stereotyping, prejudice, or denials of human dignity and worth that might occur in specific ways for specific groups of people, to recognize that personal characteristics may overlap or intersect (such as race, band membership, and place of residence in this case), and to reflect changing social phenomena or new or different forms of stereotyping or prejudice.[99]

McLachlin C.J. and Bastarche J. for the other five justices took issue with this approach, arguing that it endorsed shifting analogous grounds.[100] It appears, however, that L'Heureux-Dube J. was simply stating that we should not foreclose on new analogous grounds that might encompass previously rejected grounds arising in new contexts and intersecting with other characteristics. Although McLachlin C.J. and Bastarache J.'s point that grounds should be permanent suspect markers of discrimination is not contrary to this, their opposition and insistence that it was only the third part of the test—whether discrimination exists—that would respond to differences in claims reflects an analytical rigidity which is reproduced in *Gosselin*.[101]

2. Intersectionality in *Gosselin*

The judicial drive to categorize, and more specifically, to work within traditionally recognized categories, is apparent in *Gosselin*, where every judgment unquestioningly accepted that the impugned distinction was based on the enumerated 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 at the least and creates four problematic issues for the analysis in this case.

First, recall that the first part of the *Law* test requires two alternative, but complementary inquiries: "Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?"[102] Clearly, under the *Regulation respecting social aid*, the formal distinction was based on age: distinguishing between those under thirty and those over thirty. However, the second part of the inquiry—regarding a failure to account for "the claimant's already

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[99] *Ibid.* at para. 61.
[100] *Ibid.* at para. 10.
[101] *Ibid.* at paras. 9, 108.
[102] *Law*, *supra* note 5 at para. 88.

disadvantaged position ... resulting in substantively different treatment ... "—[103] is equally applicable to this case. In particular, the claimant's status as either a poor person, an unemployed person, a recipient of social assistance, or all three, places her in a position of disadvantage under the regulation. This disadvantage is exacerbated by the substantive effects of the difference in social assistance rates. When we then proceed to the second part of the *Law* test—whether the differential treatment is based on an analogous ground—can a contextual and purposive analysis really exclude consideration of the claimant's socio-economic status? Although the test is defined as determining *the* ground of the distinction, there can be little doubt that what is sought to be enumerated in section 15(1) are prohibitcd grounds of *discrimination*, and not merely any formal ground on which distinctions are made.[104]

In substantive terms, although the legislative distinction in *Gosselin* was formally one of age, it was thc claimant's socio-cconomic status and her dependence on social assistance that made this distinction possible. It has been recognized that the poor, and cspecially those on social assistance, are disproportionately susceptible to state-sanctioned invasions of privacy,[105] regulation of personal lifestyle,[106] and discrimination.[107] 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 at the heart of the differential treatment in this case. The granting and withholding of resources for basic human necessities should be the distinction at issue and such recognition of the role of socio-economic status in a legislative age distinction would allow for a more accurate, realistic, and eontextual approach to a claim of discrimination. The following comment made by former Justice La Forest as ehair 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:

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[103] *Ibid.*

[104] Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experienccs" (2001) 13 C.J.W.L. 37 (advocating a strengthened emphasis on grounds in examining section 15 claims).

[105] See *e.g. Glasgow v. Nova Scotia (Minister of Community Services)* (1999), 178 N.S.R. (2d) 115, 178 D.L.R. (4th) 181. A similar reading could be inferred from the result in *Re Privacy Act (Can.)*, [2001] 3 S.C.R. 905, 210 D.L.R. (4th) 279, 2001 SCC 89.

[106] *Falkiner v. Ontario (Minister of Community and Social Services)* (2002), 59 O.R. (3d) 481, 212 D.L.R. (4th) 633 (C.A.) and other cases where the "spouse in the house" rule affecting social assistance has been found unconstitutional.

