



WOMEN'S LEGAL EDUCATION AND ACTION FUND

FONDS D'ACTION ET D'ÉDUCATION JURIDIQUES POUR LES FEMMES

Charitable Registration
No. 10821 9916 RR0001
Numéro d'Enregistrement

2 rue Carlton Street, Suite 1307
Toronto, ON M5B 1J3

Telephone: (416) 595-7170
Facsimile: (416) 595-7191
Website: www.leaf.ca

GOSSELIN IMPACT STUDY

Fiona Sampson
September 8, 2006

TABLE OF CONTENTS

Page No.

1. INTRODUCTION:	1
2. <i>GOSSELIN V. QUEBEC</i>	2
i) BACKGROUND –	2
ii) THE SUPREME COURT OF CANADA DECISION:	3
a) <i>Evidentiary Problems</i> :	5
b) <i>“Contextual” Dignity Analysis</i> :	7
c) <i>Intersectional Analysis</i> :	9
3. FUTURE CONSIDERATIONS:	10
4. APPENDIX “A”:	15
5. APPENDIX “B”:	23
I. THE JUDICIAL IMPACT OF GOSSELIN:	23
a. <i>Followed</i> –	23
1. <i>Canada (A.G.) v. Lesiuk</i> [2003] FCA 3	23
2. <i>Khadr v. Canada (Minister of Foreign Affairs)</i> 2004 F.C. 1145	24
3. <i>Ali v. Canada</i> [2006] T.C.J. No. 213	25
4. <i>McKenna v. Canada</i> [2005] T.C.J. No. 464	26
5. <i>Burnett v. B.C. (Workers’ Compensation Board)</i> [2003] B.C.J. No. 1531	27
6. <i>S.J.B. (Litigation Guardian) v. B.C. (Director of Child, Family and Community Service)</i> [2005] B.C.J. No. 836	28
b. <i>Distinguished</i> -	29
1. <i>Nova Scotia (Workers’ Compensation Board) v. Martin</i> [2005] 2 S.C.R. 504	29
2. <i>Front commun des personnes assistées sociales du Québec v. Canada</i> [2003] A.C.F. no. 1609	30
3. <i>Ferraiuolo v. Olson</i> [2004] A.J. No. 1054	31
4. <i>Ontario Nurses Association v. Mount Sinai Hospital</i> [2005] O.J. No. 1739	32

1. INTRODUCTION:

LEAF is national, federally incorporated, non-profit advocacy organization founded in April, 1985 to secure equal rights for Canadian women as guaranteed by the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). To this end, LEAF engages in equality rights litigation, research, and public education. Commencing with LEAF's work in the Supreme Court of Canada case of *Andrews v. British Columbia*¹, LEAF has contributed to the development of equality rights jurisprudence and the meaning of substantive equality in Canada. LEAF has developed and advocated equality rights arguments in contexts where sex inequality is compounded by other prohibited grounds of discrimination such as race, class, aboriginal status, sexual orientation and/or disability.

In May, 2004 LEAF, in partnership with the Income Security Advocacy Clinic (ISAC), hosted a national consultation focused on an examination of Canadian equality jurisprudence as a tool for advancing social and economic rights. The main focus of this consultation was an assessment of the current state of the jurisprudence relating to socio-economic equality rights, theories of equality and economic security, and particularly the impact of the Supreme Court of Canada decision in *Gosselin v. Quebec*.² *Gosselin* was identified as an appropriate focus for the consultation as it is the first poverty case litigated under the *Charter* to reach the Supreme Court of Canada. The consultation was attended by approximately 60 participants from across Canada. The participants included legal theorists, equality practitioners, equality and anti-poverty advocates, and representatives from equality seeking organizations. There was widespread interest in this consultation, and the feedback received on the consultation was very positive.

This impact study was informed by the presentations and discussions at the LEAF/ISAC 2004 consultation. The paper includes an analysis of the Supreme Court of Canada's decision in *Gosselin*. The paper also examines how the test for discrimination established by the Supreme Court in *Law v. Canada* is applied to the disadvantage of the claimant in *Gosselin*. The paper includes an analysis of poverty law and social and economic rights, especially as they relate to women, in a broader context beyond the *Gosselin* context. The paper also includes two appendices, appendix "A" is an inventory of the evidence introduced by the parties at trial in

¹ (1989) 1 S.C.R. 892.

² [2002] 4 S.C.R. 429; The following is a list of the presentations that were made at the consultation: "Advancing Social and Economic Rights in the Current Social and Political Context" (Shelagh Day and Jean-Yves Desgagnés); "*Gosselin*: Autonomy with a Vengeance" (Gwen Brodsky); "Evidentiary Review: Lessons to be Learned from *Gosselin* and Other Social & Economic Rights Challenges" (JoAnne Frenschkowski and Judith Keene); "What Went Wrong/Right in *Gosselin*?" (Plenary Discussion, Martha Jackman, facilitator); "LEAF *Law* Project: Is the *Law* Test the Problem?" (Fay Faraday); "Making the Dignity Test Work" (Denise Réaume); "Section 7 and the Right to Health Care" (Martha Jackman); "Section 36 'Providing Essential Public Services of Reasonable Quality to all Canadians'" (Byron Williams); "Social Inclusion/Exclusion, Social Citizenship" (Kate Stephenson); and "Capabilities Approach" (Margaret Denike).

The following is a list of the case study sessions that were held at the consultation: "Challenging the Clawback of the National Child Benefit Supplement from Social Assistance Recipients"; "Enforcing Positive Economic Duties of the State: Does the Social Union Framework Agreement have Anything to Offer?"; and "The Right to Social Assistance: Challenging BC's Two-year Time Limit on Receipt of Social Assistance".

*Gosselin*³, and appendix “B” is a summary of the judicial impact of *Gosselin*, highlighting the cases in which *Gosselin* has been followed and distinguished.

2. *GOSSELIN v. QUEBEC*

i) Background –

In *Gosselin v. Quebec*⁴, writing for a majority of the Court, McLachlin C.J. upheld a Quebec law that paid drastically lower welfare benefits to all claimants aged 18 to 30 who were deemed fit to work. The 2002 decision includes a slim five-to-four split, with four separate dissenting judgments, and very different positions adopted by the majority and minority. *Gosselin* deals with a claim of discriminatory treatment within a social assistance scheme and 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.⁵ The challenge was brought by Louise Gosselin to Quebec's social assistance regulations of the 1980s (it took 10 years to complete the case). Under section 29(a) of the Regulation respecting social aid⁶, 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 as opposed to 500 dollars. Under the scheme, participation in one of three education or work experience programs allowed people under 30 to increase their welfare payments to either the same as, or within \$100 of, the base amount payable to those 30 and over.

Louise Gosselin was a welfare recipient under 30 and brought a class action challenging the social assistance scheme on behalf of all welfare recipients under 30 subject to the differential regime. Ms Gosselin argued that the social assistance regime violated section 7 of the *Charter*, and section 15 on the basis of age, and section 45 of the Quebec *Charter of Human Rights and Freedoms*. She requested that s. 29(a) of the Regulation be declared to have been invalid from 1987 (when it lost the protection of the notwithstanding clause) to 1989 (when it was replaced), and that the government of Quebec be ordered to reimburse all affected welfare recipients for the difference between what they actually received and what they would have received had they been 30 years of age or over, for a total of roughly \$389 million, plus interest. The claim involved legislation that perpetuated a discriminatory stereotype – that of poor, young people

³“Poverty, Law and Litigation: A National Consultation on the Direction of Social and Economic Rights after *Gosselin*” an unpublished paper drafted for the Court Challenges Program by JoAnne Frenschkowski, counsel with OLAP, 2006.

⁴ [2002] 4 S.C.R. 429.

⁵ Natasha Kim and Tina Piper, “*Gosselin v. Quebec*: Back to the Poorhouse ...” (2003) 48 McGill L.J. 749 at para. 77.

⁶ 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.

reliant on social assistance as lazy and insufficiently motivated to obtain employment.⁷ The Superior Court dismissed the class action. The Court of Appeal upheld the decision, with one judge finding a violation of section 15 on the basis of age that could not be justified under section 1. The Court of Appeal decision was appealed to the Supreme Court of Canada and heard October 29, 2001.

The case raises a variety of different issues including the interpretation and application of section 15 of the *Charter*, the interpretation of section 45 of the *Quebec Charter of Human Rights and Freedoms*⁸ and section 33 of the *Charter of Rights and Freedoms*, the proper scope of section 7 of the *Charter*, and the justiciability of "economic" rights. Underpinning all of these issues, 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.⁹ The focus of this report will be the interpretation and application of section 15, with particular attention paid to the specific context of this case, the context of economic and social rights.

ii) The Supreme Court of Canada Decision:

The Supreme Court was deeply divided in its decision in *Gosselin*, with a narrow five person majority finding against Ms Gosselin. The majority decision was written by McLachlin C.J., and concurred in by Gonthier, Iacobucci, Major and Binnie J.J.. Bastarache J. wrote the main dissenting opinion relating to section 15, with which LeBel, Arbour and L'Heureux-Dubé J.J. expressed agreement. LeBel and L'Heureux-Dubé J.J. also wrote their own section 15 opinions. The minority found that there was a section 15 violation that could not be saved by section 1.

The majority concluded, following an examination of the *Law* test for discrimination, 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). It held that young people, as a group, had not suffered from historical disadvantage and age distinctions were common and necessary for ordering society. Second, it found 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, it held 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). The majority concluded that the impugned law did not adversely affect Ms Gosselin'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.¹⁰

⁷ Gwen Brodsky, "*Gosselin v. Quebec (Attorney General): Autonomy with a Vengeance*" (2003) 15 CJWL 194; and Natasha Kim and Tina Piper, "*Gosselin v. Quebec: Back to the Poorhouse ...*", *supra*; see also *Gosselin*, *supra* at para. 407, LeBel J. in dissent.

⁸ R.S.Q., c. C-12, s. 45.

⁹ Kim and Piper, *supra* at para. 3.

¹⁰ *Gosselin*, *supra* at paras. 59-62, 42 and 74.

