THE MARRIAGE OF HUMAN RIGHTS CODES AND SECTION 15 OF THE CHARTER IN PURSUIT OF EQUALITY: A CASE FOR GREATER SEPARATION IN BOTH THEORY AND PRACTICE

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I. INTRODUCTION FROM ENRICHMENT TO CONTAMINATION

Like many marriages, the equality provisions of the *Charter of Rights and Freedoms* and Canada's human rights codes began with the hope and expectation that the experiences of each one would enrich the other. Both legal structures pursue a fairer and more egalitarian society, and there was optimism that the two traditions would reinforce each other and make life better for victims of discrimination. In an evolving symbiotic relationship, the concept of substantive equality would be advanced and Commissions, Tribunals and Courts would collaborate in producing a more egalitarian Canadian society. While not stated in these grandiose terms, these were the seeds planted by Justice McIntyre in the first section 15 case of *Andrews v BC Law Society*. In *Andrews*, McIntyre J advocates building the *Charter*'s equality jurisprudence on the foundation of Canada's experiences with statutory human rights codes.[1]

Unfortunately as with too many marriages, the union of *Charter* equality and human rights codes has not always been a positive one and the *Charter* has become more of a burden than a benefit to its statutory partner. Indeed, many now argue that the importation of *Charter* equality concepts into the interpretation of human rights codes has limited the goal of substantive equality and reduced access to justice for front line victims of discrimination. As Professor Leslie Reaume rightly argues, the nature of the *Charter* should be a source of enrichment for human rights codes and not a source of contamination.

> [B]orrowing from the *Charter* context to the statutory context is appropriate so long as the exercise enriches the substantive equality analysis, is consistent with the limits of statutory interpretation, and advances the purpose and quasi-constitutional status of the enabling statute. The objection raised in this paper is not to the interplay but to the manner in which *Charter* principles, specifically those articulated in the decision in the *Charter*, are imported and then allowed to dominate an analysis which should be driven first by the principles of statutory interpretation, and second by the jurisprudence which has developed specifically in the regulatory context. [2]

One of the ways in which the *Charter* might enrich human rights code jurisprudence would be in respect to theory. Both mechanisms are intended to reduce

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[1] *Andrews v Law Society of British Columbia* [1989] 1 SCR 143, at 175. He does also recognize that there are differences between the statutory and constitutional structures as well as points of convergence.

[2] Leslie Reaume, "Postcards from O'Malley: Reinvigorating Statutory Human Rights Jurisprudence in the Age of the Charter" in Fay Faraday, Margaret Denike, and M Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto, Irwin Law, 2006) at 375.

discrimination in Canadian society and advance the cause of substantive equality. Substantive equality takes account of differences where appropriate and recognizes that formally neutral rules can have adverse and discriminatory effects on vulnerable groups in society. Thus one could expect some overlap in theory and even the legal tests to be applied. However, the marriage of the two systems has its limits in theory as well as practice.

Theory is about thinking systematically about what we think the ultimate goals are. In this sense there is nothing as practical as good theory. It helps decision-makers understand the value choices that they make. However, theory must be set in a practical and specific context and leave room for flexibility. This is true in all areas of the law but is particularly relevant to the complex pursuit of equality.

Theories, structures, and tests help to produce predictability and certainty in the law, including laws pertaining to equality. On the other hand, flexibility and context are always important in producing justice and equality in a particular case. The challenge is to strike the correct balance between structure and predictability on the one hand and flexibility and context on the other.

The case-by-case bottom up approach of the common law has been rejected in respect to discrimination in favour of a more theoretical top down approach to equality.[3] This is an important reality in the consideration of a balanced equality structure in Canada.

Professor Denise Reaume contrasts two methodologies for the design and development over time of legal norms: the top-down model of the comprehensive code designed to bring to life a grand theory about the norms regulating human interactions, and the bottom-up model of case-by-case analysis, aiming toward the development of a set of principals explaining and justifying individual decisions. The author argues the latter is better suited to creating and changing norms in the discrimination law area. However, the abdication of responsibility by the common law has led to the legislatures intervening in their typical top-down style. Without a grand theory (e.g., definition of discrimination etc.) the statutory rules become arbitrary pigeonholes into which complainants must fit their fact situation or fail.[4]
In early *Charter* section 15 cases such as *Egan v Canada*, Justice L'Heureux-Dube expresses a similar frustration with an excessive focus on grounds of discrimination into which all claims must be fitted.

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[3] *Seneca College v. Bhaudaria*, [1981] 2 SCR 181.

[4] Denise G Reaume, "Of Pigeonholes and Principles: A Reconsideration of Discrimination Law" (2002) 40 Osgoode Hall LJ 113.

> By looking at the grounds for the distinction instead of at the impact of the distinction on particular groups, we risk undertaking an analysis that is distanced and desensitized from real people's real experiences.[5]

Because of the limited role played by courts in pursuing equality and the rejection of a common law bottom up approach to equality, human rights codes play an important and continuing role in pursuing equality. There is obviously room for overlap and cross fertilization between the *Charter* and human rights codes but the tests and theories that properly apply in one context do not necessarily work in the other one. Some marriage of the two structures may well be fruitful, but the distinct and separate identities of the two partners should not be lost. As will be explored in the next section, courts and human rights tribunals play different institutional roles within the Canadian legal structure.

II. BACK TO BASICS: DIFFERENT INSTITUTIONAL ROLES AND APPROACHES

As with many complex legal problems it may be helpful to get back to some basics. Section 15 of the *Charter* is a constitutional provision that is entrenched and superior to other forms of law. Human rights codes are statutes, and while frequently described as "quasi-constitutional", they are not entrenched and can still be changed by the normal process of a majority vote in the relevant legislature. Thus one would expect that section 15 of the *Charter* would be a more powerful guardian of equality than statutory human rights codes. Both the *Charter* and human rights codes are committed to pursuing substantive equality and therefore a critical question arises: when should the two institutional structures converge and diverge?