[107] See *e.g. Dartmouth/Halifax County Regional Housing Authority v. Sparks* (1993), 119 N.S.R. (2d) 91, 101 D.L.R. (4th) 224 (S.C.); Sheilagh Turkington, "A Proposal to Amend thc Ontario Human Rights Code: Recognizing Povertyism" (1993) 9 J.L. & Social Pol'y 134; Martha Jackman, "Constitutional Contact with the Disparitics in the World: Poverty as a Prohibited Ground of Discrimination Under thc 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].

> 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.*[108]

Second, while both McLachlin C.J. and Bastarache J. focussed on case-specific differences in the third (rather than the second) part of the *Law* analysis, as they jointly advocated in *Corbiere*, the judgments reached diametrically different conclusions. The difference can be attributed partly to McLachlin C.J. who, having assumed age to be the enumerated and applicable ground, turned the discrimination analysis into a marginally elevated similarly-situated test:

> 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 whieh 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.[109]

Although the majority was willing to compare those over thirty to those under thirty at the level of gencrality in determining prc-existing disadvantage, it refused to evaluate differences *between* social assistance recipients because they may have 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 a more substantive analysis is undertaken in the earlier parts of the section 15 test.

Though he came to a very different result, Bastarache J.'s judgmcnt is similarly problematic. He too assumed that age was the only applicable ground of discrimination and thus considered receipt of social assistance as a contextual factor under the third part of the *Law* test in determining pre-existing disadvantage:

> The fact that their status as beneficiaries of social assistance was not argued as constituting a new analogous ground should not be a matter of concern at this stage of the analysis, since it has already been determined at the second stage of the *Law* test that the differentiation has been made on the basis of an enumerated ground. The issue, at this stage, is to determine whether, in the context of this case, a differentiation based an enumerated ground is threatening to the appellant's human dignity. If the vulnerability of the appellant's group as

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

[109] *Gosselin*, *supra* note 1 at para. 35.

> welfare recipients cannot be recognized at this stage, can we really be said to be undertaking a contextual analysis?[110]

While the majority characterized poverty as the product of the lack of individual effort to become employed, Bastarache J. situated poverty as a precursor of discrimination, to be considered merely as another contextual element. In both cases, poverty was understood as an externality, and neither of the justices was willing to consider poverty as a possible ground, in itself or in combination with another ground, so long as the second stage of the test could be based on an enumerated ground.

This leads us to the third sign of analytical rigidity: while the Court forewarned us in *Lovelace* not to encourage a "race to the bottom" for competing disadvantages,[111] 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 evidenee before the Court in *Gosselin* that women in poverty were more susceptible to abuse, harassment, and sexual exploitation.[112] Additionally, persons with disabilities, racialized persons, including Aboriginal persons, and single parents disproportionately live in poverty.[113] As we have seen, age is also a marker of poverty for both youth and seniors. Similarly, geographical region can also be a factor: a prime example being the particular situation in Quebec at issue

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

[111] *Lovelace, supra* note 50 at para. 69. Bastarache J. reiterates this stance in *Gosselin* (*ibid.* at para. 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.

We would also warn against using the analogous grounds analysis to create a proliferation of detailed grounds in the name of responding to multiple discrimination when the grounds, or components thereof, are encompassing facts rather than identity markers. We are currently witnessing this in refugee law where proof of distinet elements of the refugee definition is required in order to establish that the claimant forms a member of a "particular social group" (see *e.g.* Chantal Tie, "Sex, Gender, and Refugee Protection in Canada under Bill C-11: Are Additional Protections Required in Light of *In re R.A.*?" *Refuge* 19:6 (August 2001) 54, online: <http://www.yorku.ca/crs/Refuge/refuge_-_volume_19,_issue_no__6.htm>). Such tautological reasoning should especially be avoided in the discrimination analysis to prevent splintering analogous grounds into smaller, individual classifications. Intersectionality analyses should allow for a nuanced and holistic examination, not a requirement that the claimant repeatedly satisfy the test for a number of grounds in succession.