The majority decision dismissing the claim is based on the finding that there was insufficient evidence to support the claim (the trial judge had reached the same conclusion).¹¹ The fact that the case was dismissed because of a lack of evidence means that its value as a precedent may be diminished, and therefore its significance reduced. However, the problems that the majority identified with the evidence are of concern, especially in light of the fact that the evidence introduced at trial seemed especially fulsome.¹²

However the main area of disagreement between the majority and minority was the application of the *Law* test for discrimination. In *Law* the Supreme Court set out a three-step test for discrimination: i) is there differential treatment; ii) is the differential treatment based on an enumerated ground; iii) is the differential treatment discriminatory. According to Iacobucci J., the purpose of section 15(1) is “...to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.”¹³ Iacobucci J. found that four factors may demonstrate an injury to a person’s dignity in a manner which violates section 15(1) and that constitutes discrimination under step three of the *Law* test. The four factors are:

- (i) Is there pre-existing disadvantage, stereotyping, prejudice or vulnerability experienced by the individual or group at issue?
- (ii) Is there correspondence, or lack of it, between the ground on which a claim is based and the actual need, capacity or circumstances of the claimant or others?
- (iii) Does the legislation have an ameliorative purpose or effect for a group which has been historically disadvantaged in the context of the legislation?
- (iv) What is the nature of the interest affected by the legislation?¹⁴

Iacobucci J. cautioned that this list of factors is not closed and that there is no specific formula to be applied in the consideration of a violation of human dignity. The Court also stated that the dignity factors identified in *Law* should not be applied “too mechanically”.¹⁵

From LEAF’s perspective, the *Law* test for discrimination has compounded pre-existing problems with section 15 *Charter* based equality rights analyses, and introduced new challenges for equality claimants seeking to advance claims pursuant to section 15.¹⁶ The problems with the

¹¹ *Gosselin, supra* at para. 8 and 54.

¹² A complete list of the evidence introduced at trial is attached to this report as appendix “A”, as reproduced from “Poverty, Law and Litigation: A National Consultation on the Direction of Social and Economic Rights after *Gosselin*” an unpublished paper drafted for the Court Challenges Program by JoAnne Frenschkowski, counsel with OLAP, 2006.

¹³ *Law supra* at para. 51.

¹⁴ *Ibid* at paras. 62-75.

¹⁵ *Ibid, supra* at para. 88.

¹⁶ For a discussion of LEAF’s concerns with the *Law* test for discrimination please see Fiona Sampson, “LEAF and the *Law* Test for Discrimination: An Analysis of the Injury of *Law* and How to Repair It” November, 2004 available at www.leaf.ca; and also Fay Faraday, Margaret Denike and M. Kate Stephenson, editors, *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law Inc., 2006).

Law test for discrimination include, but are not limited to (1) a narrow and problematic comparator group analysis; (2) a formal equality approach; (3) the requirement of proof of motivation or intention to discriminate, and the importation of section 1 justification analyses into section 15; and (4) the decontextualization of discrimination claims and a cursory human dignity inquiry which reduces substantive discrimination to a subjective perception of personal injury or “hurt feelings”. The repercussions of several of these problems are apparent in the majority’s decision in *Gosselin*. The following issues will be addressed in the analysis below: (1) evidentiary problems with the Court’s decision in *Gosselin*; (2) problems with the dignity analysis, including the lack of an appropriate contextual analysis and the importation of section 1 justification analyses; and (3) problems with the intersectional analysis.

a) Evidentiary Problems:

One of the problems with the s.15 *Law* test for discrimination and the injury to dignity analysis relates to the issue of proof. In *Gosselin* the Court affirmed that a claimant bears the burden under s. 15(1) of showing, on a civil standard of proof, that a challenged distinction is discriminatory, in the sense that it harms her dignity and fails to respect her as a full and equal member of society.¹⁷ While the required standard of proof may be clear, the challenges in meeting that standard have increased since the introduction of the *Law* test. The concept of human dignity is abstract and ambiguous, which makes it a difficult fit with an analysis of human rights violations that demands concrete assessments of context and disadvantage. Because of the amorphous nature of “dignity interests” and the new focus on this element of equality rights, it seems more important than ever for claimants to develop a factual record to provide tangible contextual evidence to establish that an allegedly discriminatory distinction violates a person’s dignity. In addition, it is important to provide the Court with extensive evidence relating to the socio-political-economic context of the claim and the impact of the disadvantage resulting from the discrimination.¹⁸

However, even taking into consideration the increased evidentiary expectations that seem to be associated with the *Law* test, the provision of a fulsome evidential record may not be sufficient to persuade the Court of the discriminatory effect of a law or practice pursuant to the injury to dignity analysis. For example, writing for the majority in *Gosselin*, McLachlin C.J. stated that she disagreed with the minority in that case with respect to “the nature of the inferences” drawn from the factual record in the case. Clearly the challenges of anticipating and addressing “inferences” that the Court is going to make about dignity evidence are huge; and the challenge of shutting down any judicial prejudices or biases that may be informing those “inferences” may be even larger. L’Heureux-Dubé, in dissent, came to a different conclusion about the evidence in this case – one that persuasively supports a s.15 violation:

These are the facts that are before this Court.

¹⁷ *Gosselin*, *supra* at para. 18.

¹⁸ Sheilah Martin, “Court Challenges: *Law*”, A Paper Prepared for the Court Challenges Program, May, 2002 at 55-58.

As a result of s. 29(a), adults under 30 were uniquely exposed by the legislative scheme to the threat of living beneath what the government itself considered to be a subsistence level of income. Of those eligible to participate in the programs, 88.8 percent were unable to increase their benefits to the level payable to those 30 and over. Ms. Gosselin was exposed to the risk of severe poverty as a sole consequence of being under 30 years of age. Ms. Gosselin's psychological and physical integrity were breached. There is little question that living with the constant threat of poverty is psychologically harmful. There is no dispute that Ms. Gosselin lived at times below the government's own standard of bare subsistence. In 1987, the monthly cost of proper nourishment was \$152. The guaranteed monthly payment to young adults was \$170. I cannot imagine how it can be maintained that Ms. Gosselin's physical integrity was not breached.

The sole remaining question is whether a reasonable person in Ms. Gosselin's position, apprised of all the circumstances, would perceive that her dignity had been threatened. The reasonable claimant would have been informed of the legislature's intention to help young people enter the marketplace. She would have been informed that those 30 and over have more difficulty changing careers, and that those under 30 run serious social and personal risks if they do not enter the job market in a timely manner. She would have been told that the long-term goal of the legislative scheme was to affirm her dignity.

The reasonable claimant would also likely have been a member of the 88.8 percent who were eligible for the programs and whose income did not rise to the levels available to all adults 30 years of age and over. Even if she wished to participate in training programs, she would have found that there were intervals between the completion of one program and the starting of another, during which the amount of her social assistance benefit would have plunged. The reasonable claimant would have made daily life choices in the face of an imminent and severe threat of poverty. The reasonable claimant would likely have suffered malnourishment. She might have turned to prostitution and crime to make ends meet. The reasonable claimant would have perceived that as a result of her deep poverty, she had been excluded from full participation in Canadian society. She would have perceived that her right to dignity was infringed as a sole consequence of being under 30 years of age, a factor over which, at any given moment, she had no control. While individuals may be able to strive to overcome the detriment imposed by merit-based distinctions, Ms. Gosselin was powerless to alter the single personal characteristic that the government's scheme made determinative for her level of benefits.

The reasonable claimant would have suffered, as Ms. Gosselin manifestly did suffer, from discrimination as a result of the impugned legislative distinction. I see no other conclusion but that Ms. Gosselin would have reasonably felt that she was being less valued as a member of society than people 30 and over and that she was being treated as less deserving of respect.¹⁹

The problems of the majority in *Gosselin* with proof also included an apparent misapplication of the established jurisprudence. The majority seemed to apply a higher evidentiary burden to Ms

¹⁹ *Gosselin*, *supra* at paras. 129-133.

Gosselin's case than is generally required in a section 15 case. The majority implied that Ms Gosselin was not representative of the members of the class that she represented²⁰, despite the fact that she had had the class action authorized. Bastarache J. correctly noted in dissent, that "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. As the Chief Justice wrote in *Sauvé*: "Even one person whose *Charter* rights are unjustifiably limited is entitled to seek redress under the *Charter*."²¹ The majority's misapplication of the evidentiary requirements for an equality claim contradicts Iacobucci J.'s warning in *Law* against imposing too heavy a burden on claimants. He stated that claimants should 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. Such materials may be adduced by the parties, and may be of great assistance to a court in determining whether a claimant has demonstrated that the legislation in question is discriminatory. However, they are not required."²² Unfortunately this direction was not applied in the *Gosselin* case.

b) "Contextual" Dignity Analysis:

There seems to be some confusion within the Court about what exactly constitutes a contextual analysis under the new dignity test. In *Gosselin*, McLachlin C.J., stated that a contextual analysis involves a determination of whether "... 'the legislation which imposes differential treatment has the effect of demeaning [his or her] dignity' having regard to the individual's or group's traits, history, and circumstances".²³ This approach sounds appropriate, as a contextual analysis should include a comprehensive examination of the effect of the legislation in relation to the historical socio-political disadvantage experienced by the claimant as a member of a disadvantaged group. However, the focus on the legislation's effect on the claimant is lost by the introduction of a competing analysis relating to the purpose of the legislation. McLachlin C.J. concluded that "the context of a given legislative scheme also includes its purpose"²⁴ and therefore legislative intent, while perhaps not technically determinative, is now significantly relevant. McLachlin C.J. did concede that a beneficial purpose will not shield a discriminatory distinction²⁵, but it seems clear that the focus of the effect of an impugned law/practice on the claimant is diluted when the context is broadened to consider the legislature's perspective within the section 15 analysis. Such an analysis facilitates the type of conclusion inferred by McLachlin C.J., that the legislation at issue in *Gosselin* was not discriminatory, because it was introduced for the group's "own good".²⁶

McLachlin C.J. claimed to have conducted a contextual analysis in *Gosselin*; however, that analysis was flawed as she misinterpreted the interests affected by the law to mean the societal interests related to the program in general, rather than the claimant's interests that were

²⁰ *Gosselin*, *supra* at para. 33.

²¹ *Gosselin*, *supra* at para. 20, citing *Sauvé v. Canada*, [2002] 3 S.C.R. 519 at para.55.