Bruce Ryder, Cidalia Faria and Emily Lawrence refer to *Eldridge v British Columbia* to say that:

> Section 15 has two purposes: ensuring that laws avoid treating individuals according to irrelevant personal characteristics, and ensuring that laws avoid further subordination of already disadvantaged groups.[6]

The authors also note that section 15 of the *Charter* raises some fundamental questions about the different roles of the institutional players in a Canadian democracy.

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[5] *Egan v Canada*, [1995] 2 SCR 513 at para 53. L'Heureux-Dube's approach is supported and elaborated in Daphne Gilbert, "Time to Regroup: Rethinking Section 15 of the *Charter*" (2003) 48 McGill LJ 627-649.

[6] Bruce Ryder, Cidalia C. Faria & Emily Lawrence, "What's Law Good For? An Empirical Overview of Charter Equality Rights Decisions" (2004) 24 Sup Ct L Rev (2d) 103, at 107. – citing *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 54. This same approach was supported in later cases such as *Eaton v Brant County Board of Education*, [1997] 1 SCR 241.

> In a society characterized by persistent inequalities, the judiciary could enlist section 15 in the redistribution of a wide range of legal and material entitlements. Section 15 thus implicates, in a particularly profound manner, the appropriate division of responsibility between courts and legislatures in a constitutional democracy.[7]

Courts have been cautious in their approach to section 15. This may be because section 15 deals with such fundamental values, and courts believe these fundamental issues are better suited to the legislative or executive branches. Thus courts have been inclined to be deferential to the other levels of the state at both the violation and section 1 limitation stages.

This may in part explain the low success rate for section 15 claims, compared to those under most other sections of the *Charter*. Ryder's study is one of the few empirical studies and it considered more than 350 cases (including some lower court rulings) between 1989-2004.

> Overall, the data suggests that the success rate of section 15 claims has been relatively low, compared to *Charter* claims generally, throughout the *Andrews* decade and the first five years under *Law*. The data does not support the view that the *Andrews* test operated in a manner more supportive of equality claimants. Nor does it support the view that the courts have been particularly receptive to the claims of equality-seeking groups. For example, examining the record of Supreme Court decisions, it is striking that six of the nine grounds of discrimination listed in section 15 have not given rise to a single successful claim (race, national origin, ethnic origin, colour, religion, mental disability). Since there have been either no claims considered by the Court, or very few, on each of these grounds, this is a reminder that the costs of litigation remain the most formidable barrier to the affirmation and protection of equality rights….
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> Interestingly, the success rate of claims based on sex discrimination is 25 percent (2/8), and in the two successful cases, the claimants were men.[8]

The deference shown by courts in section 15 claims is even more pronounced when the effect of a successful claim would be to require the relevant government to spend significant sums of money.[9] The reluctance of courts to act is even greater when the rights claim can be construed as a positive obligation on the state rather than a negative prohibition to refrain from acting.

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[7] Ryder, *ibid* at 104.

[8] *Ibid* at 115.

[9] *Gosselin v Quebec (Attorney General)*, 2002 SCC 84, 4 SCR 429 and *Auton (Guardian ad litem of) v British Columbia (Attorney General)* 2004 SCC 78, 3 SCR 657 are but two examples of this. *Moore v. British Columbia* 2012 SCC 61 is at least in part an exception to this rule.

> The recognition of a positive dimension to rights to equality and rights to life, liberty and security of the person, and the imposition of corresponding obligations on government, is important for many equality-seeking groups, especially for people with disabilities.…
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> Courts' reluctance to impose positive obligations on government under rights to equality can be largely attributed to deference toward executive and legislative decisions on the allocation of scarce resource and the prioritization of competing policy concerns.[10]

The comparative role of courts and human rights tribunals in respect to social and economic rights has been explored elsewhere.[11]

While there is no doubt that the courts are the primary players in a section 15 *Charter* claim, both the legislative and executive branches have roles to play in respect to human rights codes. It is the relevant legislature that enacts the codes and has the authority to amend or even repeal the statutes. Both the commissions and tribunals are created by statute and are in some respects extensions of the executive branch of government, even though they claim a measure of independence.

Other academic commentators have explored the differences in institutional structures:

> Ontario's *Human Rights Code* is provincial legislation, it can be, and has been, amended in the manner of any other provincial legislation. It binds the Crown and prevails over other legislation. The Supreme Court has repeatedly described human rights legislation as fundamental and quasi-constitutional. The Code applies to particular areas of social life rather than to particular social actors, and it applies equally to government and private actors. The Code is a comprehensive scheme, and it specifically identifies which groups have been subjected to historic disadvantage and are to be protected by legislation.[12]

Denise Reaume emphasizes the opportunity for the legislature to balance the competing interests at play in equality claims, within the statutory structure itself.

> The structure of the OHRC makes clear that the legislature has taken great pains to balance the right to equal treatment and the legitimate interests of

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[10] Cara Wilkie & Meryl Zisman Gary, "Positive and Negative Rights under the *Charter*: Closing the Divide to Advance Equality" (2011) 30 Windsor Rev Legal Soc Issues 37 at 38 and 44 respectively.

[11] Wayne MacKay, "Social and Economic Rights in Canada: Who Can Best Protect Them?" (2009) 45 Sup Ct L Rev 385.

[12] Lesli Bisgould, "Twists and Turns and Seventeen Volumes of Evidence, or How Procedural Developments Might Have Influenced Substantive Human Rights Law" (2012) 9 JL & Equality 5 at 17.