[112] 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/gossclin_part1.htm> [NAWL Factum]).

[113] See CHRA Review Panel, *supra* note 107 at 108; NAWL Factum, *ibid.* See also A. Wayne MacKay, Tina Piper & 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.ea/ehra/en/socond2.htm>.

in *Gosselin*. 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 formalistie calculus.[114] Unfortunately, all of the judgments in *Gosselin*, for the most part, glossed over the intersectionality aspects of the claim and optcd instead for the more simplistic, but necessarily incomplete approach of focusing on the single cnumerated ground of age.

Finally, it should be noted that whereas flexibility is required for categorizing and acknowledging intersectional grounds of discrimination, precision should be required when limiting rights through judicial notice. This accords with the underlying philosophy of equality analysis which posits a broad interpretation of rights and a narrow interpretation of limitations to those rights.[115] As two sides of a liberal and purposive approach to equality, both serve the object of section 15 and were undermined in this case. What is apparent is that a holistic analysis of multiple discrimination in cases where socio-economic status is at issue will continue to face challenges so long as stcreotypes of those living in poverty persevere.

D. Stereotypes

People living in poverty or of low socio-economic status face a host of barriers and discrimination. We will attempt to highlight some of the underpinning attitudes and stereotypes that have slipped into the decision in *Gosselin*. Thc 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.[116]

This kind of statement fails to recognize that dependence on social assistance offers neither a liveable cxistence nor a valued status in our society. It ignores that the effort involved in simply surviving on only I70 dollars per month could be an all-consuming job in itself. Daily trials would includc finding enough food when access

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[114] See Iyer, *supra* note 91.

[115] See *e.g. McKinney*, *supra* note 30 at 382-84, Wilson J., dissenting. See also *Andrews*, *supra* note 18; *Hunter v. Southam*, [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641.

[116] *Gosselin*, *supra* note 1 at para. 43 [emphasis added].

to food banks is limited and restricted; finding reasonable accommodation 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.[117] A greater amount of assistance or "a bigger welfare cheque" could, in fact, be more conducive to employability[118] because it would enable people to have a small measure of security and time to assess their options and opportunities.[119]

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.[120]

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 had just tried hard enough, could have become "productive" members

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

[118] We hesitate, however, to endorse the amount given to those over-thirty as sufficient.

[119] See *e.g.* NAWL Factum, *supra* note 112; *Gosselin*, *supra* note 1 (Factum of the Intervenor, Charter Committee on Poverty Issues).

[120] Part of a submission by Jean Swanson of End Legislated Poverty obtained from Human Resources Development Canada through an Access to Information request and cited in CHRA Review Panel, *supra* note 107 at 110 [all notes in square brackets except the first are in the CHRA report].

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 partieipate; clearly "aid received" is not necessarily equivalent to "total income".[121]

Even though receiving other income (in addition to the deemed amount of need to which one may be entitled) would be contrary to the *Regulation respecting social aid,* possibly even criminal,[122] and could fulfill the stereotype of "welfare cheats" abusing the system, it was the *assumption that it occured* 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. The legacy of the "poor laws" of the nineteenth century lingers on today.[123] 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.[124] 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 at home 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. 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

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[121] *Gosselin, supra* note 1 at para. 51.

[122] 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 seheme. 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>.

[123] See Turkington, *supra* note 107 at 157-64.

[124] 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.

Quebec legislation removes the *choice* to work and the right to be free from coercion that should be central to human dignity.[125]

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 the purported purpose underlying the scheme claims to be highly complementary to that of equality provisions: 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."[126]

Conclusion

Our discussion has traversed four major problems with the Supreme Court of Canada's section 15 analysis in *Gosselin*. Throughout we have noted the importance of understanding the purpose of the section 15 equality guarantee and remembering the rationale and precedents that underpin various legal tests, particularly the *Law* test. We have noted as well the importance of strictly limiting measures that constrain rights, broadly interpreting provisions that expand rights guarantees, and the need to avoid stereotypes. It is from these problems and principles that we derive the following recommendations for future equality cases.