²² *Law*, *supra* at para. 77.

²³ *Gosselin*, *supra* at para. 25.

²⁴ *Ibid* at para. 26.

²⁵ *Ibid* at para. 27.

²⁶ *Ibid* at para. 27.

particularly affected by the distinction in the application of the law.²⁷ McLachlin C.J. found that the legislation under review sought "... to promote the self-sufficiency and autonomy of young welfare recipients through their integration into the productive work force, and to combat the pernicious side effects of unemployment and welfare dependency".²⁸ Based on this finding she concluded that the impugned program actually supported and promoted human dignity, and did not result in an injury to dignity. McLachlin C.J. may have accurately identified the purpose of the legislation (irrelevant to a s.15 analysis as discussed below), but she did not identify the effect of the legislation as supported by the claimant's evidence – the analysis that should be at the centre of a contextual substantive equality analysis.

McLachlin C.J.'s contextual analysis also went astray as she inaccurately concluded that the interest affected in *Gosselin* was "... faith in the usefulness of education"²⁹, when in fact the interest denied was a subsistence level welfare payment. McLachlin's confusion over the interest affected led her to conclude that "The nature and scope of the interests affected point not to discrimination but to concern for the situation of welfare recipients under 30. Absent more persuasive evidence to the contrary, I cannot conclude that a reasonable person in the claimant's position would have experienced this scheme as discriminatory, based on the contextual factors and the concern for dignity emphasized in *Law*."³⁰ These errors in the contextual analysis constitute fatal flaws in the majority's reasoning and demonstrate the precarious and unreliable nature of the Court's dignity test as an equality rights assessment mechanism.

The majority's contextual analysis was also flawed by the inclusion of section 1 proportionality or minimal breach-type considerations relating to the justification for the law at issue – a consideration not previously included in contextual analyses prior to *Law*. Specifically, the majority's reliance on the concept of relevant distinctions under the second factor of the dignity test resulted in the introduction of s.1 type justifications. The second factor of the dignity test relates to the substantive equality principle that differential treatment can be required to properly address non-stereotypical, differential needs ("Is there correspondence, or lack of it, between the ground on which a claim is based and the actual need, capacity or circumstances of the claimant or others?"³¹). If this factor is considered in isolation, however, it has the potential to import conceptions of "relevance" and "reasonableness" that fail to question the very discriminatory norms the equality claim seeks to eliminate. It also has the potential to shift the focus away from effects to look instead for discriminatory intention, as happened in *Gosselin* (discussed above). For example, McLachlin C.J. concluded as follows:

A final objection 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

²⁷ *Ibid* at para. 65.

²⁸ *Gosselin, supra* at para. 65.

²⁹ *Ibid*.

³⁰ *Gosselin, supra* at para. 66.

³¹ *Law, supra* at para. 88(9)(B).

-- 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.³²

The minority in *Gosselin* acknowledged the problem with the importation of a justification analysis into the section 15 analysis. In dissent, both L'Heureaux-Dube and Bastarache J.J. noted the need to keep the violation and justification analyses distinct.³³ The majority's introduction of a legislative purpose analysis unfortunately distorted its section 15 analysis to the disadvantage of the claimant.

c) Intersectional Analysis:

There are also problems with the majority's analysis of the intersectional issues in *Gosselin*, i.e. sex, age, and poverty. Specifically, the majority in *Gosselin* failed to give consideration to the experience of intersectional disadvantage that was central to Louise Gosselin's claim. As argued by the intervener the National Association of Women and the Law (NAWL), young women are especially vulnerable to the disadvantage associated with poverty, as economic inequality leaves women vulnerable to violence, sexual exploitation and coercion.³⁴ Unfortunately the majority only considered the ground of age, and concluded that young people as a group do not suffer from historical disadvantage.³⁵ The failure to identify the comprehensive nature of the discrimination at issue meant that the majority could not accurately assess the discrimination experienced in the third part of its discrimination analysis. As Gwen Brodsky has argued, "the artificial separation of the fact of the claimants being young adults from the fact of their being poor results in an impoverished understanding of the impact of the cut to their social assistance."³⁶ The intersectional nature of the experience was critical to understanding the effects and causes of the discrimination, and its erasure constitutes a significant problem with the discrimination analysis in this case.

The majority did not identify the experience of poverty as relevant to its contextual analysis and did not deconstruct the significance of that experience in the context of this case. In fact, the majority seemed to rely on some problematic stereotypes about poverty and youth that operate to perpetuate the disadvantage experienced by poor, young people. For example, the majority inferred that youth must be forced through incentives to find work, i.e. without incentives young people would choose to languish in poverty.³⁷ Bastarache J., writing for the minority accurately identified the problem with the legislation as follows: "The only logical inference for the differential treatment is that younger welfare recipients will not respond as positively to training opportunities and must be coerced by punitive measures while older welfare recipients are

³² *Gosselin, supra* at para. 57.

³³ *Gosselin, supra* at 103 and 243.

³⁴ National Association of Women and the Law (NAWL) SCC factum in *Gosselin v. Le Procureur General du Quebec*, May 29, 2001 at paras. 5-9.

³⁵ *Gosselin, supra* at paras. 9 and 33.

³⁶ Brodsky, *supra*.

³⁷ *Gosselin, supra* at para. 60.

expected to respond positively to incentives.”³⁸ However, both the majority and the minority failed to recognize poverty as a possible ground of discrimination and focused only on the enumerated ground of age, failing to recognize that it was the claimant’s socio-economic status that was actually at the centre of the experience.

The inaccurate identification of the grounds involved in the *Gosselin* claim may have been partially a result of the rigidity of the comparator group analysis undertaken at the first and second stages of the section 15 analysis. Binnie J. found in *Hodge v. Canada* that the criteria for identifying the appropriate comparator group is as follows:

The appropriate comparator group is the one which **mirrors** the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought except that the statutory definition includes a personal characteristic that is offensive to the *Charter* or omits a personal characteristic in a way that is offensive to the *Charter*.¹ (emphasis added)

Herein lies the heart of the critical problems with the comparator group analysis. The problems relating to the comparator analysis are that it is overly formalistic and artificial. However, the primary problem is that it reinforces the dominant norm that is usually the source of the subject oppression. It is an analysis that is very much removed from what should be at the core of a discrimination analysis, i.e.: whether the claimant, a member of a protected or analogous group, has experienced treatment that exacerbates or perpetuates a pre-existing disadvantage. The comparator group analysis operates to reinforce the dominant norm, invites analyses of formal discrimination, and is especially problematic for claimants who are more than one step removed from the dominant norm, such as poor, young women. The analysis invites the easy reference to a direct comparator, i.e. young people vs. older people, and does not facilitate the exposure of the complexity of an experience of a young, poor woman.³⁹ It is the kind of narrow and restrictive analysis that makes it impossible to fulfill the potential of section 15.

3. FUTURE CONSIDERATIONS:

Socio-economic rights may prove to be the most difficult *Charter* battleground. They involve the assertion of positive rights which the courts have been reluctant to recognize.⁴⁰ Claims to socio-economic rights by people who live in poverty are an equality claim that, if successful, will

³⁸ *Gosselin*, *supra* at para. 250.

³⁹ For further discussion of the problems associated with the comparator group analysis please see For further discussion of the problems with the comparator group analysis see Beverly Baines, “*Law and Canada: Formatting Equality*”, (2000) 11(3) *Const. Forum* 65 at 89; Jennifer Koshan, “*Alberta (Dis)Advantage: The Protection of Children Involved in Prostitution Act and the Equality Rights of Young Women*” Fall 2003, *Journal of Law and Equality*, 211 at 238-239; Fiona Sampson, “*The Law Test for Discrimination and Gendered Disability Discrimination*” in Fay Faraday, Margaret Denike and M. Kate Stephenson, editors, *Making Equality Rights Real: Securing Substantive Equality Under the Charter*, *supra* at 245.

⁴⁰ See Dianne Pothier, “*Eldridge v. British Columbia (Attorney General): How the Deaf Were Heard in the Supreme Court of Canada*” (1998) 9 *N.J.C.L.* 263; and also Natasha Kim and Tina Piper, “*Gosselin v. Quebec: Back to the Poorhouse...*” (2003) 48 *McGill L.J.* 749.

cost society money, however, almost all *Charter* rights cost money.⁴¹ Some provincial human rights codes do provide some protection against discrimination on a ground related to the receipt of social assistance, which provides for some access to justice relating to socio-economic rights, and may provide the best avenue through which to advance socio-economic claims initially.⁴² As Diana Majury has argued, the painfully tortured process of the recognition of sexual orientation as an analogous ground under s.15 of the *Charter*, based in part on its inclusion in human rights legislation, offers hope for the eventual recognition of socio-economic status as a protected ground under the *Charter*.⁴³ The litigation of *Gosselin* can be considered an early instalment in the evolution of socio-economic *Charter* rights. The litigation of poverty related equality claims will usually provide an opportunity to address the intersectionality of life experiences that increase the likelihood of poverty and go to the core of dignity concerns, and to hold the Court accountable for problematic assumptions about poverty that often underlie judicial decision making, e.g. the Supreme Court's decision in *Gosselin*, which serve to perpetuate stereotypes of those living in poverty.⁴⁴ These are complex yet vitally important equality claims that have the potential to advance the equality of the some of most disadvantaged in society.

Social and economic rights encompass a number of rights such as rights to food, housing, social security, education, an adequate standard of living and health.⁴⁵ Social and economic rights are considered positive rights, and equality claims relating to these rights have met with limited success.⁴⁶ There is no specific guaranteed right to socio-economic equality under the *Charter*,⁴⁷ although laws relating to socio-economic equality must be applied in accordance with the guarantees found s.15 of the *Charter*, which are of course limited by s. 1 (where cost often becomes a stated or unstated reason for the claim failing). Canada is a signatory to the International Covenant on Economic, Social and Cultural Rights (ICESCR); Canada is also a

⁴¹ See the LEAF SCC factum in *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia* ("Bill 29") at para. 68.

⁴² See *Falkiner v. Ontario (Ministry of Community and Social Services)* (2002), 59 O.R. (3d) 481 (C.A.) at para. 90.

⁴³ Diana Majury, *supra* at para. 64.