> respondents. If its complex structure achieves that balance fairly through the interplay of factual prima facie case and variously tailored exemptions, there is no reason to tamper with it. The significance of the spheres included in the codes, together with creating exemptions wherever fairness requires, seals the argument that narrowing the scope of discrimination by increasing the threshold at the prima facie stage is an unworthy interpretation of the codes. It is precisely the significance of the spheres in this balance that the Court of Appeal seems not to appreciate in *Tranchemontagne*.[13]

Leslie Reaume provides a good review of the points of convergence and divergence between the *Charter* and human rights codes. She notes that the two are similar in that:

> Both the *Charter* and human rights statutes share the goal of achieving substantive equality, and are driven by similar underlying principles, such as the promotion of human dignity, the recognition of the benefits of diversity, and the pursuit of activities related to full citizenship: all of these principles ground a broad, liberal, purposive interpretation by adjudicators and courts. In both arenas, discrimination means something more than mere distinction. Both schemes are also anti-majoritarian instruments, and adjudicators and judges frequently attract criticism for "activism" on interpreting them in favour of claimants. They are also beset by the same challenges in attempting to advance substantive equality within the limits of "prohibited grounds."[14]

She goes on to note that the two structures diverge in that they "arise in different social and legal contexts which is a significant factor in the interpretation of those instruments, including the development of definitions of discrimination."[15] Leslie Reaume also considers that "[h]uman rights legislation is regulatory in nature. It establishes and regulates a limited set of entitlements and expectations between individuals in the context of their private relationships and in the interaction of individuals with government service providers and employers".[16] Comparatively, the *Charter* "prohibits discrimination which arises by the application or operation of law and is invoked only against a government actor."[17] Finally, Leslie Reaume notes that the *Charter* has "much greater potential for advancing the equality rights of

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[13] Denise Reaume, "Defending the Human Rights Codes from the *Charter*" (2012) 9 JL & Equality 67 at 94.

[14] *Supra* note 2 at 382.

[15] *Supra* note 2 at 383-384.

[16] *Supra* note 2 at 384.

[17] *Supra* note 2 at 384.

historically disadvantaged groups, through a focus on the experience of dominance and subordination that arise through the operation of law and government policy."[18]

There are also other important differences such as the different dispute resolution processes. The human rights structures offer a wide variety of processes including mediation and more recently restorative approaches, before reaching a more adversarial tribunal stage. Also, human rights commissions and tribunals may have more comparative expertise in human rights than more generalist courts. They operate in related but different contexts and many of the problems that will be discussed in this article arise from a failure to take proper account of the different contexts and institutional roles.

A. CHALLENGING BENEFIT SCHEMES – BLURRING THE LINES

Claire Mumme links these contextual differences to the comparative roles of the *Charter* and human rights codes in the pursuit of equality in Canada. Problems have particularly arisen since human rights codes have been used to challenge government benefit schemes in ways that have traditionally been done by a constitutional challenge.

> In a system of government that is based on parliamentary sovereignty as well as on a separation of powers between the legislature, executive, and judiciary, the human rights codes have come to take on an extraordinary role, and the human rights tribunals have come to occupy an unusual position. The codes, which are ordinarily enacted statutes (albeit quasi-constitutional ones), have been used to review the substance and administration of other statutes, in a manner that is seemingly at odds with the principles of parliamentary sovereignty, according to which only the Constitution limits the legislature's ability to legislate. And the tribunals, hybrid executive judicial actors, have been able to act as arbiters of decisions by the executive and legislative branches of government in regard to public spending.[19]

The author provides an historical account of human rights litigation, going back to the Bill of Rights and then forward. The historical account focuses on government services cases in the era of the Bill of Rights, pre-*Charter*, *Charter*, and post-*Law* and examines what led the courts to allowing quasi-constitutional tribunals to decide on other statutes/statutory schemes. This is illustrated through case-law.

> The expanding reach of human rights statutes suggests that its adjudicators now rival the superior courts as sites for public law adjudication. However, it is perhaps also exactly for this reason that the

[18] *Supra* note 2 at 384.

[19] Claire Mumme, "At the Crossroads in Discrimination Law: How the Human Rights Codes Overtook the Charter in Canadian Government Services Cases" (2012) 9 JL & Equality 103, at 106-107.

> door has opened to the use of constitutional jurisprudence in the statutory framework and that judicial decision makers have been receptive to claims of merger between these two instruments. Put simply, while the questions of the human rights codes' supremacy and of what constitutes a "service" have been effectively closed, a new unease has emerged with using an administrative tribunal to review legislative and executive decisions under a less deferential standard than is brought to the same questions under the *Charter*.[20]

We agree with Mumme that the government services cases are at the heart of the process of blurring the lines between equality challenges under human rights codes and the *Charter*. It does seem contrary to the natural constitutional order that government programs can be more effectively challenged by human rights codes than section 15 of the *Charter*. However, this may reflect more on the high degree of deference shown in *Charter* equality claims and the answer is not to treat the human rights challenges in the same way. If the view is that human rights code challenges are going too far in the benefits area, the relevant statutes can be amended by the legislature. The problems of merging the section 15 *Charter* approaches with those at the prima facie stage of human rights code analysis are further magnified when these codes are applied in the private sector.

We turn in the next section to the complex questions arising from importing the more demanding *Charter* standard for finding an equality violation into the human rights code context. The case for some degree of separate approaches is fortified by the larger issues of institutional roles discussed above.

III. TESTS FOR DISCRIMINATION: SECTION 15(1) OF THE CHARTER AND O'MALLEY'S PRIMA FACIE CASE

A. THE *ANDREWS* ERA: HAPPY UNION

As alluded to earlier, the original *Andrew's* test for finding a violation of section 15(1) of the *Charter* was based on the approach to discrimination in statutory human rights codes. Indeed Justice McIntyre emphasizes in *Andrews* that section 15 of the *Charter* is not an all-purpose guarantee of equality but rather a ban on discrimination pursuant to laws. The cornerstone of section 15 in McIntyre's analysis is discrimination, and does not envision remedying all distinctions, even those with adverse effects. The origins of this cross fertilization between section 15 of the *Charter* and human rights codes is succinctly recognized and affirmed by the

[20] *Ibid* at 135. See also *supra* note 2 at 374. Reaume emphasizes that there are two major consequences of importing a Charter standard – (1) raising the burden of proof and (2) diverting attention from the human rights statue.

following passage from the well articulated reasons of Justice Rowles in *British Columbia (Ministry of Education) v Moore*.