First, we suggest the promulgation of and adherence to clear evidentiary standards and guidelines for the evidentiary responsibilities of claimants in class actions under section 15. We have considered how the evidentiary burden imposed on Ms. Gosselin, despite prior judicial direction to the contrary, could prevent low-income and other claimants from challenging unjust laws by requiring an unnecessarily high standard. This barrier to access to justice is even more egregious when the standard is hidden, shifting, and based on unsubstantiated stereotypes of the claimant group.

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[125] 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 make 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) [emphasis added]: "The State Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he *freely chooses or accepts* ... " See *Gosselin*, *supra* note 1 at para. 44.

[126] *Egan*, *supra* note 24. 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.

Second, precise and conservative use of judicial notice should be maintained for facts in section 15(1) cases that operate to the detriment of the claimant. We highlighted that the pernicious use of stereotypes and arguably improper use of judicial notice may impede goals of substantive equality. It would be consistent with a liberal and purposive interpretation of section 15(1) to approach with caution unproven assumptions that could be founded upon stereotypes of the claimant group. Furthermore, a flexible approach should be applied to those facts to be proven by a claimant (showing a section 15(1) violation) when they are consistent with the bases for judicial notice and logical reasoning.

Third, the section 15(1) test should be applied thoroughly, but flexibly and contextually, to avoid fallacies in reasoning and dangerous analytical shortcuts. In comparing *Gosselin* to past section 15(1) jurisprudence, we considered the major differences between *Gosselin* and *Law* that mitigate against applying the *Law* analysis wholesale to *Gosselin*. We also exposed the regressive steps taken by the majority in its understanding and application of the concept of equality, particularly through the use of "relevant" distinctions and "ameliorative purpose" to distort the purposive application of section 15(1). Lastly, we noted that the failure to consider both the first and second step of the *Law* test for discrimination resulted in a skewed analysis at the third step. Although we would stop short of suggesting that detailed reasons should be required for every step in every case, we would caution against the complete omission of an inquiry at any of the stages of the test.

Our fourth recommendation concerns avoiding rigid categorization of claimants. We critiqued the inadequacy of the majority and dissenting analyses in accounting for the intersections of various identity markers which formed part of the claim. In particular, the intersection of socio-economic status with other identity markers raises challenges to the categorical traditions of the law, which have been (and continue to be) barriers to the realization of substantive equality. A major step towards addressing this problem would be to recognize an analogous ground such as social condition or socio-economic status under the *Charter*. This ground would have to be defined fluidly enough so as to capture the intersectionality of many claims which may traverse narrow slots of identities.

Finally, we highlighted some of the underpinning assumptions about social assistance recipients and people living in poverty that perpetuate stereotypes and act as a barrier to the attainment of substantive equality. Clearly, we cannot impugn the intent or good faith of the majority judges of *Gosselin* in this regard, however, their evaluation of the effect of the *Regulation respecting social aid* on Ms. Gosselin's human dignity and the interspersed and implied stereotypes, which appear to be relied on throughout the judgment, indicate that serious education may be required. One of the hallmarks of systemic discrimination is the ability to cloak itself in "common sense" and to erase the realities of those suffering from discrimination. Appointments of judges from diverse backgrounds and judicial education exposing the barriers to participation faced by those living in poverty are some of the effective measures that may be taken in this regard.

Throughout this piece we have worked within the legal framework in which *Gosselin* arose: the *Law* test, the section 15(1) jurisprudence, and the general rules of interpretation. Our recommendations are not so bold as to challenge the existing law or judicial tests for establishing the constitutional right to equality under the *Charter*. After all, the majority's reasoning should be able to withstand the limits of its own boundaries if it is to stand at all.