# Substance Without Form: The Impact of Anonymity on Equality-Seeking Groups

Daphne Gilbert*

THIS ARTICLE EXAMINES THE CONSTRUCTS of “identity” and “anonymity”’ within the context of equality litigation under section 15 of the *Canadian Charter of Rights and Freedoms*. It begins with some discussion around the process for granting a litigation party’s request for anonymity in civil suits. It considers the rationale for preferring that a party identify herself and argues the different considerations should apply in *Charter* litigation, especially under section 15. The article then examines three equality decisions: *Law v. Canada (Minister of Employment and Immigration), Gosselin v. Quebec (Attorney General)* and *Falkiner v. Ontario (Ministry of Community and Social Services)*. It considers the complicated tension between the identification and anonymisation of claimants that is embedded in current equality analysis. The article concludes by arguing that if judges want to promote equality values in constitutional litigation, much more attention must be paid to the unique identifying features of equality claimants.

CET ARTICLE EXAMINE LES INTERPRÉTATIONS des termes « identité » et « anonymat » dans le contexte du contentieux mettant en cause la protection de l’égalité prévue à l’article 15 de la *Charte canadienne des droit et libertés*. L’article commente d’abord la procédure suivie afin de déterminer s’il y a lieu d’accueillir la demande d’anonymat d’une partie à un litige dans une action civile. Après un examen des justifications pour lesquelles on préfère qu’une partie s’identifie, l’auteure formule la thèse que des considérations différentes devraient entrer en jeu dans les affaires soulevant la *Charte*, en particulier l’article 15. L’article passe ensuite en revue trois décisions en matière d’égalité : *Law c. Canada (Ministre de l’Emploi et de l’Immigration)*, *Gosselin c. Québec (Procureur général)* et *Falkiner c. Ontario (Ministère des Services sociaux et communautaires)*. Il sonde les tensions complexes qui surgissent en matière de l’identification et de la préservation de l’anonymat des parties demanderesses dans le contexte actuel de l’analyse de l’égalité. L’article conclut que si les juges veulent promouvoir les valeurs d’égalité dans le litige constitutionnel, il leur faudra prêter davantage attention aux identificateurs uniques des parties revendiquant l’égalité.

---

Copyright © 2006 by Daphne Gilbert.

* Daphne Gilbert, LLB (Manitoba), LLM (Yale), Assistant Professor, University of Ottawa Faculty of Law, email: <dgilbert@uottawa.ca>. The research for this paper was funded by the Social Sciences and Humanities Research Council of Canada, under the auspices of the project, “On the Identity Trail: Understanding the Importance and Impact of Anonymity and Authentication in a Networked Society.” It was presented at a project conference, “The Concealed I: Anonymity, Identity and the Prospect of Privacy” in March 2005 and at a feminist lecture series at the University of Ottawa Law School sponsored by the Shirley Greenberg Professorship and the Human Rights Research and Education Centre. I am grateful to Ian Kerr, Sheila McIntyre and Sanda Rodgers for the opportunity to present this work and for helpful comments. I am also grateful to Constance Backhouse, Jane Bailey, Stephen Bierbrier, Jennifer Chandler, Don Gilbert and Elizabeth Sheehy for encouragement, questions and suggestions. Special thanks to Shoshana Magnet for an inspired reaction and Diana Majury for putting it all together. Thanks also to my research assistants Pam Ermuth, Jena McGill and Rafal Morek.

**227** 1. INTRODUCTION

**229** 2. CONCEPTUAL OVERVIEW

**231** 3. "IDENTITY ANONYMITY": MOTIONS FOR PARTY ANONYMITY

**235** 4. "IMPACT ANONYMITY": CLAIMANT IDENTITY AND SECTION 15

**241** 5. THE CONCEPTUAL INTEGRITY OF EQUALITY CLAIMANTS

**247** 6. CONCLUDING THOUGHTS

# Substance Without Form: The Impact of Anonymity on Equality-Seeking Groups

Daphne Gilbert

## 1. INTRODUCTION

THE CONSTRUCTS OF IDENTITY AND ANONYMITY sit in uncomfortable tension with each other as a subtext to challenges under the Canadian constitutional equality rights provision.[1] At a superficial level, section 15 claims are all about identity. The requirement that claimants affiliate with an enumerated or analogous ground forces one to identify oneself in a most basic, and arguably rudimentary, of ways. By picking a ground on which to base a claim of discriminatory legislative treatment, section 15 asks claimants to say: "It is because of my race, my gender, my religion, my nationality that I have suffered unequal treatment." This forces an individual into a group within the ground: "It is because I am a woman that I suffer sex discrimination." The claimant's identity is the group's identity: female, racialized, disabled, gay. If one probes a bit deeper, it becomes evident that there are elements of both identification and anonymity in the process of choosing a ground. The individual is herself and lost in the group identity. The individual has her own lived experiences that brought on the claim, but also adopts the shared history of the group, along with the historic disadvantage and stereotypes suffered by that group.

Litigation is also about identity. Our system of justice is, for the most part, an individualized one. Individual plaintiffs or claimants launch lawsuits or bring challenges based on their own lived experiences. Written judgments follow a pattern that includes a summary of the "facts" at the beginning of each

---

1. The idea of combining equality analysis with the constructs of anonymity and identity first evolved out of the "On the Identity Trail" project, <http://anonequity.org/en3/index.html>, and the "Concealed I" conference, <http://www.anonequity.org/concealedI/>. I committed to presenting a paper on constitutional aspects of anonymity and identity and wanted to consider those ideas in relation to other work I was doing on section 15 of the *Charter* and equality theory. I worried at first that the thesis might seem a bit contrived but have since found that notions of anonymity and identity, both broadly conceived, are central to equality litigation, and there is a growing consensus amongst feminist academics in particular that section 15 jurisprudence is problematic.

decision, facts that include the details of the particular litigant's life. Anonymity, in the context of litigation, is a departure from the norm.

This paper considers two kinds of anonymity in section 15 challenges. First, is the anonymity that a party might *seek* in proceeding with litigation, by way of an application to sue under a pseudonym or by initials. One might see this as "identity anonymity." Second, there is a kind of anonymity that *results* from section 15 litigation. This anonymity is derived from discussions that happen around section 15 and the test for establishing equality violations that the Supreme Court of Canada has constructed. "Impact anonymity" is more complicated than "identity anonymity" and is an undesirable consequence of judicial analysis under section 15.

Part 2 of this paper is concerned with the theoretical constructs of anonymity and identity, and offers a very brief conceptual overview of some of the basic premises. Part 3 considers "identity anonymity" and canvasses some of the well-known arguments around freedom of expression and the principle of open courts, which operate to restrict or limit a claimant's ability to proceed under a pseudonym in the pursuit of litigation. Part 3 continues with an overview of the test that the courts apply to grant party anonymity in the civil context and offers some comments on why the test and procedures are problematic. Part 4 considers the section 15 context in particular and looks at the framework for analysing section 15 as outlined by the Supreme Court of Canada in *Law v. Canada (Minister of Employment and Immigration)*.[2] The aim is to explore the impact of the details that claimants reveal about their lives in section 15 litigation and the extent to which those details become part of the fabric of analysis under the rubric of "human dignity." Building on the idea of "impact anonymity," Part 5 discusses the contextual integrity of equality claimants: what happens to a claimant's identity in the context of a section 15 claim and what happens to the claim itself when identity is ignored? What is the inter-relationship between claimant identity and group identity and how does the erasure of one negate the impact of the discrimination on the other?