> Without doubt, there is considerable cross-fertilization between statutory human rights cases and equality cases decided under the *Charter*. In *Andrews v Law Society of British Columbia*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 [*Andrews* cited to S.C.R.], the first decision of the Supreme Court of Canada under s. 15 of the *Charter*, McIntyre J. held, at 175, that, in general, the principles which have been applied under human rights codes are equally applicable in considering questions of discrimination under s. 15(1) of the *Charter*. He defined "discrimination" for the purposes of s. 15(1) by reference to prior human rights jurisprudence, as follows (at 174):
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> > I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.
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> Subsequent to *Andrews*, the interplay has continued and McIntrye J.'s description of discrimination has been regularly employed in the adjudication of statutory human rights claims: see *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566, 140 D.L.R. (4th) 1 at para. 20 [*Gibbs*]; *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] 1 S.C.R. 161 at para. 47, Abella J. concurring; *International Forest Products Ltd. v. Sandhu*, 2008 BCCA 204, 82 B.C.L.R. (4th) 35 at paras. 24–32 [*Sandhu*].[21]

The interplay between the *Andrews* definition of discrimination and the same concept in human rights codes is emphasized not only by its use in adjudicating human rights cases but also its inclusion as the statutory definition in the *Nova Scotia Human Rights Act*.[22] Furthermore, academic commentators have identified human rights jurisprudence as one of the key sources for giving meaning to the elusive concept of *Charter* equality.

> In resolving the challenges posed by section 15 of the Charter, the courts have drawn significant guidance from anti-discrimination jurisprudence developed under Canadian human rights statutes, from the experience of other nations and from international law.[23]

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[21] *British Columbia (Ministry of Education) v. Moore* 2010 BCCA 478 at paras 40 and 41, 12 BCLR (5th) 246.

[22] *Nova Scotia Human Rights Act*, RSNS 1989, c 214, s 4.

[23] Ryder, *supra* note 6 at 105.

It would thus appear that there was considerable convergence between the concept of discrimination in human rights codes and the constitutional concept of equality as articulated in *Andrews*. The marriage of section 15 of the *Charter* and human rights codes appeared to be a beneficial union. In these happier days there was no suggestion that the *Charter* approach to equality replaced the established test for finding a prima facie case of discrimination as articulated by the Supreme Court of Canada in *Ontario (Human Rights) v Simpsons Sears Ltd.* (referred to as *O'Malley*).[24] The essence of this test is set out by Justice Rowles in *Moore* as follows:

> To make out *prima facie* discrimination in the provision of a service under s. 8(1) of the *Code* pursuant to *O'Malley*, human rights cases have generally held that a complainant must establish on a balance of probabilities that:
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> 1. There is a service customarily available to the public;
> 2. The complainant is a member of a group possessing a characteristic or characteristics protected under the *Code*;
> 3. The complainant was denied the service, or was discriminated against in the provision of a service; and
> 4. The protected characteristic was a factor in the denial or discrimination.[25]

In line with her general agreement with the dissenting opinion of Justice Rowles in the British Columbia Court of Appeal, Justice Abella for the Supreme Court of Canada in *Moore v British Columbia* agrees with the above description of the prima facie case test.

> As the tribunal properly recognized, to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.[26]

This is a clear indication that the Supreme Court of Canada does not agree with those who argue that the traditional human rights code test for violation has

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[24] *Ontario (Human Rights Commission) v Simpsons Sears Ltd*., [1985] 2 SCR 536 [*O'Malley*].

[25] *Supra* note 21 at para 36.

[26] *Moore*, *supra* note 9 at para 33.

been modified by the section 15 *Charter* jurisprudence. As the following pages indicate not everyone saw it so clearly.

B. THE *LAW* ERA: STRAINS EMERGE

Problems began to develop after the reformulation of the test for section 15 violations in *Law v Canada (Minister of Employment and Immigration)*.[27] In simple terms the *Law* test repeated the *Andrews* requirements for a (1) distinction (by either an action or failure to take account of differences); (2) based upon an enumerated or analogous ground but added that (3) the action or omission is only discriminatory if it imposes a burden or withholds a benefit in a way that promotes stereotypes or a view that the claimant is less worthy of recognition. This third element required that the claimant prove a violation of "dignity" a term that is at least as elusive as the concept of equality itself.

This was widely regarded by academics and others as narrowing the scope of *Charter* equality. The change placed additional burdens of proof on the claimant and imported balancing considerations into the section 15 analysis that should have been considered at the section 1 justification stage.[28] As the cases unfolded these problems did emerge[29] and the concerns about a retreat from substantive to formal equality were validated (at least in part) by the Supreme Court of Canada in *Kapp*.[30] It is interesting to note that in a rare empirical study of the claimants' success rates under section 15 of the *Charter*, the success rate actually improved under the *Law* test compared to the *Andrews* decade. However, Ryder et al. suggest there are many qualifications to this surprising conclusion.[31] One limitation is that their study covers only the first 5 years of the *Law* era.

Some human rights tribunals and courts began to import both the violation of "dignity" component from *Law*, and a more formal comparator group analysis. The latter will be discussed further on in this article. In *British Columbia Government and Service Employees' Union v British Columbia (Public Services*

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[27] *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497.

[28] *R v Kapp*, 2008 SCC 41, at para 22, 2 SCR 483. The Court noted that "as critics have pointed out, human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an additional burden on equality claimants, rather than the philosophical enhancement it was intended to be. Criticism has also accrued for the way Law has allowed the formalism of some of the Court's post-Andrews jurisprudence to resurface in the form of an artificial comparator analysis focused on treating likes alike."

[29] See *Gosselin*, *supra* note 9 and *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4, 1 SCR 76.

[30] *Kapp*, *supra* note 28.

[31] Ryder, *supra* note 6.

Employee Relations Commission) (referred to as *Reaney*)[32] and *British Columbia School Employers' Association v British Columbia Teachers' Federation* (referred to as *Teachers*)[33] the courts applied the *Law* test in the human rights code context. In *Reaney* the concern was with the term of a collective agreement that was premised on a government benefits program, which had been found to not violate section 15 of the *Charter*. Lambert J.A. found that the *Law* test was a relevant point of reference, even if not applied as a strict test.