⁴⁴ Natasha Kim and Tina Piper, "*Gosselin v. Quebec*: Back to the Poorhouse..." (2003) 48 McGill L.J. 749.

⁴⁵ Many women's equality groups are dedicated to doing advocacy work to advance the socio-economic equality of women in Canada, for example FAFIA and NAWL. Recently, on May 1, 2006 FAFIA and NAWL made joint submissions to the UN Committee on Economic, Social and Cultural Rights to report on Canada's performance under the International Covenant on Economic, Social and Cultural Rights, and specifically how past federal budgets have starved many crucial social programs and contributed to the on-going gender imbalance in the allocation of Canada's resources; see: http://www.fafia-afai.org/abo/news/CESCR_press_release.php and <http://www.ohchr.org/english/bodies/cescr/cescrs36.htm>.

⁴⁶ Examples of successes in this area are the Supreme Court's decision in *Eldridge v. British Columbia*, and the Ontario Court of Appeal's decision in *Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch)* [2002] 59 O.R. (3d) 481; (2000), 188 D.L.R. (4th) 52; leave to appeal to the Supreme Court of Canada submitted to the Court January 27, 2003, S.C.C. Bulletin, 2003 at 121; leave to appeal to the Supreme Court of Canada granted March 20, 2003, leave to appeal withdrawn September 8, 2004. At issue in the *Falkiner* case is whether amendments to Ontario's social assistance regulations that significantly change the definition of "spouse" for the purposes of receiving social assistance, violate sections 7 and 15 of the *Charter*. The regulations provide that if a social assistant recipient lives with a person of the opposite sex, the two are presumed to be spouses, and the social assistant recipient is presumed to have access to the income of the other person. LEAF intervened in both *Eldridge* and *Falkiner*.

⁴⁷ Poverty is not an enumerated protected ground under s.15 of the *Charter*, although it is possible that it could be recognized as an analogous ground under s.15.

signatory to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which also includes a number of economic and social rights that could be relied upon to advance the socio-economic rights of women in Canada.

The issue of the justiciability of socio-economic equality claims represents a significant hurdle to the successful advancement of poverty related claims. Shelagh Day and Gwen Brodsky have identified the main obstacle to recognizing poverty-related claims as justiciable as the dominant paradigm of domestic and international human rights thinking which regards civil and political rights as rigidly distinct from social and economic rights and grants primacy to the former.⁴⁸ Those who argue that economic and social rights claims are not justiciable rely for support on the bifurcation of civil and political rights and economic and social rights with different understandings of obligation attached. Support for the treatment of economic and social rights claims as non-justiciable is also drawn from classical constitutionalism which conceives of constitutional rights as merely negative constraints on government.⁴⁹

However, the concept of indivisibility – the treatment of political and civil rights as inseparable from social and economic rights – together with the express rulings of international committees provide a way of moving past the marginalization of social and economic rights. They point to the conclusion that social and economic rights, agreed to in human rights treaties, must be made the subject of justiciable domestic rights, along with civil and political rights. Canada's treaty commitments include an obligation on governments to establish monitoring mechanisms and institutions for the protection of all human rights. Sections 7 and 15 of the *Charter* are obvious provisions through which domestic effect can be given to the obligation to ensure that everyone has the equal opportunity to an adequate standard of living, free of poverty.⁵⁰ The idea that the *Charter* can be divided into positive vs. negative rights is false, and is incompatible with the values that underlie the *Charter* and incompatible with the concept of substantive democracy. The Supreme Court has already found that s. 15 has a two-fold, remedial purpose: (1) to eliminate and prevent discrimination, and (2) to promote equality.⁵¹ As Martha Jackman argues, the denial of socio-economic rights can in itself be understood to constitute a *Charter* infringement: "traditional distinctions between classical or negative rights, and social and economic or positive rights, and the willingness to provide for judicial enforcement of one, but not the other, operate in fact to discriminate against the poor."⁵²

As discussed above, *Gosselin* deals with a claim of discriminatory treatment within a social assistance scheme. It was the claimant's status as a poor, young person that made the distinction at issue possible. While not a direct challenge to the positive right of entitlement for social assistance, the case did raise the normative issues associated with positive claims, including the extent to which a nation-state should be compelled to provide for the basic necessities of its residents. The stereotypes that informed the majority's thinking in *Gosselin* need to be challenged to ensure the success of future socio-economic claims. The advancement of poverty related equality claims would constitute a huge victory as it would represent a significant step

⁴⁸ Shelagh Day and Gwen Brodsky, *supra*.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Law v. Canada, supra* at para. 51.

⁵² Martha Jackman, "What's Wrong with Social and Economic Rights?" (2000) 11 N.J.C.L. 235 at 243

towards eliminating so many related experiences of inequality. In a capitalist system, poverty is no accident and therefore its elimination constitutes a significant challenge. The judicial recognition of poverty related discrimination constitutes an important attitudinal shift that could influence the public's understanding of poverty related inequality and contribute to its eradication. Small steps towards the legal recognition of the rights of the poor have been secured. For example, as noted by Natasha Kim and Tina Piper, it has been recognized that the poor, and especially those on social assistance, are disproportionately susceptible to state-sanctioned invasions of privacy⁵³, and regulation of personal lifestyle and discrimination⁵⁴. The dissent in *Gosselin* provides some useful analysis upon which to build future claims, and as Diana Majury has argued, today's dissent can be tomorrow's majority.⁵⁵

The section 7 analysis in *Gosselin*, while not the focus of this paper, does provide some encouragement with respect to the successful litigation of future socio-economic claims.⁵⁶ While the majority found that there was no section 7 violation in *Gosselin*, it did leave the door open to the possibility that section 7 could support a positive obligation to provide for the basic economic necessities of citizens in the future. With respect to section 7, McLachlin C.J. concluded as follows:

One day s. 7 may be interpreted to include positive obligations. To evoke Lord Sankey's celebrated phrase in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136, the *Canadian Charter* must be viewed as "a living tree capable of growth and expansion within its natural limits": see *Reference re Provincial Electoral [page492] Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at p. 180, *per* McLachlin J. It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases. In this connection, LeBel J.'s words in *Blencoe, supra*, at para. 188 are apposite:

We must remember though that s. 7 expresses some of the basic values of the *Charter*. It is certainly true that we must avoid collapsing the contents of the *Charter* and perhaps of Canadian law into a flexible and complex provision like s. 7. But its importance is such for the definition of substantive and procedural guarantees in Canadian law that it would be dangerous to freeze the development of this part of the law. The full impact of s. 7 will remain difficult to foresee and assess for a long while yet. Our Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*.

⁵³ *Glasgow v. Nova Scotia (Minister of Community Services)* (1999), 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 as cited by Kim and Piper at para. 62.

⁵⁴ *Falkiner v. Ontario (Minister of Community and Social Services)* (2002), 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; as cited by Kim and Piper at para. 62.

⁵⁵ Diana Majury, "The *Charter*, Equality Rights And Women: Equivocation and Celebration" (2002) 40 Osgoode Hall L.J. 297 at para. 30.

⁵⁶ Section 7 states that "[e]veryone has the right to life, liberty and security of the person" and "the right not to be deprived" of these "except in accordance with the principles of fundamental justice".

The question therefore is not whether s. 7 has ever been -- or will ever be -- recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.⁵⁷

The fact that the majority's decision in *Gosselin* was premised upon evidential findings makes it of limited value as a precedent, and the dissent in *Gosselin* provides good material upon which to build future claims, perhaps in combination with section 7 and Canada's international human rights obligations. Diana Majury has argued that equality rights progress may be particularly slow and incremental because this is still a new area of the law "where we all have a huge amount to learn and integrate into our thinking" – this may be especially true with respect to the litigation of socio-economic rights.⁵⁸

⁵⁷ *Gosselin*, *supra* at para. 82.

⁵⁸ Diana Majury, "The *Charter*, Equality Rights, and Women: Equivocation and Celebration", (2002) 40 Osgoode Hall L.J. 297 at para. 30.

4. APPENDIX "A":

Gosselin c. Québec

La Preuve/The Evidence

<u>Témoignage</u>	<u>Oral Evidence</u>
Témoignage de Louise Gosselin *	Testimony of Louise Gosselin *
Témoignage de Arthur Sandborn * (Travailleur communautaire)	Testimony of Arthur Sandborn * (Community Worker)
Témoignage de Danielle Gratton * (Psychologue)	Testimony of Danielle Gratton * (Psychologist)
Témoignage de Jocelyne Leduc-Gauvin * (Diétiste)	Testimony of Jocelyne Leduc-Gauvin * (Dietician)
Témoignage de Christine Colin * (Médecin)	Testimony of Christine Colin * (Physician)
Témoignage de Denis Fugère (Rechercheur et spécialiste en politique, ministère des affaires sociales)	Evidence of Denis Fugère (Researcher & Policy Analyst, Ministry of Social Affairs)
Témoignage de Louise Bourassa (Directrice de la politique, ministères du travail, main d'oeuvre et sécurité du revenu; Directrice des services pour la jeunesse)	Evidence of Louise Bourassa (Policy Director, Ministries of Labour, Manpower & Income Security; Director of Services for Youth)
Témoignage de Pierre Fortin (Économiste)	Evidence of Pierre Fortin (Economist)
Témoignage de Donald Bouffard (Directeur de la politique, ministère du main d'oeuvre)	Evidence of Donald Bouffard (Policy Director, Employment Programs, Ministry of Manpower)
Témoignage de Louison Pronovost (Sociologue, ministère du main d'oeuvre et sécurité du revenu)	Evidence of Louison Pronovost (Sociologist, Ministry of Manpower and Income Security)
Témoignage de Guy Nolet (Économiste)	Evidence of Guy Nolet (Economist)
Témoignage de Jean Pronovost (Sous-ministre adjoint en éducation; SMA)	Evidence of Jean Pronovost (Former assistant deputy minister for education; ADM for Manpower and