There is no doubt that section 15 claimants, especially by the time a case reaches the Supreme Court of Canada, are in many ways "fronts" for a much larger group on whose behalf they claim that legislation is discriminatory. To the extent that an individual is a fungible representative of a larger class, claimant anonymity makes sense and may be a choice or preference of a claimant. If we want to encourage individuals to challenge discriminatory legislation, it may be helpful to consider whether we need to know the intimate details of their lives. We may want to make it easier for claimants to proceed anonymously, a process that is now quite difficult, confusing, and discretionary.

However, when one considers what happens in section 15 cases, individuals do to a great extent become secondary to the ground of discrimination, and their very particular concerns or grievances are subsumed in

---

2. *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, <http://scc.lexum.umontreal.ca/en/1999/1999rcs1-497/1999rcs1-497.html>, 170 D.L.R. (4th) 1 [*Law* cited to S.C.R./LexUM].

a larger, systemic argument. This is arguably both disrespectful and demeaning to a claimant who has had the fortitude to bring the lawsuit. These tendencies may be exacerbated by a move in favour of claimant anonymity, further reinforcing the unimportance of the individual. There are also serious consequences for equality-seeking groups. When the impact of the legislative distinction being challenged is neutralized by disconnecting it from the actual consequences for the claimant, the individual loss is also a loss for the entire group with whom the claimant affiliates. The suffering of both the group and the individual are lost in the process. The power of a group's history of disadvantage or stereotype is borne out and demonstrated by the lived experiences of individuals within the group. If we eliminate the individual, we sanitize the group of all of the issues that contribute to its disadvantaged position in society.

In the end, this paper hopes to address three central questions: What details of an equality claimant's identity matter to the courts in assessing section 15 claims? What details about a claimant's identity and what group characteristics should matter? What happens when identity does not seem to matter?

*

## 2. CONCEPTUAL OVERVIEW

THE WORD "IDENTITY" CONJURES a whole range of details about a person, depending on the context of the process of identification. Gary Marx has laid out seven levels of "identity knowledge" that offer a useful point of departure:[3]

1. legal name (implying a connection to a biological/social lineage);
2. locatability (address, email address, information about how to find you);
3. pseudonyms that can be linked to legal name and/or locatability, *i.e.*, pseudo-anonymity (for example student numbers, social insurance numbers);
4. pseudonyms that cannot be linked to "real" identity (for example, numbers assigned for anonymous drug testing that are never linked to one's name or address);
5. pattern knowledge (for example, riding the bus at the same 6. time each day with the same passengers; participating in a class with the same people every week);
6. social categorization (for example, being sorted by gender, religion, age, organizational membership, etc.)
7. symbols of eligibility/non-eligibility (for example, possessing passwords, codes, tickets, badges, uniforms, etc. that label you as a particular kind of person to be treated in a certain way).

3. Gary Marx, "What's in a Name? Some Reflections on the Sociology of Anonymity" (1999) 15:2 The Information Society 99, <http://web.mit.edu/gtmarx/www/anon.html>. The categories and some of the examples are his; other examples are mine.

Anonymity is commonly understood as a concealment or hiding of some or all of the levels of "identity knowledge" and is usually described as a kind of privacy, perhaps the ultimate privacy.[4] The *Oxford English Dictionary* defines "anonymous" as "nameless, having no name; of unknown name." Helen Nissenbaum argues that, "… the value of anonymity lies not in the capacity to be unnamed, but in the possibility of acting or participating while remaining out of reach, remaining unreachable."[5] Most of the legal and philosophical analysis of anonymity is in two broad areas: in freedom of expression and the right to freedom of anonymous expression; and in the right to control the use, dissemination and access to one's personal information.[6]

What does the construct of anonymity offer to an examination of equality law? If one looks at anonymity and identity or identification as being on a spectrum, it is important to see section 15 as being about two kinds of "identification," and hence two possible reactive notions of anonymity. Obviously section 15 is at least in part about "ground identification" (Marx's sixth category of identity information). Section 15(1) of the *Canadian Charter of Rights and Freedoms* states, that "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[7] Section 15, therefore, requires claimants to affiliate themselves with an enumerated or analogous ground; thus one significant component of any case is the choice of which ground best describes the basis on which an individual asserts discriminatory treatment. This means adopting the history of discrimination, stereotype and prejudice embedded in the ground, all of which implicitly identifies claimants by a host of characteristics or realities that they may or may not share with other members of the group within that ground. If a claim of discrimination is based on the enumerated ground of sex, a history of gender discrimination in this country against women (or more controversially sometimes men) is relied upon. The identification of ground often subsumes or "anonymizes" the individual claimant, who may not have experienced all the

---

4. Another kind of knowledge and corresponding anonymity that could perhaps be considered an eighth level (to Marx's seven suggestions) is knowledge around a person's sexual identity. There are many times when assumptions are made (socially, legally, in a business context, etc.) around hetero- and homosexuality. In a comprehensive and illuminating analysis of the phenomenon of "covering," Kenji Yoshino offers the following summary of ways in which sexual identity can be "concealed" (or in the language of this paper, ways that sexual identity could be made more anonymous): "In fact or in the imagination of others, gays can assimilate in three ways: conversion, passing, and covering. Conversion means the underlying identity is altered. Conversion occurs when a lesbian changes her orientation to become straight. Passing means the underlying identity is not altered, but hidden. Passing occurs when a lesbian presents herself to the world as straight. Covering means the underlying identity is neither altered nor hidden, but is downplayed. Covering occurs when a lesbian both is, and says she is, a lesbian, but otherwise makes it easy for others to disattend her orientation." See Kenji Yoshino, "Covering" (2002) 111:4 Yale Law Journal 769, <http://www.yalelawjournal.org/pdf/111-4/YoshinoFINAL.pdf> at p. 772.

5. Helen Nissenbaum, "The Meaning of Anonymity in an Information Age" (1999) 15:2 Information Society 141, <http://www.nyu.edu/projects/nissenbaum/paper_anonimity.html> at p. 142.

6. See Peter Carmichael Keen, "Anonymity and the Supreme Court's Model of Expression: How Should Anonymity be Analysed Under Section 2(b) of the *Charter*?" (2003) 2:3 Canadian Journal of Law & Technology 167, <http://cjlt.dal.ca/vol2_no3/pdfarticles/keen.pdf>.

7 . *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c.11, <http://laws.justice.gc.ca/en/charter/>, s. 15(1), .

aspects of that history, or who may have other characteristics that combine with the ground argued to make the discrimination especially poignant.[8]

A second kind of identification occurs through the most basic requirement of "form" in our legal culture. Individual claimants must, for the most part, "name" themselves. The norm in our system is to require at least the legal name (the first level of identity knowledge according to Marx). Many other levels of knowledge are detailed in the first section of any written court judgment (the "facts" section). In fact, depending on the case, any or all of Marx's seven levels of identity knowledge can be found in reasons for judgment and easily accessed by members of the public at large. The procedure for being granted the right to proceed anonymously in litigation (either under a pseudonym, or more commonly by initials) is confusing and highly discretionary.

*

## 3. "IDENTITY ANONYMITY": MOTIONS FOR PARTY ANONYMITY

THERE ARE FEW WRITTEN DECISIONS arising from motions for party anonymity. It seems that the main reasons for preferring identity to anonymity include:

1. The probability that witnesses are more likely to be truthful in their testimony if they know it is subject to being scrutinized by an audience that knows who they are;
2. The fostering of personal responsibility for words and actions, assumed to be more likely when one's identity is available to the public;
3. The creation of a public standard of accountability, aided when a litigant's identity is known. If the plaintiff's identity is kept secret, there is a possibility that evidence from members of the public, who might otherwise have learned of the case and come forward with information, will not be made available.[9]

The judicial support for preferring identity is encapsulated by this line of reasoning:

> It may be argued that private litigants resorting to our public justice system should have the right to do so away from the public glare. The answer, very simply put, is that secrecy can only attend a private system of justice, not a public one. Or put in a different way, publicity is a necessary consequence of the obvious benefits that are derived from a public system put in place to serve society in general, including private litigants.[10]

---

8. Kimberlé Crenshaw notes that even though African-American women experience discrimination both because of their gender and because of their race, anti-discrimination laws treat characteristics such as race and gender as separate and distinct. Crenshaw argues that this single-issue approach further marginalizes those caught within the intersection of race and gender. See Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Anti-racist Politics" (1989) University of Chicago Legal Forum 139 at p. 140.
9. For a detailed discussion see Joan Steinman, "Public Trial, Pseudonymous Parties: When Should Litigants Be Permitted to Keep Their Identities Confidential?" (1985) 37:1 Hastings Law Journal 1.
10. Per Smith J in *S.(P.) v. C.(D.)* (1987), 22 C.P.C. (2d) 225 (Ont HCJ) at para. 14.