In the *Teachers* case, also in a labour context and involving employee benefits and the possible co-ordination of benefits between married teachers, the allegation was discrimination based upon marital status. Once again some of the justices referred to the *Law* test as well as the traditional *O'Malley* test for a prima facie case of discrimination.

In a third British Columbia case, *Armstrong v British Columbia (Ministry of Health)*[34] the issue was the discrimination on the basis of sex for providing less funding for the prevention by screening of prostate cancer, compared to breast cancer in women. The human rights tribunal found no violation by applying parallel *Law* and *O'Malley* analyses and that decision was reversed on judicial review at the trial level, because of the *Law* analysis. At the British Columbia Court of Appeal the original tribunal decision was restored on the basis that the *Law* analysis was only an alternative analysis.

In reaching this decision Justice Tysoe in *Armstrong* made a clear case for continuing to treat *Charter* and human rights code situations as both overlapping but still distinct.

> There is considerable promise in maintaining distinct analytical frameworks between the *Charter* and the statutory human rights arenas. The challenge will be to find ways to develop analytical concepts which give life to the purposes which underlie these important instruments, appreciating that they are linked by the grander purpose of eradicating discrimination. The goal should be an interactive framework which provides opportunities for enriching equality rights jurisprudence and advancing substantive equality without supplanting the principles developed specifically for the issues which arise in these two distinct contexts.[35]

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[32] *British Columbia Government and Service Employees' Union v British Columbia (Public Services Employee Relations Commission)*, 2002 BCCA 476, 4 BCLR (4th) 301 [*Reaney*].

[33] *British Columbia School Employers' Association v British Columbia Teachers' Federation*, 2003 BCCA 323, 15 BCLR (4th) 58.

[34] *Armstrong v British Columbia (Ministry of Health)*, 2010 BCCA 56, 2 BCLR (5th) 290.

[35] *Ibid* at para 36.

It is interesting that his sentiments echo those of some academic commentators calling for an interactive process that enriches but does not limit.[36]

C. CONVERGENCE ON GOVERNMENT BENEFITS

It is not accidental that the above British Columbia cases are governmental in nature and involve in some way the distribution of benefits. Benjamin Oliphant argues that the application of a *Charter*-like test at the prima facie stage appears to be particularly attractive to courts in cases that involve the government's provision of services. This is especially the case where a concern is voiced that a strict application of the standard routinely applied to private services providers would be unfair to government respondents. The question of whether the *Charter* and code tests for discrimination should match is an important one, and its resolution turns on several complex issues including whether an approach such as that adopted in *Tranchemontagne* represents a change in the law as articulated by the Supreme Court of Canada, and if so, whether that change is justified.[37] Oliphant attempts to show that in *Tranchemontagne*, a plain reading of the decision would suggest that the burden of showing the rule to be unacceptable has shifted. The burden to show the rule is somehow unreasonable, arbitrary, or based on prejudice and stereotyping has shifted to the claimant, running directly contrary to previous code jurisprudence. He outlines a number of cases to support this. He concludes that:

> The mischief in the *Tranchemontagne* decision and others that follow a similar conceptual framework is not that these cases have necessarily reached the wrong conclusions on the facts but, rather, that by modifying the procedure for establishing a successful claim they have redefined the scope of the prohibition on discriminations, either without averting to this fact or acknowledging it openly.[38]

The case of *Ontario (Director, Disability Support Program) v Tranchemontagne*[39] provides a convenient backdrop against which to explore the question of whether, and to what extent, different and distinct routes to equality ought to be maintained in respect to statutory human rights structures and the *Charter of Rights*. This decision places at the forefront the issue of the appropriate limits that a claimant should face in being allowed to import a constitutionally rooted "jurisprudential frame that imposes higher burdens on claimants than those

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[36] *Supra* note 2.

[37] Benjamin Oliphant, "Prima Facie Discrimination: Is *Tranchemontagne* consistent with the Supreme court of Canada's Human Rights Code Jurisprudence" (2012) 9 JL & Equality 33 at 35-36.

[38] *Ibid* at 65.

[39] *Ontario (Director, Disability Support Program) v Tranchemontagne*, 2010 ONCA 593, 324 DLR (4th) 87.

specifically designed for the statutory context."[40] The relevant legal test to apply in such cases is of great concern for the evolution of equality jurisprudence.[41]

In a later article Mumme reiterates the centrality of the core issue in *Tranchemontagne* in the following terms.

> In *Ontario (Director, Disability Support Program) v Tranchemontagne*, the Ontario Court of Appeal entered on to the most recent battleground in the world of statutory human rights law - a challenge to the content of a statutorily created government program under the auspices of the Ontario Human Rights Code (OHRC) instead of under section 15(1) of the Canadian Charter of Rights and Freedoms.' The doctrinal question at issue was whether the traditional jurisprudential test for discrimination under the human rights codes should be used to analyze a challenge to a statute or whether that statutory standard should be displaced by the tests usually applied under section 15(1) of the Charter. As I will argue, however, lurking beneath this doctrinal question is a set of much more fundamental issues about the relative purpose and scope of constitutional equality and statutory anti-discrimination protection in Canadian equality law.
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> …
>
> In government services claims, a challenge is brought under the *Human Rights Code* to the substantive content of a statute that creates a government program, or discretionary decision-making under the statute's terms. In Tranchemontagne for instance, the challenged services were the Ontario Disability Support Program, created by the *Ontario Disability Support Program Act* (ODSPA), and Ontario Works (welfare), created by the Ontario Works Act). Such claims seek either an order requiring a change in administrative practice or a declaration that an offending legislative provision is inoperative because it violates the *OHRC*.
>
> These claims are thus almost identical to ones that would otherwise be brought under the section 15(1) constitutional equality provision, and the codes provide an almost identical remedy. They do so in a much more accessible manner because the tribunals are faster and less expensive. And, it can be argued, the analytical framework for determining a violation of the human rights codes is significantly friendlier to claimants than is the constitutional test.[42]

In the *Tranchemontagne* case the courts address a growing trend in equality jurisprudence – that of using the provincial human rights statutes to challenge the

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[40] Claire Mumme, "Tranchemontagne – Statutory Challenges to Statutory Enactments: What is the Appropriate Standard" *The Court* (10 September 2010), online: <http://www.thecourt.ca/>.