en main d'oeuvre et sécurité du revenu)	Income Security)
Témoignage de Louis Ascah * (Économiste)	Evidence of Louis Ascah* (Economist)
<u>Preuve documentaire de la demanderesse, Louise Gosselin</u>	<u>Documentary Evidence of the Applicant, Louise Gosselin</u>
Certificat de naissance	Birth certificate
Tableau des sources de revenus de Louise Gosselin pour la période du 17 avril 1985 au 28 février 1987	Table representing income support received by Louise Gosselin from April 17, 1985, to February 28, 1987
Calculs de remboursements effectués par Louise Gosselin	Calculation of repayments made by Louise Gosselin
Remboursement dû à la demanderesse pour la période du 17 avril 1985 au 31 juillet 1989	Amount owed to applicant for the period April 17, 1985, to July 31, 1989
Statistiques émanant du Procureur général du Québec basées sur les paiements mensuel effectués par le ministère de la Main d'oeuvre et de la Sécurité du revenu pour les personnes seules aptes au travail et âgées de moins de 30 ans, touchées par l'article 29 paragraphe a) du règlement sur l'aide sociale pour la période d'avril 1985 à août 1986	Statistics produced by the Attorney General of Quebec based on monthly payments made by the Ministry of Manpower and Income Security to single, work-able recipients aged under 30 affected by article 29, paragraph a) of the regulation on social aid, for the period April 17, 1985, to August 1986
Personnes seules aptes de moins de 30 ans résidant ou non au domicile familial – 1985 à 1989	Persons single, work-able, under age 30, residing in or outside the family home – 1985 to 1989
Détail des sommes à être déposées par le Procureur général	Detail of amounts
Mesures d'employabilité – personnes seules – aptes moins de 30 ans	Employability measures for single, work- able, under age 30 persons
Montant payé aux membres dans le cadre des programmes d'employabilité	Amounts paid to recipients participating in employability measures
Détail des sommes dues aux membres selon le barème régulier	Detail of the amounts due to recipients according to the regular rate

Montant réclamé	Amount claimed
Rapport d'expertise – monsieur Arthur Sandborn, travailleur communautaire	Expert Report of Arthur Sandborn (community worker)
Statistiques sur la clientèle des travailleurs communautaires de la Clinique communautaire de Pointe St-Charles – annexe I du rapport d'expertise	Statistics concerning the clients of community workers at the Pointe St.-Charles community clinic – appendix I to the expert report
Statistiques du bureau d'aide social de Pointe St-Charles – annexe II du rapport d'expertise	Statistics from the Pointe St.-Charles social assistance office – appendix II to the expert report
Méthodologie de détermination des seuils de revenus minimums au Québec ministère de la Main d'oeuvre et de la Sécurité du revenu – direction des politiques – annexe III du rapport d'expertise	Methodology for determining the minimum income threshold in Quebec, Ministry of Manpower and Income Security, Policy Directives – appendix III to the expert report
Relevé des logements locatifs – Société canadienne d'hypothèque et de logement - annexe IV du rapport d'expertise	Facts about rental units – Canadian Mortgage and Housing Corporation – appendix IV to the expert report
Rapport de la Commission Rochon (extraits) – Le portrait socio-économique des jeunes adultes – annexe V du rapport d'expertise	Rochon Commission Report (extracts) – The socio-economic portrait of young adults – appendix V to the expert report
Planification stratégique – Centre des services sociaux Montréal Métropolitain services des communications (besoins spéciaux) – annexe 7 du rapport d'expertise	Strategic Plan – Social Services Centre of Metropolitan Montreal, communications branch (special needs) – appendix 7 to the expert report
Rapport d'expertise psychologique sur les jeunes assistés sociaux de 18-30 ans – Danielle Gratton, psychologue-anthropologue	Expert report on young social assistance recipients aged 18-30 – Danielle Gratton, psychologist-anthropologist
Évaluation psychologique de madame Louise Gosselin – Danielle Gratton, psychologue-anthropologue	Psychological evaluation of Louise Gosselin – Danielle Gratton, psychologist-anthropologist
'La discrimination contre les moins de trente ans à l'aide sociale du Québec-un	'Discrimination against those under age 30 on social assistance in Quebec – an

regard économique' – rapport d'expertise par Louis Ascah	economic perspective – expert report of Louis Ascah
Fortin, Pierre (1984), 'Le chômage des jeunes au Québec – aggravation et concentration, 1966-1982', <u>Relation industrielle</u> , 419-447	Fortin, Pierre (1984), 'Youth unemployment in Quebec – aggravating factors and concentration, 1966-1982', <u>Relation industrielle</u> , 419-447
Hum, Derek (1986), 'UISP and the Macdonald Commission : Reform and Restraint', <u>Canadian Public Policy/Analyse des Politiques</u> , 92-100	Hum, Derek (1986), 'UISP and the Macdonald Commission : Reform and Restraint', <u>Canadian Public Policy/Analyse des Politiques</u> , 92-100
Gouvernement du Canada, Conseil national du bien-être social (1987) <u>Le bien-être social au Canada : Un filet de sécurité troué</u>	Government of Canada, National Council of Welfare (1987), <u>Social Welfare in Canada: A torn social safety net</u>
Gouvernement du Québec, Rapport de la Commission d'enquête sur la santé et le bien-être social (1971), <u>La sécurité du revenu</u> , troisième partie, tome II, titre troisième – Les nouveaux régimes	Government of Québec, Report of the commission of inquiry on health and social welfare (1971), <u>Income security</u> , third part, volume II, third heading – The new regime
Gouvernement du Québec, Conseil consultatif du travail et de la main d'oeuvre (1984), <u>Quinzième rapport annuel 1983-1984</u>	Government of Québec, Advisory committee on work and manpower (1984), <u>15th annual report, 1983-1984</u>
Gouvernement du Québec, ministère des Finances (1984), <u>Livre blanc sur la fiscalité des particuliers</u>	Government of Québec, Ministry of Finance (1984), <u>White paper on taxation</u>
Jonathon R. Kesselman, Un système global de sécurité du revenu pour les travailleurs canadiens – tiré de la répartition du revenu et de la sécurité économique au Canada - chap. 8	Jonathon R. Kesselman, A global income security system for canadian workers – excerpted from Distribution of Income and Economic Security in Canada – chapter 8
Proportion de participants aux programmes chez les personnes seules, aptes et âgées de moins de 30 ans	Proportion of participants who are single, work-able, and aged under 30 in employability programs
Application des taux d'efficacité des programmes d'employabilité (juin 1988) au cumulatif des participants distincts (mars	Applicability of the success rate of employability programs (June 1988) to the total of distinct participants (March 1989)

1989)	
La situation des jeunes assistés sociaux et assistées sociales du Québec – rapport d'expertise préparé par madame Jocelyne Leduc-Gauvin, diététiste professionnelle	The situation of young social assistance recipients in Quebec – expert report of Jocelyne Leduc-Gauvin, professional dietician
Évaluation nutritionnelle de madame Louise Gosselin – rapport d'expertise préparé par madame Jocelyne Leduc-Gauvin, diététiste professionnelle	Dietary evaluation of Louise Gosselin – expert report of Jocelyne Leduc-Gauvin, professional dietician
Commentaire présenté à madame la Ministre Pauline Marois concernant la situation des jeunes assistés sociaux de 18-30 ans par la Corporation professionnelle des diététistes, des infirmières et infirmier, des médecins, des psychologues, des travailleurs sociaux et l'Association professionnelle des criminologues du Québec, annexe I du rapport d'expertise	Commentary presented to Minister Pauline Marois concerning the situation of young social assistance recipients, aged 18-30, by the Association of professional dieticians, nurses, physicians, psychologists, social workers, and the Association of criminologists of Quebec, appendix I to the expert report
Extrait du journal La Presse – Adrien Noël : La moitié des jeunes itinérants ont déjà tenté de se suicider – annexes 7 et 8 du rapport d'expertise	Extract from the newspaper La Presse – Adrien Noël: Half of homeless youth have already attempted suicide – appendices 7 & 8 of expert report
Commentaire concernant la situation des personnes de milieu économiquement faible, plus précisément celle des femmes enceintes et allaitantes et des nourrissons, Corporation professionnelle des diététistes du Québec, annexes 11 et 16 du rapport d'expertise	Commentary concerning the situation of low income persons, more specifically, that of pregnant and nursing mothers and infants, Association of professional dieticians of Quebec, appendices 11 & 16 of expert report
Organisation mondiale de la santé – Relevé épidémiologique hebdomadaire – annexe 17 du rapport d'expertise	World Health Organization – Bi-weekly epidemiological facts – annex 17 of expert report
Consommation d'aliments	Food consumption
La santé des jeunes de 18 à 30 ans à très faible revenu, rapport d'expertise préparé par le docteur Christine Colin du département de santé communautaire de l'Hôpital Maisonneuve-Rosemont	The health of young people aged 18-30 of very low income, expert report prepared by Dr. Christine Colin of the community health department of Maisonneuve-Rosemount Hospital

<u>'Les pauvres et les soins de santé au Canada', Conseil national du bien-être social</u>	<u>'The poor and health care in Canada', National Council of Welfare</u>
<u>Les jeunes sans emplois sont-ils pauvres?</u> Madeleine Gauthier dans Les nouveaux visages de la pauvreté, Institut québécois de la recherche sur la culture, Québec, 1987, pp. 45 à 65	<u>Are young unemployed people poor?</u> Madeleine Gauthier in 'the new face of poverty', Quebec Institute for Cultural Research, Quebec, 1987, pp. 45-65
<u>Les buts de la santé pour tous, Organisation mondiale de la santé, Copenhague, 1985</u>	<u>The goal of health for all, World Health Organization, Copenhagen, 1985</u>
<u>Preuve documentaire du Défendeur, Procureur Général du Québec</u>	<u>Documentary Evidence of the Respondent, Attorney General for Québec</u>
Document : Les jeunes et le marché du travail	Study: Youth and the labour market
Document : Étude d'évaluation des résultats des programmes de développement de l'employabilité	Study: Evaluation of the results of employability programs
Suivi des résultats des programmes d'employabilité	Follow-up on the results of the employability programs
Document : Étude d'évaluation sur les mesures de relance	Study: Evaluation of the employability measures
Document : Étude d'évaluation sur les mesures de relance, II	Study: Evaluation of the employability measures, II
Document : Étude d'évaluation sur les mesures de relance, III	Study: Evaluation of the employability measures, III
Document : Les jeunes et le chômage : Conséquences psychologiques et sociales	Study: Youth and unemployment: Psychological consequences
Document : Les jeunes et le marché du travail	Study: Youth and the labour market
Document : Les mouvements de clientèle à l'aide sociale	Study: Movement on and off social assistance