There is no specific rule for granting a party anonymity in civil litigation, and the process is judicially unclear. Some judges ground their power in the rules of civil procedure, others in the statutes governing court administration.[11] The process requires a party to make a motion for an injunction allowing that party to proceed under a pseudonym or by initials and banning publication or use of their name. Whatever its procedural roots, it appears that judges use the same approach for this kind of injunctive relief as with all other requests for injunctions: whether there is a serious issue to be tried, whether there is a likelihood of irreparable harm if the injunction is not granted, and whether the balance of convenience favours granting the injunction. In cases involving a request for party anonymity, the balance of convenience is between the party requesting the order and the public interest in open courts. The principles to apply in considering whether to grant anonymity must be assessed in light of the strong presumption of openness in courts: "It has been said that the best disinfectant is sunlight. We need and welcome public scrutiny to ensure confidence in our administration of justice."[12] The countervailing interest for litigants wanting anonymity is accessibility to the system. Courts must be concerned with whether litigants will decide to forego a legitimate case if they have to reveal their identity over an issue that may be embarrassing, painful or simply very personal.[13] The open court principle is not offended when disclosure of what is sought to be kept confidential would serve no useful public purpose.

The test for injunctive relief is meant to be highly discretionary. It allows judges to respond to the immediate concerns of the parties before the court, and to balance the particular context of all of the interests in the case. However, that very discretion works against litigants who want to proceed anonymously, for in commencing their lawsuits, there is no way to be certain that they will get the relief they seek. Since the norm in civil litigation is for party identity, requests

---

11. For a comprehensive overview of the procedure for obtaining anonymity in civil litigation, see David L. Corbett and Bryce Edwards, "Keep My Name Out of This: Anonymity Orders in Civil Proceedings" in *Must Justice be Seen to be Done? Secrecy, Privacy and Confidentiality in the Courtroom* (2003 Ontario Bar Association Continuing Legal Education) at tab 8. In *T.(S). v. Stubbs et al,* (Ont Gen Div 1998), 38 O.R. (3d) 788, 158 D.L.R. (4th) 555 [*T.(S.)*], the judge grounded authority for anonymity orders in the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, <http://www.e-laws.gov.on.ca/DBLaws/Regs/English/900194a_e.htm>, and in particular in Rule 14.06(1) (every originating process shall set out the names of parties) and Rule 2.03 (the court can dispense with compliance of any Rule at any time). In *P.Q. v. Bederman* (Ont Gen Div 1998), 31 C.P.C. (4th) 313, the judge expressed serious doubts about this basis for an anonymity order, preferring instead to base jurisdiction in either s.101 of the *Courts of Justice Act*, R.S.O. 1990, c. 43, <http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90c43_e.htm> (the court can grant an interlocutory injunction or mandatory order where just or convenient) or in the inherent jurisdiction of the court to control its trial process.
12. *T.(S.)*, *ibid.* at para. 56.
13. The protection of anonymity is statutorily ingrained in criminal procedures through provisions of the *Criminal Code* that automatically entitle sexual assault complaints to anonymity, upon request of the Crown. The major reason for this statutory availability is the hope that anonymity will encourage rape complainants to come forward, a move that is held to be in the public interest. At "The Concealed I" conference, Jane Doe of *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*, (Ont Gen Div 1998), 39 O.R. (3d) 487, gave a riveting talk about the imposition and adoption of anonymity by rape victims (Marsha Hanen, Jane Doe, and Oscar Gandy, "Gender, Race, and the Social Casualties of Information Policy" (Panel discussion, The Concealed I, March 2005)). She is engaged in a project wherein she is interviewing women who have been sexually assaulted, to investigate their reasons for either remaining anonymous or naming themselves.

for anonymity are treated with some suspicion. Two recent cases in Ontario illustrate the frailties of the process and the way that decisions can turn on small discrepancies.

*B.(A.) v. Stubbs*[14] and *T.(S.) v. Stubbs*[15] are two lawsuits against the same doctor, with very similar facts, alleging negligence in the performance of a penile enhancement operation. In *T.S.*, the plaintiff adduced psychiatric evidence that he would suffer irreparable harm in the form of embarrassment if his name was made public. The plaintiff argued he would find it "devastating" to have his friends, customers, co-workers and acquaintances learn of his deeply personal problems (which led to the need for the surgery). The plaintiff shared the name of a well-known celebrity and he argued this would exacerbate the press coverage of his case. He initially sought the procedure because of a history of low self-esteem. He argued that public attention to the lawsuit would exaggerate his self-image problems. When the court weighed the balance of convenience, it acknowledged the understandable importance of full access by the public to all of the operations of our court system as weighted against the accessibility of the plaintiff to the judicial system. In this case, T.S. was granted the right to sue anonymously.

In *B.A.*, the plaintiff did not call a psychiatrist; his case came after *T.S.* and he relied heavily upon its reasons. The plaintiff argued that he was a quiet and religious man who would be acutely embarrassed and devastated if friends and co-workers were to learn he underwent the penile enhancement procedure. He also stated that he would only proceed with his claim if granted anonymity. Cumming J held that the potential for embarrassment does not in itself constitute irreparable harm for it is common for at least one party in any court action to be embarrassed by commencement of litigation. The judge further stated that the degree of potential embarrassment is not determinative for embarrassment is an unavoidable consequence of an open justice system. B.A. argued he was an "ordinary person" in whose identity the public has no particular interest but the court held that an anonymity order should not be dependent upon whether or not the public has a particular interest in the person seeking the order. Cummings J concluded: "Persons who testify in their own names are held to a public standard of accountability …. There is the danger of creating a moral hazard in allowing a plaintiff anonymity."[16]

The case law does not distinguish between cases brought against private defendants and those launched against governments to challenge the validity of legislation. There is arguably a significant difference that is relevant to the balance of convenience. Very few *Charter* challenges are anonymous—the most famous perhaps is *M. v. H.*, a challenge to Ontario's *Family Law Act* and the validity of its restriction in the definition of "spouse" as being limited to those in

---

14. *B.(A.) v. Stubbs* (Ont SCJ 1999), 44 O.R. (3d) 391 [*B.(A.).*].
15. *T. (S.)*, *supra* note 11.
16. *B.(A.). supra* note 14 at para. 36.

a heterosexual relationship.[17] There are no published reasons on why the claimants in that case were allowed to proceed anonymously. The trial judgment simply records that the injunction against publishing their names was granted out of respect for their privacy.[18] When compared to the facts at issue in the *Stubbs* cases, it is difficult to see why M. and H. were granted anonymity while B.A. was not. Why would financial information or relationship discord be more persuasive on a balance of convenience than embarrassment over an intimate surgical procedure? The only compelling reason for granting anonymity in *M. v. H.* (as opposed to *B.A.* for example) is the fact it was a *Charter* challenge and therefore raised larger, more generalized issues.[19]