[41] *Ibid*.

[42] *Supra* note 19 at 103 and 104 respectively.

legislative content of government programs rather than making a section 15 *Charter* equality claim. The central issue at all levels in this case was determining the appropriate test when a human rights statute rather than the *Charter*, is used to challenge a statutory benefits scheme. To what extent, if at all, should constitutional standards be imported into the human rights context?

> What legal test to apply in such cases is of profound significance for equality jurisprudence. Cases such as *Tranchemontagne* have arisen because of the increasing difficulties faced by equality-seeking groups in bringing social and economic claims under section 15 of the *Charter*, leading claimants to seek remedies elsewhere.[43]

Mumme goes on to explore why many claimants prefer the human rights path to that of section 15 of the *Charter*.[44] In addition to the lower costs and greater accessibility associated with the human rights commission structure, she argues that the *O'Malley* prima facie test sets a lower standard for claimants to meet than the *Charter* test. As a consequence, a section 15 *Charter* claim has become the last legal resort for many claimants.[45] After the *Law* case the marriage of human rights codes and the *Charter* has become strained and a greater degree of separation appears in order. This is well illustrated in *Tranchemontagne*, itself.

Specifically, in the course of deciding whether the claimants, as alcoholics who are disabled on account of their substance dependence, were entitled to income support under the *Ontario Disability Support* Program, the Social Benefits Tribunal conducted its analysis under the "rubric of the four contextual factors" contained in the third step of *Law*. They used the factors "as an analytical tool" rather than as a "checklist to be applied mechanically."[46] The Tribunal concluded that the human rights code and section 15(1) of the *Charter* should be interpreted in a congruent and consistent manner.[47] For its part, the Ontario Divisional Court affirmed that these separate texts equally "represent guarantees of substantive equality."[48] There is "no question that the interpretation and application of each provision ought to inform the other."[49] With that said, the trial court cautions that "this does not mean that the tests used in one context can or should be imported wholesale into the other."[50]

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[43] *Supra* note 40.

[44] *Supra* note 40.

[45] *Supra* note 40.

[46] *Ontario Disability Support Program v. Tranchemontagne*, 2009 95 OR (3d) 327 (Div Ct) at para 118.

[47] *Ibid* at para 96.

[48] *Ibid*.

[49] *Ibid*.

[50] *Ibid.*

Most recently, the Ontario Court of Appeal in *Tranchemontagne* sought to uphold the Social Benefits Tribunal's decision on the grounds that it "explained its reasons for rejecting the Director's evidence using the full *Law* framework" and that its "reasons [we]re entirely consistent with *Kapp*."[51] The Appellate court readily overlooked or disregarded the context-specific nature of the analytical concepts which have been developed in the respective administrative and judicial arenas. This decision opens the door for an academic discussion on the dangers of courts and tribunals too readily importing legal ideas from one context into another. We will return shortly to the situation in the *Kapp* era of *Charter* analysis, but the hangover of the dignity analysis from *Law* may not be completely gone.

D. THE *LAW*/DIGNITY HANGOVER

The introduction of the dignity concept into the equality analysis following *Law v Canada (Minister of Employment and Immigration)*[52] provoked a great deal of criticism and concern among those within the academic community. Academicians greatly feared that the third prong of the *Law* test would impose serious and crippling "limitations on equality claims."[53] A sincere belief existed that the addition of the dignity step would invariably introduce "section 1 concerns into the section 15(1) analysis, thereby shifting the government's burden to justify itself onto the claimants as part of proving rights violations" - with the unfortunate effect that this would "result in fewer findings of discrimination and fewer required justifications under section 1."[54]

These concerns do not carry as much weight in the post-*Kapp* era. This is because the Supreme Court used *Kapp* as an opportunity to clarify the existing state of the law. It held that:

> *Law* does not impose a new and distinctive test for discrimination, but rather affirms the approach to substantive equality under s. 15, as set out in *Andrews* and developed in numerous subsequent decisions. The factors cited in *Law* should not be read literally as if they were legislative dispositions, but as a way of focusing on the central concern of s. 15

[51] *Supra* note 39 at para 123.

[52] *Supra* note 27.

[53] Caroline Hodes, "Dignity and the Conditions of Truth: What Equality Needs from Law" (2007) 19:2 Canadian Journal of Women and the Law 273 at 283. See also Donna Greschner, "Does Law Advance the Cause of Equality?" (2001), 27 Queen's LJ 299; Daphne Gilbert, "Time to Regroup: Rethinking Section 15 of the Charter" (2003), 48 McGill LJ 627; R. James Fyfe, "Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada" (2007), 70 *Sask L Rev* 1; Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001), 13 *CJWL* 37.

[54] Caroline Hodes, "Dignity and the Conditions of Truth: What Equality Needs from Law" (2007) 19:2 Canadian Journal of Women and the Law 273 at 282. See also *Gosselin*, *supra* note 9 and Canadian Foundation for Children, *supra* note 29.

> identified in *Andrews* - combating discrimination, defined in terms of perpetuating disadvantage and stereotyping.[55]

The potential for misuse and abuse of the dignity concept is much less of an issue in present times. The possibility that the dignity barrier might be wrongly applied and overextended in the human rights context is thus, by extension, a more distant and removed one.

There is little debate that the Court in *Kapp* distanced itself from the *Law* test when it rejected the need for an explicit consideration of the dignity concept as the umbrella for the four contextual factors. However, this does not mean that there is no value in further considering the potential dangers that arise after exporting the dignity analysis or other forms of *Charter* analysis from a constitutional forum to a human rights one. Human dignity may now be seen less as a discrete, additional hurdle. Nevertheless, human dignity is now the "definitional objective of equality, as reflected in questions of whether a person is treated with equal concern, respect, and consideration."[56] Human dignity is an "essential value" which underlies the whole section 15 guarantee and appears in the preambles of many human rights codes. The "protection of all of the rights guaranteed by the *Charter* has as its lodestar the promotion of human dignity."[57] Indeed many human rights codes also refer to dignity of the individual as an underlying concept.