Document : La situation des jeunes à l'aide sociale	Study: The situation of young people on social assistance
Document : Méthodologie de détermination des seuils de revenu minimum au Québec	Study: Methodology for determining a minimum income threshold in Quebec
Tableau : Programmes subventionnés du ministère de la main d'oeuvre et de la Sécurité du revenu	Table: Programs subsidized by the ministry of manpower and income security
C.T. no. 150132 concernant les normes, modes d'attribution et critères d'éligibilité applicables à l'activité Stages en milieu de travail	Policy document 150132 concerning the standards, means of allocating, and eligibility criteria applicable to the activity of On-the-job training
C.T. no 166005 (24 nov. 1987) concernant le programme Stages en milieu de travail	Policy document 166005 (Nov. 24, 1987) concerning the program of On-the-job training
C.T. no 150027 concernant les normes, modes d'attribution et critères d'éligibilité applicables à l'activité Travaux communautaires	Policy document 150027 concerning the standards, means of allocating, and eligibility criteria for the activity Community Work
C.T. no 150133 concernant les normes, modes d'attribution et critères d'éligibilité applicables à l'activité Rattrapage scolaire	Policy document 150133 concerning the standards, means of allocating, and eligibility criteria applicable to the activity Remedial Education
Tableau : Évaluation de la participation des mesures de développement de l'employabilité (participants actifs)	Table: Evaluation of participation in employability measures (active participants)
Tableau : Évaluation de la participation des mesures de développement de l'employabilité (participants actifs)	Table: Evaluation of participation in employability measures (active participants)
Analyse des mesures de développement de l'employabilité (avril 1984-août 1986)	An analysis of employability measures (April 1984-August 1986)
Annexe statistique sur l'évolution des ménages au petit barème (1976-1987)	Statistical portrait of the evolution of households receiving the reduced rate (1976-1987)
Quelques données utiles sur la clientèle à	Some useful facts about social assistance

l'aide sociale	recipients
Quelques données utiles sur la clientèle à l'aide sociale	Some useful facts about social assistance recipients
Quelques données utiles sur la clientèle à l'aide sociale	Some useful facts about social assistance recipients
Extraits des débats parlementaires entourant l'adoption de la Loi sur l'aide sociale en novembre 1970	Hansard excerpts concerning the adoption of the Law on social aid in November 1970
Pierre Fortin, <u>Les mesures d'employabilité à l'aide sociale : origine, signification, et portée</u>	Pierre Fortin, <u>Employability measures in social assistance: origin, significance and impact</u>
Barèmes pour les personnes aptes de moins de 30 ans et pour les autres personnes seules	Rates for persons able to work, aged under 30, and for other single persons
Barèmes en vertu de la Loi de l'assistance publique et autres lois avant 1970	Rates under the Law of Public Assistance and other laws before 1970
Statistiques mensuelles sur les personnes seules aptes âgées de moins de 30 ans	Monthly statistics concerning single recipients, work-able, and under age 30
Rapport statistique mensuel sur les programmes d'employabilité et tableaux connexes	Monthly statistical report on the employability programs and associated tables
Pour une politique de sécurité de revenu, document d'orientation	Towards a policy of income security, Directive
Historique des paiements effectués à la représentant	History of payments to applicant
Tableau	Table
Impacts socio-économiques de la parité d'aide sociale	Socio-economic impact of benefit parity

5. APPENDIX “B”:

I. THE JUDICIAL IMPACT OF *GOSSELIN*:

The Supreme Court’s decision in *Gosselin* has been followed in 6 cases, distinguished in 4 cases, explained in 5 cases, mentioned in 48 cases, and cited in dissent in 3 cases. The cases in which *Gosselin* has been followed or distinguished are summarized below, along with the judiciary’s application of *Gosselin* in the specific case.

a. Followed –

1. Canada (A.G.) v. Lesiuk [2003] FCA 3

Lesiuk dealt with a challenge to the constitutionality of revisions made in 1996 to the eligibility requirements for federal (un)employment insurance benefits available under the *Unemployment Insurance Act*. Under the *Unemployment Insurance Act* eligibility was determined by reference to the concept of a major workforce attachment, which was defined under section 5(1) of the Act as a claimant who had 20 or more weeks of insurable employment in the qualifying period, with a week defined as 15 hours or 20 percent of his or her maximum weekly earnings. Reforms to the legislation introduced in 1996 via the *Employment Insurance Act*⁵⁹ (E.I. Act) changed the eligibility criteria. Under section 6(1) of the *Employment Insurance Act* a major attachment claimant is now defined as "a claimant who qualifies to receive benefits and has 700 or more hours of insurable employment in their qualifying period." Section 7(2) of the *Employment Insurance Act* goes on to establish a threshold for employment insurance benefit eligibility based only on hours of insurable employment (between 420-700), depending upon the regional rate of unemployment. The total hours specified must be worked within the qualifying period, which is generally 52 weeks. Sections 22 and 23 of the Act provide that only major attachment claimants are eligible to receive maternity and parental benefits. In making the conversion from a weeks-based system to the new hours-based system, a week of work was defined as consisting of 35 hours: "The actual average weekly hours for all workers since 1976".⁶⁰ The same 35-hour average was used to redefine "major attachment". The legislation was challenged by Kelly Lesiuk as unconstitutional because of sex and parental status discrimination.

The Federal Court of Appeal decided against Ms Lesiuk and found that the impugned provisions of the *Act* were constitutional. The Court of Appeal’s primary concerns related to a general dissatisfaction with the statistical evidence relied on by both of the parties⁶¹, and a concern with the appellant’s alleged failure to provide evidence relating to the contextual factors deemed necessary as part of the injury to dignity test⁶². While the Court did find that there had been differential treatment based on an analogous ground, a woman in a parental status, it concluded that the differential treatment did not discriminate. The Court found the Umpire’s decision was

⁵⁹ *Employment Insurance Act*, R.S.C. 1996, c.23

⁶⁰ Canada Employment Commission, 1998 Employment Insurance Monitoring and Assessment Report, Vol. 1 at p. 17 as cited in *Lesiuk* at para. 28

⁶¹ *Lesiuk* [2003] at para. 24

⁶² *Ibid* at para. 44

fatally flawed as all but the second branch of the dignity test in *Law* had been ignored by the Umpire.⁶³ In his own consideration of the required contextual factors, Letourneau J., writing for a unanimous Court of Appeal, found that Ms Lesiuk failed to show a history of “disadvantages, stereotyping, vulnerability and prejudice” against women.⁶⁴ He concluded that the vast majority of employed women with young children work more hours than required and are unaffected by the legislative changes under review.⁶⁵ He went on to find that

These requirements do not create or reinforce a stereotype that women should stay home and care for children. Nor do these requirements affect the dignity of women by suggesting that their work is less worthy of recognition. Anyone who

works the requisite number of hours in their qualifying period will qualify.⁶⁶

With respect to *Gosselin*, the Federal Court of Appeal referenced the case with respect to the need for a contextual analysis, as emphasized by the Supreme Court in *Gosselin* (and as critiqued above). (at paras. 41, 42 and 44). The Federal Court in *Lesiuk* also reaffirmed the Supreme Court’s finding in *Gosselin* that “Whatever the minimum entrance requirement, there will always be persons or groups who will not be able to qualify.” (at para. 67), failing to analyze and identify the discriminatory nature of the requirements in *Lesiuk*, in the same way that the Supreme Court failed to make that analysis in *Gosselin*.

2. *Khadr v. Canada (Minister of Foreign Affairs)* 2004 F.C. 1145

Khadr dealt with an application brought by Omar Khadr's family to compel the government to extend consular and diplomatic services to him. It was argued that, in failing to provide these services, the Minister has acted contrary to the Department of Foreign Affairs and International Trade Act, R.S.C. 1985, c. E-22 (DFAITA) and infringed the rights of Omar Khadr and his family under the *Charter*. Khadr, a 17-year-old Canadian citizen, had been detained since 2002 by the US government because of his alleged involvement with Al-Queda forces in Afghanistan. During his detention, he had been regularly interrogated, had not been brought before an independent tribunal, and had been denied access to consular officials, to counsel and to his family. He potentially faced the death sentence for events occurring when he was 15 years old. The application sought an order of mandamus that the Minister provide Khadr with the consular services set out in its Guide for Canadians imprisoned abroad, and an order prohibiting the Minister from interviewing Khadr in Guantanamo Bay and a declaration of a *Charter* violation

⁶³ The four contextual factors identified in *Law* are:

- (i) Is there pre-existing disadvantage, stereotyping, prejudice or vulnerability experienced by the individual or group at issue?
- (ii) Is there correspondence, or lack of it, between the ground on which a claim is based and the actual need, capacity or circumstances of the claimant or others?
- (iii) Does the legislation have an ameliorative purpose or effect for a group which has been historically disadvantaged in the context of the legislation?
- (iv) What is the nature of the interest affected by the legislation? (*Law, supra* at paras 62-75)

⁶⁴ *Lesiuk* [2003] at para. 45

⁶⁵ *Ibid* at para. 45

⁶⁶ *Ibid*

with regard to past interviews. This second order sought was substantially the same remedy the applicants sought in another action against the Minister.

The motion was allowed in part. It was decided that pursuant to Rule 302, the applicants could not challenge two decisions within one application unless the decisions were part of a continuing course of conduct. It was also an abuse of process for the applicants to challenge the same decision and seek the same relief in parallel proceedings. Those portions of the notice of application relating to the interviews were struck. The applicants also failed to establish an arguable case that the Minister's decision was a necessary precondition to Khadr's treatment. There was no evidence that Khadr's circumstances were similar to those of other detainees who had been released or that diplomatic actions would lead to the same result as those taken by other foreign governments. It was found that as Khadr had never been in Canadian custody, the government was not under a positive *Charter* obligation to address possible deprivations of his rights. Those portions of the notice of application relating to *Charter* allegations were struck. It was found however, that there was a persuasive case that both the foreign affairs legislation and the Minister's guide created a legitimate expectation that a Canadian citizen detained abroad would receive the services which Khadr had requested. It would be shocking if the provision of consular services in an individual case was left to the complete and unreviewable discretion of the Minister. The Court also concluded that the applicants also made out an arguable case that section 10 of the legislation was to be interpreted with regard to the Vienna Convention on Consular Relations which created individual rights to the services requested.