Some careful thought is owed to what it means to proceed anonymously in *Charter* litigation, especially under section 15. On the one hand, claimants are challenging legislation, and thus the government's role as defendant is not of the same nature (or carrying the same burden) as a private defendant in civil litigation. Section 15 claimants can be viewed at least in part as fungible representatives of a larger group of people who suffer under

---

17. *M. v. H.*, [1999] 2 S.C.R. 3, <http://scc.lexum.umontreal.ca/en/1999/1999rcs2-3/1999rcs2-3.html>, 171 D.L.R. (4th) 577, [*M. v. H.* cited to S.C.R.]. *See also E. (Mrs.) v. Eve*, [1986] 2 S.C.R. 388, <http://scc.lexum.umontreal.ca/en/1986/1986rcs2-388/1986rcs2-388.html> (in which the Court denied a mother's application for permission to sterilize her mentally disabled daughter). Sanda Rodgers argues: "In *Re: Eve* the outcome of the case arguably was determined at the moment the pseudonym was chosen. The choice of "Eve" doesn't simply protect her privacy; it identifies her as a stand-in for a larger group of issues about women's sexuality as well as for the broader (women's) community." Sanda Rodgers, "Misconceived: Equality and Reproductive Autonomy in the Supreme Court of Canada" in Sheila McIntyre and Sanda Rodgers, eds., *Diminishing Returns: Inequality & the Canadian Charter of Rights and Freedoms* (Toronto: LexisNexis Butterworths, 2006) 271–290 at p. 277.

18. On 20 August 1993, Adams J ordered that the action be transferred to the Family Law Division and that there be a trial of all issues with M as plaintiff and H and the companies as defendants. Adams J also ordered that the action be titled *M v. H*, having regard to the wishes of M and H to privacy concerning their personal lives. See *M. v. H.* (Ont Gen Div 1996), [1996] O.J. No. 365 at para. 17.

19. In fact, by the time that *M. v. H.* reached the Supreme Court, the issues as between the parties were moot for they had reached a settlement. Cory J notes that it was the Attorney General for Ontario alone who sought and was granted leave to appeal to the Supreme Court of Canada (each of M. and H. appeared as respondent with counsel). Cory J adds, on the issue of whether the appeal is moot: "The social cost of leaving this matter undecided would be significant. The appeal has come to this Court in an adversarial context. The record is ample and complete and all points of view were very well presented." *M v. H.*, *supra* note 17 at para. 44. While Cory J does summarize some of the personal details around the lives and relationship of M. and H., the focus of the appeal is on the more generalized impact of the legislation on the dignity of same-sex couples.

    Another interesting example of party anonymity before the Supreme Court of Canada is the case of *New Brunswick (Minister of Health and Community Services) v. J.(G.)*, [1999] 3 S.C.R. 46, <http://scc.lexum.umontreal.ca/en/1999/1999rcs3-46/1999rcs3-46.html> [*J.(G.)*]. At the lower levels (trial and appeal), this case proceeded under the claimant's name, Jeannine Godin. It was also granted leave to appeal under her name and the first few motions before the Supreme Court (to add intervenors, etc.) proceeded under *Godin v. New Brunswick (Minister of Health and Community Services).* In the list of motions available online at Quicklaw (from the Supreme Court Bulletins at 1997 S.C.C.A. 278), there is no motion to ask for party anonymity. In fact, on Quicklaw the decisions above have been renamed under the initials "G.(J.)." However, if one turns to the hard copies of the Supreme Court bulletins, one finds that it was not until part way through the process (between two motions granted 1 October 1998 and 23 October 1998) that the style of cause was changed from "*Godin*" to "*G.(J.)*." *G.(J.)* concerned the provision of legal aid to a mother whose child was seized by the Minister of Health and Community Services and placed under protective care. The Court notes (at para. 5) that the claimant was "indigent" and receiving social assistance, but otherwise few details about her are mentioned. The analysis proceeded as a more generalized discussion around section 7 and an expansion of the Court's approach to considering security of the person.

discriminatory legislation. In this respect, claimant anonymity in terms of an individual's actual "name" makes some sense. Anonymity would protect individual privacy and perhaps encourage more equality litigation. What are the downsides? Why do our legal norms not encourage claimant anonymity in *Charter* cases?

*

## 4. "IMPACT ANONYMITY": CLAIMANT IDENTITY AND SECTION 15

SINCE OUR JUDICIAL CULTURE REQUIRES claimants to identify themselves in litigation, and since that norm seems to operate within *Charter* litigation specifically, what details about a claimant's identity seem to matter to the courts in assessing claims? What role does a claimant's identity play in the analysis of the claim? This discussion is particularly poignant in the context of the judicial analysis of human dignity within the framework of section 15. Two cases in particular illustrate the serious problems courts can have in grappling with claimant identity: *Law* and *Gosselin.*

The current test for violations of section 15 was set out in a 1999 decision of the Supreme Court of Canada in *Law*.[20] Iacobucci J emphasized that the equality guarantee deserves a purposive and contextual approach involving three broad inquiries:[21] (1) does the impugned law draw a formal distinction between the claimant and others on the basis of one or more personal characteristics?; (2) is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?; and (3) does the differential treatment discriminate? This last question has evolved into the "human dignity" test, requiring claimants to establish that the impugned law violates or demeans their dignity or otherwise marginalizes them in Canadian society.

In Law, we know the following facts about the claimant:[22] "The appellant, Nancy Law, married Jason Law in 1980. Mr. Law died in 1991, at the age of 50, having contributed to the CPP for 22 years. At the time of his death, … [Nancy Law] was 30 years old. Prior to Mr. Law's death, the couple had co-owned a small business. … [Nancy Law] was responsible for business operations and her husband had the requisite technical knowledge and expertise. The business failed soon after Mr. Law's death." She applied for survivor benefits under the Canada Pension Plan (CPP) but was denied because of her age. The CPP gradually reduces benefits for claimants without dependents and under the age of 45, to the point where the cut-off for receiving any benefits is age 35.

Which of those details mattered for the Court? The claimant based her claim of discrimination on the enumerated ground of age and the Court accepted that characterization. She argued in essence that awarding benefits

---

20. *Law*, *supra* note 2.
21. *Ibid.* at para. 88.
22. Taken from *ibid.* at paras. 10–11. See also the trial decision at *Law v. Canada (Minister of Employment and Immigration)* (1996 FCA), [1996] F.C.J. No. 511 at para. 2.

according to age categories was an inappropriate basis on which to respond to claimant need and life circumstances. The crux of her dignity argument was that the age restrictions in the CPP are based on faulty and discriminatory assumptions that young people are better able to find a job after the death of a spouse and that it is demeaning to her dignity to have such assumptions made about her. She argued that these assumptions are not true in general and are not true specifically in her case.

Iacobucci J, who wrote the decision for the Court, disagreed and held that the Court could take judicial notice of the increasing difficulty with which one can find and maintain employment as one grows older. He held that the impugned law functions not by the device of stereotype but by distinctions corresponding to the actual situation of individuals it affects. By being young, Nancy Law, has a greater prospect of long-term income replacement. Iacobucci J concluded that "[a] reasonable person under the age of 45…would properly interpret the distinction created by the CPP as suggesting that younger people are more likely to find a new spouse, are more able to retrain or obtain new employment, and have more time to adapt to their changed financial situation before retirement."[23]

This finding by Iacobucci J is the objective part of a two-tiered perspective adopted by the Court for assessing discrimination. The claim is first considered from the point of view of the claimant and clearly they will almost always assert that their dignity has been violated since they are bringing a claim on that basis. But a court also looks at the claim objectively from the point of a view of a reasonable person dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant. This viewpoint is, as one can imagine, difficult to achieve. While there are many different times in legal analysis that a court relies on the mythical "reasonable person," the problems around that construct are heightened in the section 15 context when the focus is on "human dignity." What attributes should the reasonable and actual claimant share? What are the relevant circumstances? These questions resonate in cases where a court denies the section 15 challenge, in essence determining that the claimant's subjective feelings (which led to the litigation) are unreasonable.