A post-*Kapp* definition of dignity might reasonably encompass everything from "having the means to subsistence, enough food, adequate shelter, adequate medical care, and a quality education, including skills training, protection from violence, protection from social exclusion, and protection from poverty."[58] In this way, to the extent that human dignity continues to be regarded as the hallmark of discrimination, the potential still exists for this *Charter*-based idea to be overextended and invoked to an unreasonable degree, within the human rights framework. To put it another way, insofar as the dignity concept merely "adds substance" to one of the already articulated purposes of the section 15 *Charter* guarantee, human rights tribunals may be enticed to consider whether a claimant has suffered a violation of their dignity.

A rights claimant need only prove prima facie discrimination before the onus shifts to the respondent to prove a bona fide justification encompassing reasonable accommodation. However, this fair and balanced shifting of the burden has the potential to be seriously undermined by the importation of the dignity

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[55] *Supra* note 28 at para 24.

[56] Gilbert, *supra* note 53 at 630-631.

[57] *Supra* note 28 at para 21.

[58] Hodes, *supra* note 53 at 285.

concept into the human rights world. Specifically, the *Law* test merges the distinction between violation (a section 15(1) concern) and justification (at the section 1 *Charter* stage), with the effect that the claimant faces an increased burden to prove a violation of their right.[59] The government enjoys a correspondingly reduced burden to justify its decisions. If this logic were to be extended outside of the *Charter* context, it means that private employers could discriminate more easily in the workplace and more easily resist adjudicative efforts to even the playing field.

A statutory adjudicator who recognizes the inherent interplay between constitutional and human rights instruments may be inclined to allow the *Law* principles to dominate the human rights analysis. A likely consequence of such a practice is "an elevated burden on a human rights claimant which effectively supplants the more appropriate evidentiary principles articulated in *O'Malley*."[60] This is of immediate concern when only a small proportion of the complaints that are filed with human rights commissions ultimately make their way to a public hearing stage.[61] This increased claimant burden would seemingly limit the potential for any meaningful evolution in human rights jurisprudence. Quite simply, too great of an emphasis on *Law* and even its successors *Kapp*[62] and *Withler*[63] outside of the constitutional realm, creates problems. Too little attention will be given by statutory decision-makers to the "language of the enabling statute, the principles which have evolved through statutory human rights adjudications, the regulatory context in which statutory human rights allegations arise, the intent of the framers of the legislation, and the quasi-constitutional nature of human rights."[64]

Statutory human rights do not enjoy the status of being constitutionally entrenched. As such, they require "appropriate contextual interpretation" in order to "give life to the values which underlie them."[65] The problem is that the human dignity concept or its *Kapp* and *Withler* successors become "element[s] of the burden of proof", rather than a value or guiding force, which underscores the entire statutory scheme.[66] To the extent that the *Law* test introduced a highly rigid, mechanistic, and unnecessarily formal method of screening equality claims, it follows that the importation of this test into the statutory context puts adjudicators directly at odds

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[59] Greschner, *supra* note 53 at 306.

[60] *Supra* note 2 at 374.

[61] *Supra* note 2 at 374.

[62] *Supra* note 28.

[63] *Withler v Canada (Attorney General)*, 2011 SCC 12, 1 SCR 396.

[64] *Supra* note 2 at 374.

[65] *Supra* note 2 at 374.

[66] *Supra* note 2 at 376.

with the broad wording of their enabling legislation and the generous and liberal reasoning of the *O'Malley* decision.[67]

The point is not that statutory human rights frameworks offer an inferior means of resolving claims, but rather, that they provide a "contextually different" arena through which to achieve broad principles of justice.[68] With respect to statutory justifications and exemptions, Canadian courts consistently highlight the need to construe these limitations narrowly. A finding of no discrimination is limited to either the claimant's failure to prove a prima facie case or to the respondent's successful reliance on one of the listed defenses. Should an adjudicator be tempted to require "evidence of impairment to dignity" on the subjective-objective evidentiary standard, there would be a resulting elevation in the burden on the claimant.[69] This increased onus would be "tantamount to creating a justification which is not articulated in either the statute or the *Meiorin* framework."[70]

E. THE *KAPP* ERA: NEW TESTS?

After the *Kapp*[71] and *Withler*[72] decisions from the Supreme Court of Canada there has been a retreat from the dignity analysis in *Law*[73] as well as the more formal comparator analysis. This raises the question whether the importing of *Charter* analysis into human rights adjudication still poses a problem for claimants. One could argue that the strains imposed by *Law* on the marriage between human rights codes and section 15 of the *Charter* have been removed and the Supreme Court has signaled a return to the happier days of the *Andrews*[74] analysis. However, such a conclusion is premature. The *Kapp* case calls for a demonstration that the state by its actions or omissions is promoting either stereotyping or disadvantage.

> [*L*]*aw* does not impose a new and distinctive test for discrimination, but rather affirms the approach to substantive equality under s. 15 set out in *Andrews* and developed in numerous subsequent decisions. The factors cited in *Law* should not be read literally as if they were legislative dispositions, but as a way of focusing on the central concern of s. 15

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[67] *Supra* note 2.

[68] *Supra* note 2 at 374.

[69] *Supra* note 2 at 391.

[70] *Supra* note 2 at 392. See also *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (BCGSEU) (Meiorin Grievance)*, [1999] 3 SCR 3, SCJ No 46.

[71] *Supra* note 28.

[72] *Supra* note 63.

[73] *Supra* note 27.

[74] *Supra* note 1.

> identified in *Andrews* -- combatting discrimination, defined in terms of perpetuating disadvantage and stereotyping.[75]

Furthermore, both *Kapp* and *Withler* apply the four contextual factors from *Law*, albeit in a different way and not under the umbrella of dignity. Thus the *Charter* test still imposes a higher burden on the human rights claimant than the *O'Malley* one of the prima facie case.