With respect to *Gosselin*, the Federal Court quoted the Supreme Court's finding:

Nothing in the jurisprudence thus far suggests that section 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, section 7 has been interpreted as restricting the state's ability to deprive people of these (at para. 17 citing *Gosselin*, *supra* at para. 81).

The Federal Court concluded that the same reasoning was applicable to the facts in *Khadr*. The Court in *Khadr* made no reference to the Supreme Court's findings in *Gosselin* that "One day section 7 may be interpreted to include positive obligations. To evoke Lord Sankey's celebrated phrase in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136, the *Canadian Charter* must be viewed as "a living tree capable of growth and expansion within its natural limits": see *Reference re Provincial Electoral [page492] Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at p. 180, *per* McLachlin J. It would be a mistake to regard section 7 as frozen, or its content as having been exhaustively defined in previous cases" (at para. 82, *Gosselin*, *supra*)

3. *Ali v. Canada* [2006] T.C.J. No. 213

Ali dealt with an appeal by taxpayers from assessments disallowing medical expense credit for costs of dietary supplements. The appellants suffered from fibromyalgia and expended \$10,000 annually on vitamins, herbs and minerals recommended by naturopath. The Minister disallowed

expenses on the ground that the substances at issue were not purchased through a pharmacist and did thus not satisfy the requirement in section 118.2(2)(n) of the *Income Tax Act* of being recorded by a pharmacist. The appellants argued that the medical expense credit breached their rights of equality and right to life, liberty and security under the *Charter*. The Tax Court of Canada dismissed the appeals and found that the appellants' *Charter* rights were not infringed.

The Court concluded that Parliament chose to draw a line between types of therapeutic substances and not the physical characteristics of people. It found that the comparator group used by the appellants was the wrong one (individuals who are able to ingest drugs) was the wrong one and substituted its own comparator group (individuals who can tolerate pharmaceutical drugs and who claim a medical expense tax credit for drugs that (1) are not within well-defined parameters; (2) are not well-established as being safe and efficacious; and (3) are prescribed by a medical practitioner whose profession is not regulated in every province). The Court concluded that the appellants were not treated differently from others using this comparator group. The Legislation made no distinction on the ability to ingest drugs. There was no evidence led to indicate that appellants were affected differently from persons who were able to tolerate pharmaceutical drugs. The legislative scheme was not intended to provide tax relief for all prescribed medical expenses. The Court found that the deprivation of tax relief to the appellants had an adverse effect on them but did not engage the fundamental rights of life, liberty or security. Even if a deprivation of life, liberty or security had been established, section 7 of *Charter* was not violated as the deprivation was not contrary to principles of fundamental justice.

The Court rejected the section 7 arguments made in *Ali* and relied on the Supreme Court's section 7 findings in *Gosselin* (in their entirety) to support this conclusion. (at paras. 145-147). The Court concluded that "The denial of the tax credit does not warrant what McLachlin C.J. refers to as a 'novel application of section 7.'" (at para. 147)

4. *McKenna v. Canada* [2005] T.C.J. No. 464

McKenna dealt with a section 15 discrimination claim relating to disability tax credits.

In 2002 and 2003, the claimant taxpayer received disability pension benefits under the Canada Pension Plan (CPP) in the amounts of \$11,690 and \$11,877 respectively. In the same years she was denied a disability tax credit under section 118.3 of the *Income Tax Act*. The taxpayer alleged that to tax a person such as her at the lower end of the income scale, without giving her the disability tax credit, amounted to discrimination that was prohibited by section 15 of the *Charter*. The claimant argued that she belonged to a class or group of persons against whom the law discriminated. The discrimination was against persons of low income who suffered from a disability which entitled them to a CPP disability pension but was not of a severity or nature that would entitle them to a disability tax credit under section 118.3. The appeal was dismissed. The situation in which the taxpayer found herself resulted not from any kind of discrimination but from the fact that she did not meet the criteria for both types of socially beneficial legislation designed to assist disabled person.

The Court found that the disability provisions in sections 42 and 56 of the CPP and the disability tax credit in section 118.3 of the Act had similar purposes - the provision of a measure of relief to person with severe and prolonged physical or mental disabilities. The CPP did this by way of pension and the Act by way of a tax credit. Nonetheless, the criteria were not the same and it was possible that a person could qualify for a disability pension and not a disability tax credit. However, that did not amount to discrimination. The Court concluded that to find discrimination, the court would have to find that the taxpayer was being discriminated against because she belonged to a class of persons with a mental or physical disability that entitled her to a CPP disability pension but the nature of her disability did not qualify her for the tax credit under section 118.3 of the Act. That was not discrimination on the basis of physical or mental disability. The fact that the taxpayer met one set of criteria but not another did not put her in a class of persons who, by reason of irrelevant considerations, were marginalized or treated differently from other Canadians. She was not a member of an enumerated or analogous class who by reason of her membership in that class was the subject of discrimination. The Court concluded that the situation in which the claimant found herself resulted not from any kind of discrimination but from the fact that she did not meet the criteria for both types of socially beneficial legislation designed to assist disabled persons.

The Court relied on *Gosselin* for criteria to establish a section 15 violation, as articulated in *Law*. (at para. 13).

5. *Burnett v. B.C. (Workers' Compensation Board)* [2003] B.C.J. No. 1531

Burnett dealt with an appeal by the Workers' Compensation Board from a decision in favour of the respondent Burnett. Burnett's spouse was killed in a work-related accident in 1980. At the time, she was 32 and her son was 15. She received a monthly pension. The son ceased to be a dependent in 1985 when he was 20 and she was 37. Based on the provisions of the *Workers' Compensation Act* Burnett received a lump sum payment and was no longer entitled to a monthly pension. The reason was that she was under 40 when her son ceased to be a dependent. If she had been 40 or over, she would have been entitled to a monthly pension for the rest of her life. The judge found that the termination of the monthly pension violated Burnett's equality rights under section 15(1) of the *Charter*.

The B.C. Court of Appeal allowed the appeal. It found that the legislation did not violate section 15(1). Burnett was subjected to differential treatment on the enumerated ground of her age. However, section 15(1) applied to cases where individuals affected by the impugned legislation had suffered more than economic detriment or disadvantage. The Court concluded that something more was required to find that economic disadvantage was constitutionally significant. Burnett's disadvantage was economic. However, it did not have roots in stereotypes, prejudices or systemic vulnerability. The legislation did not result in any violation of human dignity. It did not stigmatize younger spouses. It did not perpetuate the view that younger spouses were less deserving of concern, respect or consideration than others. Government benefits were not being withheld on the basis of stereotypical assumptions about the demographic group of which Burnett was a member. The Court of Appeal concluded that the legislation was therefore not discriminatory.

The Court of Appeal referenced *Gosselin* for the principles to be applied in a discrimination analysis. (at para. 66) It concluded that “The arbitrariness of the cut-off, however, is the inevitable consequence of all age-based legislative distinctions.” (at para. 65 citing *Gosselin* at para. 57).

6. *S.J.B. (Litigation Guardian) v. B.C. (Director of Child, Family and Community Service)* [2005] B.C.J. No. 836

SJB dealt with an appeal by SJB from a decision allowing an application by the Director of Child, Family and Community Service for an order pursuant to section 29 of the *Child, Family and Community Service Act* authorizing blood transfusions and prohibiting SJB and her parents from obstructing such transfusions. SJB was 14 years old, a Jehovah's Witness and was undergoing treatment for osteogenic sarcoma. She advised her doctors that she would not consent to blood transfusions. The doctors became concerned that SJB would require a life sustaining transfusion. SJB continued to refuse such treatment, and the Director brought the application. The mother appeared without counsel, but did not request an adjournment. She indicated that she had spoken with counsel the day before. The mother also presented a note from SJB, and the judge spoke with SJB by telephone. The judge held that pursuant to the Act, the court had an overriding right to consent to treatment, and that the transfusion of blood or blood products was necessary to preserve SJB's life or to prevent serious or permanent impairment of her health. SJB argued that the judge erred by proceeding when SJB and her mother were not represented by counsel. They also argued that the Act did not empower the court to authorize treatment for a mature minor, that it was *ultra vires* and that it violated section 2(a) of the *Charter* (right to religious freedom), and section 15 on the basis of age discrimination.

The B.C. Supreme Court dismissed the appeal. The Court found that the judge did not fail to provide a fair hearing by proceeding in the absence of counsel, due to what he properly characterized as an emergency situation. He conducted a thorough trial, and was sensitive to the child's and her mother's desire to participate. While SJB was a mature minor at common law, the legislature had the power to protect the life of children endangered by their refusal to accept necessary medical treatment. This power was not constrained by the common law limits placed on the *parens patriae* powers of a court of inherent jurisdiction. The Act was not *ultra vires*. Its pith and substance was to preserve life and protect the health of children, which matters fell within provincial jurisdiction under section 92(16) of the *Constitution Act*. The Act did not violate the *Charter*. It did not infringe SJB's right to freedom of religion under section 2(a), but ensured that her beliefs did not override her section 7 *Charter* right to life and security of the person. Further, the procedure contemplated by section 29 accorded with the section 7 *Charter* principles of fundamental justice. Finally, while the Act provided protection for persons 19 and under, section 29 did not violate section 15 by discriminating against such persons. Even if it did, section 29 was a reasonable limit demonstrably justified in a free and democratic society.