In *Law,* Iacobucci J offered a "specific, albeit non-exhaustive, definition"[24] of "human dignity" which included such characteristics as: realization of personal autonomy; feelings of self-respect and self-worth; physical and psychological empowerment; and a concern with the way an individual legitimately feels when confronted with a particular legislative goal.[25] These characteristics are highly personal, emotional and subjective. Given that a claimant must always argue that his or her human dignity was demeaned by a legislative distinction (hence the fact that a claim was brought), the inquiry really

---

23. *Law*, *supra* note 2 at para. 104.
24. *Ibid.* at para. 53
25. *Ibid.* at para. 53.

rises and falls on the objective characterization of the claim. This process is fraught when one considers the subjectivity of the definition of human dignity. The "reasonable person" is not "anonymous"; he or she is known to the court in that he or she shares similar attributes as the individual claimant and is under similar circumstances. In other words, the "reasonable person" should be the claimant, but a more "reasonable" version of the claimant. Given that in *Law* the reasonable person shares similar attributes to the claimant, what attributes mattered to the Court in Nancy Law's life?

It seems that the only detail that mattered was that Nancy Law was thirty years old. That is the only fact the Court took into consideration about her life. But for the fact she was a widow, the case would not have arisen as she would not be in a position to claim CPP survivor benefits, but her reality as a widow did not factor into the Court's decision. There is no discussion of whether her widowed status added anything to the consequences of the age categories. There was also no mention of the fact that she was a self-employed business person (as opposed to an employee) and that therefore, her financial prospects, as a partner in a business with a spouse who died, were more affected perhaps than others. More remarkable from an equality standpoint is that there was no discussion as to her gender, and no consideration of whether the fact she was a female widow (as opposed to a man in that situation) made a difference to her ability to "retrain or obtain new employment." This is striking given what we know of the pink collar ghetto, glass ceilings and pay inequity.

There are presumably, many details in Nancy Law's life that influenced her decision to pursue the claim, only some of which made it into the facts as relayed by the Supreme Court (and essentially the same facts were recited in each level of the court decisions). Even fewer of those details, really only one, age, actually influenced the decision against her in the end.

What does that mean for the dignity argument, from Nancy Law's perspective? How did Nancy Law's "identity" factor into the decision? The list of characteristics offered by the Court on the definition of human dignity are highly personal and emotional. The list is concerned with the way a claimant "feels" (though admittedly only concerned with what the Court says are "legitimate feelings"). If the section 15 framework requires a claimant to argue a violation of human dignity, the Court should be prepared to respond to the power of its own definition of that concept. An analysis that reduces a claimant to only one detail does not accomplish that goal.

The Court's section 15 requirement that a claimant prove a violation of his or her human dignity has proven academically controversial. Former Supreme Court Justice L'Heureux-Dubé has described dignity as a "notoriously elusive concept."[26] One of the main criticisms of "human dignity" as a guiding principle for courts is that it is too individualistic for a right that is based on group affiliation. Dignity is about feelings and feelings belong to individuals and not groups. It is ironic that one can accept that criticism while also believing that

---

26. *Egan v. Canada*, [1995] 2 S.C.R. 513, <http://scc.lexum.umontreal.ca/en/1995/1995rcs2-513/1995rcs2-513.html>, 124 D.L.R. (4th) 609 at para. 40 [*Egan* cited to S.C.R./LexUM].

ultimately the way that the Court is actually assessing dignity is not individualistic enough. While a dignity analysis should consider the individual's particular circumstances and feelings (hence the allegation it is too individualistic), the way the Court conducts the analysis seems to ignore all of the realities of the claimant's life (hence the irony that it is not individualistic enough). The concept of dignity is inherently loaded. It is difficult and distasteful to ask claimants to prove that a distinction violates their dignity: "Draping an allegation of discrimination in dignity language deeply personalizes it and brings it to the very heart of an individual's sense of self-worth. This makes the allegation more emotion-laden, and thus more rhetorically powerful."[27] The power of the rhetoric is cheapened by the Supreme Court's simplistic analysis. The emotion of the claim is dismissed by the off-hand conclusions of the Court.[28]

While the fear might be that it is unseemly to ask claimants to prove that a distinction violates their dignity, in most cases very little of a Supreme Court decision focuses on the "real" claimant. It begs the question, what kind of "dignity" argument is really being made? If Nancy Law's claim is reduced entirely to her age, it is hard to think about human dignity in any meaningful way; dignity, under the Court's own construction, imports far greater connotations. If dignity is about self-worth, if it is emotionally laden and rhetorically powerful, then the Court should undertake an analysis that recognizes the significance of what dignity means to a claimant and to equality rights. How can an objective claimant, with Nancy Law's attributes and in her situation, be meaningfully constructed and analysed by the Court if her entire identity is reduced to her age? In essence the objective claimant shares only that one attribute with the real claimant. The Supreme Court anonymized Nancy Law by only tackling the one characteristic about her that relates to the enumerated ground on which the claim was based; the rest of her identity was erased in the Court's decision. It appeared at the beginning in the Court's summary of the "facts" but was absent in the rest of the decision; this might not have been, or "felt" to be so significant but for the fact that the analysis is premised on human dignity.

---

27. Donna Greschner, "Does Law Advance the Cause of Equality?" (2001) 27:1 Queen's Law Journal 299 at para. 25. A thorough discussion on the dignity element of section 15 analysis is beyond the scope of this paper. See Sonia Lawrence, "Harsh, Perhaps Even Misguided: Developments in *Law*, 2002" (2003) 20 Supreme Court Law Review, 2d ser. 93; Errol P. Mendes, "Taking Equality into the 21st Century: Establishing the Concept of Equal Human Dignity" (2000) 12:1 National Journal of Constitutional Law 3; Denise G. Réaume, "Discrimination and Dignity" (2003) 63:3 Louisiana Law Review 645, <http://www.law.utoronto.ca/documents/Reaume/DiscriminationandDignity.pdf>; June Ross, "A Flawed Synthesis of the Law" (2000) 11:3 Constitutional Forum 74.

28. In a recent section 15 decision, *Hodge v. Canada (Minister of Human Resources Development*), 2004 SCC 65, <http://scc.lexum.umontreal.ca/en/2004/2004scc65/2004scc65.html>, [2002] 3 S.C.R. 357 [*Hodge*], Binnie J considered the claim of a woman who separated from her common law husband six months before his death. She tried to claim a survivor's benefit under the Canada Pension Plan but was denied on the basis that she was not a spouse. She described herself as a separated common law spouse and compared herself to separated married spouses (who were eligible for benefits). The Supreme Court reassessed her group as former common law spouses and compared her to former married spouses (who were ineligible for benefits). In considering her dignity, Binnie J concluded (at para. 47): "A reasonable claimant in her position would, I think, not feel demeaned by being treated the same as other 'former' spouses." This conclusion is astonishing as a comment on her human dignity, since both her group and her comparator group were redefined, leading to a complete denial of benefits. It is impossible to imagine how Betty Hodge (or a more reasonable version of her) might have felt, given that she did not argue her claim the way that the Supreme Court saw it. Binnie J's statement is telling: it is what a judge "thinks" and not a finding that is rationally connected to an assessment of her human dignity.

An even more compelling example of the anonymizing effect of a court decision is *Gosselin v. Quebec (Attorney General).*[29] In *Gosselin* we know the following facts about the claimant (from the Supreme Court decision):[30] Louise Gosselin was born in 1959. She had led a difficult life, complicated by a struggle with psychological problems and drug and alcohol addictions. From time to time she tried to work as a cook, waitress, salesperson, and nurse's assistant, among many other jobs. Work would wear her down or cause her stress, and she would quit. For most of her adult life, Ms Gosselin received social assistance. In 1984 the Quebec government created a new social assistance scheme. Regulations set the base amount of welfare payable to persons under the age of thirty at roughly one third of the base amount payable to those thirty and over. Under the new scheme, participation in one of three education or work experience programs allowed people under thirty to increase their welfare payments to either the same as, or within CAN$100 of, the base amount payable to those thirty and over. Ms Gosselin brought a class action suit challenging the regulations as violating both her right to equality and to security of the person under the *Charter*. In the trial judgment, the judge is actually much more descriptive of Ms Gosselin's life circumstances, going on at some length about her foster homes, medical conditions and work history. The trial judge concluded by noting that in the course of her testimony she appeared to be intelligent and well-adjusted but psychologically vulnerable, always on the defensive and displaying a lack of confidence and poor self-esteem.[31] From written submissions by the claimant and interveners on her side, it is revealed that she resorted to prostitution on a number of occasions because of her poverty and that she was homeless except for those times when she was forced to move back in with her mother.[32] She testified at trial that when she finally reached an age where she could receive full benefits, she felt lucky just to have survived.[33]

The enumerated ground on which the inquiry proceeds in *Gosselin* is age. The Court concluded that young adults as a class simply do not seem especially vulnerable or undervalued. Indeed, the opposite conclusion seems more plausible said the majority, particularly as the programs participation component of the social assistance scheme was premised on a view of the greater long-term employability of under-thirties, as compared to their older

29. *Gosselin v. Quebec (Attorney General),* 2002 SCC 84, <http://scc.lexum.umontreal.ca/en/2002/2002scc84/2002scc84.html >, [2002] 4 S.C.R. 429 [*Gosselin*].

30. *Ibid.* from paras. 1–2.

31. *Gosselin c. Québec (Procureur Général)* (Qc Super Ct 1992), [1992] J.Q. no. 928 at para. 81.

32. See intervener (NAWL) briefs, available at PovNet <http://www.povnet.org/gosselin/gosselin_part1.htm>. "The record shows that she had to resort to degrading ways of surviving, such as exchanging her sexual availability for shelter and food. At one point, in order to obtain money to buy clothes so that she could look for a job, Ms. Gosselin engaged in prostitution." Superior Court Decision, vol. 18, at p. 3391; testimony of L. Gosselin, vol. 1 at p. 106 cited in *ibid.*

33. "When she reached her 30th birthday, and became eligible for the regular rate of social assistance, Ms. Gosselin felt as though she had won a victory simply because she had managed to stay alive." Testimony of L. Gosselin, vol. 1 at p. 143 cited in *ibid.*

counterparts. The only mention that McLachlin CJC (who wrote the majority decision) makes of the myriad other details related by the Court about Louise Gosselin was with respect to her involvement in the work programs offered under the scheme to those under thirty to supplement the low level of benefits:

> On those occasions when Ms. Gosselin dropped out of programs, the record indicates that this was due to personal problems, which included psychological and substance abuse components, rather than to flaws in the programs themselves. Ms. Gosselin's experience suggests that even individuals with serious problems were capable of supplementing their income under the impugned regime.[34]

Her psychological and substance abuse problems, work history, medical issues and family life were of no relevance to the analysis of whether her human dignity was violated. In fact these details only worked against her in that McLachlin CJC Cused them to explain why, for much of the time, Louise Gosselin only received the bare minimum of benefits. The only attribute ascribed to the "reasonable person" to facilitate the objective part of the test is her age. The Court used the standard of the "reasonable young person" to objectively deny any violation of Louise Gosselin's human dignity.

For Bastarache J in dissent, the additional facts about Louise Gosselin carried only a little more weight. He did accept, however, that Ms Gosselin's reality as someone receiving social assistance is certainly relevant to her claim. She is not "just" a young person; she is a young person on social assistance, which makes her vulnerable.[35] While this approach does not specifically address Louise Gosselin's history, it at least emphasizes a more germane part of the human dignity analysis; this was not a claim based only on "age" but, rather, a claim about social assistance and the way it is distributed and accessed.

McLachlin CJC described the *Gosselin* and *Law* cases as "strikingly similar."[36] For the majority of the Court, it seems that what mattered is that Nancy Law and Louise Gosselin were both thirty years old. One is left with the same question as in Nancy Law's case: what details of Louise Gosselin's life mattered to the Court? One can only conclude by the Court's reasoning that her age was all that mattered, this despite assurances from the Court that its section 15 framework is contextual, focused on substantive equality and premised on remedying legislative distinctions that degrade or demean an individual's human dignity. Whatever one's feelings about the results in the *Law* or *Gosselin* cases, if in the end both cases are described as "strikingly similar" only because both claimants were under the required age for access to the government benefit they sought, then the reasoning offered does not live up to the promise of equality rights. It is hard to see how the Court's erasure of all of the details about Louise Gosselin aside from her age, contributes to a meaningful analysis of, for

---

34. *Gosselin, supra* note 29 at para. 48.
35. *Ibid.* at para. 150 and following.
36. *Ibid.* at para. 73.

example, her self-respect, psychological empowerment, or her feelings when confronted by the legislation. All of these issues surely involve a consideration of her history of medical and psychological problems, work history and problems in accessing the maximum level of benefits through participation in the work programs, as well as the incredibly demeaning result that she was forced into prostitution to survive.

*

## 5. THE CONCEPTUAL INTEGRITY OF EQUALITY CLAIMANTS

THE DE-EMPHASIS OF CLAIMANT IDENTITY in section 15 cases leads to a tension in the judicial analysis. Especially by the time a case reaches the Supreme Court, claimants are representative of a much larger group on whose behalf they claim that legislation is discriminatory. This was definitely the case for Louise Gosselin who actually brought her suit as a class action. Clearly she was only one of many young people who suffered under Quebec's welfare regime.[37] Once a case gets to the Supreme Court of Canada, it assumes a "national importance" and the reasoning must surely address a larger group interest. Indeed, though the *Charter* is about individual rights, section 15 always takes on a group perspective because of the requirement that a claimant establish differential treatment on the basis of a ground. Choosing a ground means affiliating oneself with a segment within that ground: a claimant is a woman discriminated against on the basis of sex or a young person who suffers because of age distinctions. This group-based affiliation necessarily lends itself to an analysis that considers the needs and circumstances of the whole group and that considers the broad impact of legislation on the whole group. This is without doubt one important aspect of a section 15 analysis. In this regard, it is clear that Nancy Law and Louise Gosselin, for example, had to be viewed at least in part as "stand ins" for the group they represented and the larger interest they presented to the Court.

The whole notion of constitutional equality is premised on group equality for the law can never completely account for individual marginalization. In this respect, section 15 presents an immediate interpretive snag. Claims must be brought by individuals, yet the analysis is concerned with their group. Claims are grounded in the lived experience of one individual, for a claim cannot be

37. I should note however, that McLachlin CJC does briefly address the issue of Ms Gosselin's appropriateness as "representative" of a class of welfare recipients. She emphasizes (at para. 47): "As the trial judge emphasized, the record contains no first-hand evidence supporting Ms. Gosselin's claim about the difficulties with the programs, and no indication that Ms. Gosselin can be considered representative of the under-thirty class. It is, in my respectful opinion, utterly implausible to ask this Court to find the Quebec government guilty of discrimination under the Canadian Charter and order it to pay hundreds of millions of taxpayer dollars to tens of thousands of unidentified people, based on the testimony of a single affected individual. Nor does Ms. Gosselin present sufficient evidence that her own situation was a result of discrimination in violation of s. 15(1)." It is difficult to accept this characterization of the claim, given that Ms. Gosselin was granted permission by the Court to launch a class action suit, and given that McLachlin CJC proceeds with an analysis under sections 7 and 15 that considers the claimant as representative. In dissent, L'Heureux-Dubé J details (at paras. 130–133) the ways in which both a reasonable claimant and Ms Gosselin herself were demeaned by the legislation. She accepts that the claimant was representative of her group, a fact not properly in dispute in the appeal. *Ibid.* at para. 47.

brought in the abstract by a third party. One could not see injustice perpetrated against another and decide to bring an equality claim on behalf of that other. Yet, as *Law* and *Gosselin* demonstrate, the lived experience of the individual seems only marginally relevant to the Court's analysis.