The Court relied upon *Gosselin* for the principles to be applied in a discrimination analysis (at para. 93). The Court found that the challenged legislation was "closely tailored to the reality of affected group" and therefore unlikely to discriminate within the meaning of section 15(1). The

Court found that the legislation was closely tailored to the reality of children who are facing life-threatening health conditions or permanent or serious impairment of their health.

b. Distinguished -

1. *Nova Scotia (Workers' Compensation Board) v. Martin* [2005] 2 S.C.R. 504

Nova Scotia v. Martin dealt with an appeal by Laseur and Martin from a decision by the Nova Scotia Court of Appeal allowing appeals by the Workers' Compensation Appeals Tribunal and dismissing their cross-appeals from decisions by the Nova Scotia Workers' Compensation Board. Laseur and Martin sustained workplace injuries and were unable to return to work due to chronic pain. The Board denied their applications to receive further benefits, and they appealed to the Workers' Compensation Appeals Tribunal, arguing that section 10B of the *Workers' Compensation Act* and the Functional Restoration (Multi-Faceted Pain Services) Program Regulations violated section 15(1) of the *Charter* by limiting compensation for chronic pain to four weeks. The Appeals Tribunal found that the chronic pain provisions violated the *Charter*. Regarding Laseur's appeal, it found that she was not entitled to further benefits. The Appeals Tribunal awarded time-limited benefits to Martin. The Board appealed the *Charter* finding, and Laseur and Martin cross-appealed. In allowing the Board's appeal, the Court of Appeal held that the Appeals Tribunal did not have the jurisdiction to decide whether provisions under the Act and Regulation were constitutional.

The Supreme Court allowed the appeals. Section 10B and the Regulation were struck down. The Supreme Court found that the Appeals Tribunal had jurisdiction to interpret and apply the *Charter* with respect to the Act and Regulation. It found that administrative tribunals had the jurisdiction to subject legislative provisions to *Charter* scrutiny where they had statutory authority to consider issues of law. Pursuant to the Act, the Appeals Tribunal had jurisdiction to decide questions of law, and therefore it had the jurisdiction to decide issues of constitutionality. The Court concluded that the chronic pain provisions violated the *Charter*. They clearly imposed differential treatment on chronic pain sufferers on the basis of the nature of their disability, which was an enumerated ground under section 15. This differential treatment was discriminatory. The four-week limit on the duration of the benefits ignored the needs of workers who were permanently disabled by chronic pain. This demeaned the essential human dignity of chronic pain sufferers. The violation of section 15(1) could not be saved by section 1 of the *Charter* as the blanket exclusion of chronic pain from the workers' compensation scheme did not minimally impair the rights of chronic pain sufferers.

With respect to *Gosselin*, the Supreme Court found in *Martin* as follows:

Finally, the chronic pain provisions of the Act also differ from the welfare scheme that was challenged in *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84. The impugned regulations in that case required unemployed youth under 30 years of age to take part in educational or training programmes as a condition for receiving the same level of social assistance payment available to unemployed persons aged 30 or over. The majority held that the requirement that youth participate in

programs intended to improve their employment prospects did not communicate stereotypes or demeaning messages about young people. The majority also held that Ms. Gosselin had not satisfied her burden of proof by establishing on a balance of probabilities that she or other class members were effectively prevented from participating in the programmes (see paras. 46-54). Since Ms. Gosselin and class members did not show that they were effectively excluded from the protection against extreme poverty afforded by the social security scheme and since the conditions for receiving the basic social assistance did not force young persons to do something that demeaned their dignity or human worth, the majority concluded that the welfare scheme was not discriminatory (see para. 52).

In contrast to the scheme upheld in *Gosselin, supra*, the chronic pain regime under the Act not only removes the appellants' ability to seek compensation in civil actions, but also excludes chronic pain sufferers from the protection available to other injured workers. It also ignores the real needs of workers who are permanently disabled by chronic pain by denying them any long-term benefits and by excluding them from the duty imposed upon employers to take back and accommodate injured workers. The Act thus sends a clear message that chronic pain sufferers are not equally valued and deserving of respect as members of Canadian society. In my view, the second contextual factor clearly points towards discrimination. (at paras. 100-101)

2. *Front commun des personnes assistées sociales du Québec v. Canada* [2003] A.C.F. no. 1609

In *Front commun* the CRTC concluded that the Télévision Quatre Saisons network had not infringed section 5(1)(b) of 1987 Broadcasting Regulations, SOR/87-49, which prohibits the broadcasting of any abusive comments that tended to or was likely to expose subjects of comments to hatred or contempt, by broadcasting a program which projected a negative image of welfare recipients. The Appellant sought a broadening of the interpretation of section 5(1)(b) to include social condition. The Federal Court of Appeal found that it did not legally have power to include social condition in section 5(1)(b) of Regulations first, because it would introduce a considerable degree of ambiguity, unforeseeability and uncertainty into a penal provision which is intended to be precise and limiting since, as decisions are rendered by the courts, other grounds could then be added which might not even have been contemplated by Parliament or the offender. Second, the insertion of this ground by judicial declaration would have a retroactive effect (at para. 16). The Court refused to rule on the merits of the argument that social condition was analogous ground under section 15 of the *Charter* as the Court did not have before it sufficient facts to undertake a *Charter* analysis. The appeal was dismissed

With respect to *Gosselin*, the Federal Court of Appeal distinguished *Gosselin* from *Front commun* as *Front commun* dealt with a penal provision, and *Gosselin* dealt with access to benefits. (at para. 14)

3. *Ferraiuolo v. Olson* [2004] A.J. No. 1054

Ferraiuolo dealt with an appeal by Olson from the decision of the trial judge that the pensions at issue were recoverable. It also dealt with a cross-appeal by Ferraiuolo from a decision that part of the *Fatal Accidents Act* was not discriminatory. Marie Ferraiuolo was killed when a motor vehicle struck her while she was crossing the street. Olson, the driver of the car admitted liability. Ferraiuolo had one surviving son, Dante, who was 57 years old and married when his mother was killed. He was very close to his mother and saw her almost daily. Ferraiuolo claimed rights to his mother's Italian pensions and Canadian Old Age Pension. The judge found that the loss of the Italian pensions were recoverable as actual financial loss. Dante also claimed damages for grief and the loss of guidance, care and companionship under the Act. However, the Act provided that only those under the age of 25 who are unmarried or not living with a cohabitant were entitled to receive the \$25,000 sum under this legislation. Dante was not eligible. At trial Dante contended that this section discriminated against him on the grounds of age and marital status and was therefore unconstitutional. The judge found that the section was not discriminatory.

The appeal was dismissed and the cross-appeal allowed by the Alberta Court of Appeal. The Court of Appeal held that the judge did not err in finding that the pensions were recoverable as actual financial loss. It held that the section was discriminatory and could not be saved by section 1. The impugned restrictions were severed. The words referring to age and marital status were struck. Married and older children had generally been denied relief at law for grief and loss they suffered on the wrongful death by a parent. The provision within the Act did not correspond to the needs and circumstances of married and older children. Neither age nor marital status restrictions reflected the reality of the claimants. The government's commendable decision to confer a benefit on younger, unmarried children could not be used to defend a complete failure to recognize an entire category of children who also suffer upon the wrongful death of a parent. The law excluded a large group and completely deprived them of the benefit. The Court found that a reasonable person would have found the challenged provisions to have the effect of demeaning dignity. The provision was discriminatory and violated section 15 of the *Charter*. The provision could not be saved by section 1 of the *Charter*. There was no rational connection between excluding married and older children from claims for grief and the objectives of the legislation to keep families out of Court. The objective of awarding damages only to dependent children was not sufficiently pressing and substantial to override a *Charter* right.

The Court of Appeal distinguished the case at hand from *Gosselin* in which the Supreme Court had held that there had been an intention to assist the group adversely affected by the impugned distinctions. The Court of Appeal noted that the majority of the Supreme Court concluded in *Gosselin* that the purpose of the subject legislation was to encourage those under 30 to take advantage of work and training programs. The Court of Appeal found that the impugned legislation in *Ferraiuolo* contained no comparable positive attributes for married or older children.

4. *Ontario Nurses Association v. Mount Sinai Hospital* [2005] O.J. No. 1739

Ontario Nurses Association dealt with an appeal by Mount Sinai Hospital from a decision declaring section 58(5)(c) of the *Employment Standards Act* unconstitutional. Tilley was a member of the nurses' association union. She worked as a nurse at the hospital. She was injured in a non-work-related accident, and subsequently became disabled. She began to receive long-term disability benefits. Tilley's employment was terminated. Tilley did not receive severance pay because her injury had frustrated her employment contract. The union filed a grievance disputing the termination and claiming the denial of severance pay to disabled employees provided for in section 58(5)(c) of the Act violated section 15 of the *Charter*. The Arbitration Board upheld the termination and the constitutionality of section 58(5)(c). On judicial review, the Divisional Court found the section unconstitutional. The Attorney General of Ontario intervened on the hospital's appeal from the Divisional Court's decision, to support the constitutionality of the section.

The Ontario Court of Appeal dismissed the appeal. It found that section 58(5)(c) of the *Employment Standards Act* was unconstitutional and of no force and effect. It concluded that severance pay is retrospective, intended to compensate employees for years of service. It held that section 58(5)(c) treated disabled individuals differently from others based on a stereotype that they cannot fully contribute to the workforce. The Court of Appeal concluded that section 58(5)(c) was not saved by section 1 of the *Charter*.

The Court of Appeal relied on the Supreme Court's decision in *Gosselin* to address the issue of stereotypes as raised in section 15 analyses. The Court distinguished *Gosselin* as follows:

In *Gosselin*, the Chief Justice wrote that the legislature is entitled to proceed on informed general assumptions without running afoul of s. 15, provided these assumptions are not based on arbitrary or demeaning stereotypes. In that case, the differential treatment based on age was not based on such a stereotype; on the contrary, it was premised on the idea that people under 30 are better equipped to find employment than are people over 30. By contrast, in this case the differential treatment based on disability is premised on the stereotype that people with severe and prolonged disabilities will not return to the workforce.

Moreover, in *Gosselin* the court found that people under 30 did not suffer from pre-existing disadvantage and stigmatization because of their age. By contrast, an important contextual factor in this case is that people with disabilities have historically been undervalued in Canadian society generally, and in the area of employment in particular. Where, as in this case, the individuals who are treated differently by the legislation suffer from pre-existing disadvantage, vulnerability, stereotyping and prejudice, then, as the Supreme Court made clear in *Law* (at para. 63), it is logical to conclude that "further differential treatment will contribute to the perpetuation or promotion of their unfair social characterization, and will have a severe impact upon them, since they are already vulnerable".

Gosselin does not assist the appellant in this case. The legislature may not use employees whose contracts have been frustrated due to disability as a proxy for employees who will never work again because this assumption is based on an impermissible stereotype that disabled persons cannot fully participate in the workforce. (at paras. 24-26)