Courts have set a fairly high standard for granting a plaintiff the right to proceed in litigation under a pseudonym or by initials only. Judicial and academic commentary on the importance of requiring plaintiffs to sue under their own name places enormous value on the use of a name in terms of accountability, credibility and the value of an open court in a democratic society. In equality cases, as in other areas of law, judges receive very personal accounts of alleged discrimination, drafted by lawyers in language that emphasizes on behalf of claimants the very personal ways that a piece of legislation offends the human dignity of that claimant. Reproduced in the "facts" sections of court judgments are some of these extremely personal details, offered presumably to give some context—a human face—to the decision that follows. If there were no details offered, there would be no context to the dignity analysis, only assumptions offered by lawyers and accepted by judges; the idea of that kind of anonymous claim is offensive and dangerous. By requiring individual plaintiffs, we seem to indicate that their identity as individuals matters.

When one moves from the "facts" section of the case to the analysis, it is not at all clear *why* it matters, or in truth that identity really matters at all. It is important to look carefully at what is happening to a claimant's identity for four reasons. First, because of the importance of a *Charter* guarantee of equality, equality is perhaps *the* right that resonates the most with Canadians, both with our sense of justice as individuals but also with the collective consciousness of Canadian society. Second, it is important because of the language of equality that the Court has mandated claimants use. Dignity is a powerful word and if we speak of equality as promoting dignity, the analysis should bear that out. Third, it is important because, while individuals do front for larger groups in litigation, they are also individuals who were brave enough and with sufficient tenacity to put their lives—their dignity—on the line in the most public of fora. Law students will read about the lives of Louise Gosselin and Nancy Law for decades to come. It is only fair to acknowledge the identity of claimants to give meaning to the analysis and strength to the conclusions. If a court has to justify its reasons on the back of an individual, it may force the court to be more circumspect in its approach to the "legitimate feelings" or "reasonableness" of the claims. Finally, there is an ultimate impact on equality-seeking groups, for when the claimant's identity is neutralized, so are all of the pertinent facts and history about the group that make the discrimination claim more powerful and hence convincing. It is much easier to dismiss an alleged violation of human dignity when the claimant is "anonymous" (by virtue of having their personal history ignored), or reduced to a single identifying characteristic. The reasoning is more sophisticated and convincing when a court has to confront all of the claimant and his or her group.

The Ontario Court of Appeal's decision in *Falkiner v. Ontario (Ministry of Community and Social Services)*[38] is one example of a decision that illustrates the power of identity. In *Falkiner* that court considered the claimants as real people, with a variety of relevant characteristics that influenced the analysis. The appeal in *Falkiner* concerned changes to Ontario's *Family Benefits Act* which deemed that once persons of the opposite sex began living together, they would be presumed to be spouses unless they showed otherwise.[39] For the four women claimants who challenged this legislation, this legislative amendment meant that they lost their social assistance benefits once reassessed as a couple with the men they lived with.

The relevant facts pertaining to each claimant are similar.[40] Each claimant had experienced a close family or intimate relationship with an alcoholic or abusive man. Each was the sole support of a child or children, and before the 1995 definition of spouse, each was receiving social assistance as a single mother. In the year before the 1995 definition came into effect, each claimant began residing with a man. Each claimant considered her male co-resident a boyfriend and some hoped for a long-term relationship. Ms. Falkiner, for example, began living with her co-resident as an "experiment," hoping it would lead to a permanent relationship in the future. All of the claimants acknowledged that the social and familial aspects of their relationships amounted to cohabitation. None of the claimants considered that she was in a spousal relationship with her co-resident.

Each of the claimants, however, had a financial arrangement with her co-resident, with the latter paying a portion of the rent, food and other household expenses. Each claimant maintained her financial independence as much as possible, and none of the male co-residents had a legal obligation to support either the claimant he was living with or her children. When the 1995 definition of spouse came into effect, each claimant was reclassified as a spouse, forcing each to rely on her co-resident for financial support if she wanted to continue the relationship. The claimants argued that they have been subjected to differential treatment on the basis that they are single mothers on social assistance. That is the group with which they identified themselves. The claimants shared three inter-related and relevant characteristics: they were women, they were single mothers solely responsible for the support of their children and they were social assistance recipients. They argued that the differential treatment imposed on them by the definition of spouse flowed from these three characteristics.[41]

Laskin JA who wrote the decision for the Ontario Court of Appeal, agreed with the claimants and held that, "Because the claimants' equality claim

---

38. *Falkiner v. Ontario (Ministry of Community and Social Services)* (Ont CA 2002), 59 O.R. (3d) 481, <http://www.ontariocourts.on.ca/decisions/2002/may/falkinerC35052.htm> [*Falkiner* cited to O.R.].
39. *Family Benefits Act*, R.S.O. 1990, c. F.2, <http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90f02_e.htm>; R.R.O. 1990, Reg. 366, <http://www.e-laws.gov.on.ca/DBLaws/Regs/English/900366_e.htm>, s. 1(1)(d).
40. *Falkiner supra* note 38 at paras. 43–44.
41. *Ibid.* at para. 70.

alleges differential treatment on the basis of an interlocking set of personal characteristics, I think their general approach is appropriate. Multiple comparator groups are needed to bring into focus the multiple forms of differential treatment alleged."[42] Laskin JA first compared the claimants to the treatment of single persons not on social assistance.[43] He held that they have suffered adverse state-imposed financial consequences because they began living in try-on relationships. By contrast, single people who are not on social assistance are free to have these relationships without attracting any kind of state-imposed financial consequences; this amounted to discrimination on the basis of the analogous ground of marital status.[44] He then considered whether the new regulations amounted to sex discrimination. Though neutral on its face, Laskin JA accepted evidence that the legislation resulted in adverse-effects discrimination as the statistics unequivocally demonstrate that both women and single mothers are disproportionately adversely affected by the definition of spouse. Although women accounted for only fifty-four percent of those receiving social assistance and only sixty percent of single persons receiving benefits, they accounted for nearly ninety percent of those whose benefits were terminated by the definition of spouse.[45]

Finally, Laskin JA concluded that the claimants have been subjected to differential treatment on the analogous ground of receipt of social assistance, an approach he admitted was controversial. He found that their status as social assistance recipients was relevant to the equality analysis for social assistance may well constitute a fundamental social institution. The impact of the differential treatment was severe, compromising, as it did, the claimants' ability to meet their own and their children's basic needs. Because of the definition, each claimant lost her entitlement to social assistance as a single person. Even though each claimant could still apply with her co-resident for benefits as a couple, these benefits were lower than the benefits available to a sole support parent. Moreover, if her co-resident was self-employed or in school, the couple was ineligible. The cheque was often issued in the name of the male "head of household." This in fact happened to one of the *Falkiner* claimants, Ms Sears, who had deliberately kept her finances separate from her partner because he was a substance abuser, only to be reclassified as spouses and have the "family" cheque issued in his name. Her partner spent their money on his addiction.[46]

---

42. *Ibid.* at para. 72.
43. Although the *Falkiner* decision is generally regarded as an excellent example of intersectional or multiple-ground discrimination, it still evidences the larger problem of comparator groups in section 15 analysis. Laskin JA was forced to separate the claimants into three separate strands (women, receiving social assistance, as single mothers) and compare each strand to a different comparator group. He then united the characteristics into a more sophisticated analysis when he considered the discrimination part of the analysis. The problem of comparator groups in section 15 is a significant challenge that remains to be resolved. See Daphne Gilbert & Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dooms Section 15" (2006) 24:1 Windsor Yearbook on Access to Justice 111.
44. *Falkiner*, *supra* note 38 at para. 73.
45. *Ibid.* at para. 77.
46. *Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch)* (Ont SCJ 2000) 188 D.L.R. (4th) 52 at para. 24 [*Falkiner*].

Laskin JA added that beyond purely financial concerns, more fundamental dignity interests of the claimants have been affected. Being reclassified as a spouse forced the claimants and other single mothers in similar circumstances to give up either their financial independence or their relationship. Many women, including three of the claimants in this appeal, had been victimized by alcoholic or abusive partners. Forcing them to become financially dependent on men with whom they have, at best, try-on relationships strikes at the core of their human dignity.[47] What is more, because the 1995 definition potentially created forced financial dependence, it likely had a chilling effect on the formation of relationships.

It is quite striking as one reads the *Falkiner* decision to see the number of places that the details about the claimants surface in Laskin JA's reasons. He talked about their relationship histories, focuses on their gender and considers their motherhood. He assessed the impact of the legislative change on their finances, and the serious effect on their relationships. The facts that were detailed at the beginning of the judgment are carried through to the end to make a real difference to the analysis and the result. *Falkiner* among other things shows the power of an approach to grounds of discrimination that allows for intersectionality. These claimants were not reduced to a single identifying feature; rather they were allowed to place themselves in the apex of three grounds that combined to wreak havoc in their lives when the legislation was changed.[48] It was not even so simple as narrowing the claimants down to their three grounds, for Laskin JA assessed the impact of the legislation on the particular lives of the claimants, then used their example to extrapolate to a larger group. Contrast this approach with the Supreme Court is in *Law* or *Gosselin* and it seems clear that identity can make a very significant impact on judicial reasoning when it is allowed to matter.

A noted privacy theorist offers an approach that when inverted helps to explain why sometimes privacy (or more accurately anonymity) is a negative aspect in judicial decision-making. Helen Nissenbaum argues that "contextual integrity" is the appropriate benchmark of privacy.[49] By contextual integrity she means that all arenas of life are governed by norms of information flow. We never say "anything goes." Rather, all relationships and institutions have norms about what kind of information is shared, with whom and under what circumstances. So for example, a distinct set of norms governs the relationship

47. *Falkiner, supra* note 38 at para. 101.

48. For an argument that the enumerated and analogous grounds be de-emphasized in favour of an approach that focuses on groups, see Daphne Gilbert, "Time to Regroup: New Opportunities for the Supreme Court and Section 15 of the *Charter*" (2003) 48:4 McGill Law Journal 627, <http://www.journal.law.mcgill.ca/abs/vol48/4gilbe.pdf> and Daphne Gilbert, "Unequaled: L'Heureux-Dubé J's Vision of Equality and Section 15 of the *Charter*" (2003) 15:1 Canadian Journal of Women and the Law 1. For a contrasting view, see Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Experiences" (2001) 13:1 Canadian Journal of Women and the Law 37. See also Colleen Sheppard, "Grounds of Discrimination: Towards an Inclusive and Contextual Approach" (2001) 80:3 Canadian Bar Review 893.

49. Helen Nissenbaum, "Privacy as Contextual Integrity" (2004) 79:1 Washington Law Review 119, <http://ssrn.com/abstract=534622>.

between doctor and patient, norms that dictate that the patient divulge to the doctor any information about physical or mental health that is relevant, but norms that also say that financial or educational histories need not be discussed.

The contextual integrity of relationships is maintained when two types of norms in particular are respected: norms of appropriateness and norms of distribution. Norms of appropriateness dictate what information about persons is fitting to reveal in a particular context.[50] These norms circumscribe the type or nature of information that, within a given context, is allowable, expected or even demanded to be revealed. In the judicial context, the norms of appropriateness seem to indicate that the court can demand of claimants—and claimants can offer—a significant level of personal detail (see the facts detailed in Louise Gosselin, for example). Norms of distribution govern the transfer of information from one party to another.[51] Even in a relationship where it is appropriate to divulge certain information, it may be inappropriate to pass the information on to a third party. In our context, norms of distribution seem to be very open—the information offered and expected of claimants is repeated back in the facts section of judgments for public accountability. Nissenbaum asserts that privacy is adequately safe-guarded when both norms are respected. If a situation arises where too much information is divulged or excess information is demanded, or where the information is revealed to the wrong individuals, the contextual integrity of the relationship is violated and privacy compromised. Arguably, the reverse holds equally true: the contextual integrity of the relationship between the "law" (as represented by courts) and individuals is compromised when the information that the law requires of the individual is disregarded and plays no role in the legal outcome. The identity of claimants is a required piece in the narrative of litigation. The information about their lives is an integral aspect to section 15 litigation. Any analysis that purports to be based on assessments of human dignity and any equality rubric that claims to be contextual must consider the details that claimants offer of their lives. When the courts and hence the law disregards that information, to use Nissenbaum's theory, the contextual integrity of the relationship is violated. If "identification" is the norm (as opposed to anonymity) then the result must account for identity.

*

## 6. CONCLUDING THOUGHTS

WE RETURN TO THE CENTRAL QUESTIONS posed as this paper began. First, what details of an equality claimant's identity matter to a court in assessing section 15 claims? At the Supreme Court of Canada, at least, it appears that the only detail that matters is the one that the Court cannot avoid discussing because of section 15's requirement of an enumerated or analogous ground.

---

50. *Ibid.* at para.138.
51. *Ibid.* at para.140.

Second, what details about a claimant's identity and what group characteristics should matter? All of the details that make up the particular life of the claimant and that contributed to the negative impact of the differential treatment should matter. For Louise Gosselin, for example, that means that it must matter that she is a woman and that she was on social assistance. It must matter that because of the levels of benefits she could access, which were far below subsistence level, she was forced into prostitution, and that she suffered from a history of medical and psychological problems that no doubt influenced her ability to work and participate in training programs. The obvious problem with that list of details is that not all the people in her group would share those characteristics, but they still must be considered by a court to add some contextual integrity to the analysis. Not all welfare recipients under the age of thirty would share these characteristics, but if a court sticks with its mythical "reasonable person with similar attributes to the claimant," we could perhaps extract at least some details as relevant to others. Certainly, for example, the fact that Louise Gosselin was receiving social assistance, which was the benefit to which she claimed access, has to matter. It is the crucial detail that distinguishes her from Nancy Law and makes the cases very different.

It is also relevant that the "reasonable person" receiving social assistance might have suffered from medical and psychological problems and difficult life experiences. The circumstances around why individuals are on social assistance are certainly relevant to understanding the impact of rules around its availability. The reasonable person does not have to be Louise Gosselin, but should be recognizable as coming from the same place in life.

Finally, what happens when identity does not seem to matter? To be frank, what happens is a decision like *Gosselin*: judicial reasoning on the behalf of the majority of the court that is disconnected from the facts of the case, decontextualized from the life of the claimant and premised only on the most basic and superficial understanding of the differential treatment alleged—a decision that is without any real regard to the human dignity of Louise Gosselin or others in her situation. This despite the fact that the promotion of human dignity is said to underlie the Canadian value and right of equality and the Supreme Court's approach to section 15. Louise Gosselin did not choose to be anonymous to the Supreme Court and she should not have been made so by it.