In an excellent special issue of the *Journal of Law and Equality* in 2012, many of Canada's top equality experts explore the post *Kapp* situation in the context of the important *Tranchemontagne* case. The general conclusion appears to be that the problem of importing *Charter* analysis into human rights adjudication has been reduced, but is still present. Strains and challenges to the marriage of the *Charter* and human rights codes still exist.

> In *Tranchemontagne*, the Court of Appeal for Ontario furthered the conflation of HR jurisprudence and the Charter by deciding that discrimination should have the same meaning in the Ontario *Human Rights Code* as the *Charter*. In particular, in both realms a person claiming discrimination must now demonstrate a distinction based on a prohibited ground that creates a disadvantage by perpetuating prejudice or stereotyping.
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> The apparent appeal of uniformity can be misleading in this context. Rather than improve the law, uniformity here smooths away important distinctions, with significant implications for those who seek meaningful enforcement of their human rights.[76]

Denise Reaume emphasizes that the cases following *Kapp* have clearly placed upon the claimant in a section 15 *Charter* case the burden of proving stereotyping or disadvantage.[77]

> The most recent decisions of the Supreme Court seem to make stereotyping crucial to the establishment of a section 15 violation, placing the burden on the claimant to prove stereotyping rather than requiring the government to disprove it.
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> …

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[75] *Supra* note 28 at para 24.

[76] *Supra* note 12 at 5-6.

[77] *Supra* note 13. In this regard, Reaume cites the following cases to support that claim: *Ermineskin Indian Band and Nation v Canada*, [2009] 1 SCR 222 at para 190; *Alberta v Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567 at para 108; *Withler v Canada (Attorney General)*, [2011] 1 SCR 396 at para 34; *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37 at para 39.

> Making stereotyping effectively part of the definition of discrimination under section 15 places the burden on the claimant to prove that the legislation does indulge in stereotyping, whereas under the conventional approach to human rights adjudication under the codes, the burden falls on respondents to prove that their generalizations are accurate.[78]

Denise Reaume summarizes the issues well. From the beginning of the *Charter* era, there has been borrowing back and forth in the human rights code and section 15 jurisprudence, such as when the Supreme Court of Canada adopted the conclusion from human rights code jurisprudence that adverse effect discrimination counts as discrimination and incorporated that concept into the *Charter* jurisprudence. Thus an action with an unintended discriminatory effect is an equality violation as much as an action that intentionally discriminates. The two bodies of jurisprudence have developed along parallel tracks. It may be that the codes and the *Charter* are directed at the same problem, but the result of recent developments is to produce a different conception of discrimination under the *Charter* than has been operational under the codes. The difference matters because the "former conception of discrimination is potentially wider in scope".[79] Denise Reaume and others argue that the tests for the codes should be protected from *Charter* encroachment. Traditionally, the burden to make out a prima facie case has been relatively light, one that is largely factual rather than normative.[80] As will be discussed later in this article, the effect of conflating the Charter and human rights codes tests may be to make both routes to equality less accessible to needy claimants.

Denise Reaume encapsulates the situation in the following way:

> To summarize, there are two significant differences between the Charter test and the conventional code analysis: a difference in onus of proof and a difference in conception of discrimination. Imposing greater proof requirements under the codes makes it that much harder for vulnerable claimants to get an argument off the ground. More importantly, the Charter conception of equality seems bound up with finding stereotype.[81]

IV. COMPARATOR GROUPS IN THE HUMAN RIGHTS CONTEXT

Another important way in which the section 15 *Charter* jurisprudence has limited the broad and flexible interpretation of human rights codes is with respect to comparator

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[78] *Supra* note 13 at 81 and 82 respectively.

[79] *Supra* note 13 at 69.

[80] *Supra* note 13 at 70.

[81] *Supra* note 13 at 87.

groups. As the post *Law*[82] *Charter* cases evolved, it became increasingly clear that an equality claim was often won or lost at the stage of selecting the appropriate comparator group. As early as *Andrews*, the Supreme Court recognized that equality is a comparative concept.[83] However, the comparator analysis became increasingly rigid and formalized, as represented in *Hodge v Canada*[84] and *Auton v British Columbia*.[85] It is thus not surprising that many academics were concerned about the importation of this comparator analysis into the human rights code jurisprudence.

A. ACADEMIC CONCERN ABOUT COMPARATORS

Andrea Wright was one of the early academic commentators to recognize the limiting effect of importing the *Charter* comparator analysis into statutory discrimination cases. She decries the growing trend of human rights tribunals relying on and often misusing comparator group analysis in the statutory context. She even questions the general assumption in section 15 *Charter* cases that equality is necessarily comparative. Referring to *Charter* comparator analyses she states:

> These formulas cause claimants to thread their discrimination experiences through templates that are ill-fitting and rigid, and that often operate like formal-equality analyses. The result is often the de-contextualization of the complaint and the denial of substantive equality.[86]

In another article, Daphne Gilbert and Diana Majury echo the concern raised above. Their article examines the role of comparator groups. The authors' position is that a comparator group approach impedes the equality analysis when it is imposed as a requirement and when it is used as a test the claimant has to meet, rather than as one of a number of potential analytic tools. They also go on to argue that to focus exclusively on a single, narrow comparison and to treat that comparison as determinative of the claim substitutes oversimplification for complexity. It can also sidestep much of the section 15 *Charter* jurisprudence and in so doing divest equality of much of its meaning.[87]

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[82] *Supra* note 27.

[83] *Supra* note 1 at para 26.

[84] *Hodge v Canada (Minister of Human Resources Development)*, 2004 SCC 65, 3 SCR 357.

[85] *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78, 3 SCR 657.

[86] Andrea Wright, "Formulaic Comparisons; Stopping the Charter at the Statutory Human Rights Gate" in Fay Faraday, Margaret Denike, and M Kate Stephenson (eds) *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) at 409.

[87] Daphne Gilbert & Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dooms Section 15" (2006) 24 Windsor YB Access Just 111.

In a later article Diana Majury is even more pessimistic about expanding section 15 *Charter* analysis into the human rights code context. She asserts that the gap between the Supreme Court of Canada analysis of equality and that preferred by feminists and other equality advocates is growing. She states:

> The fact that equality is the language enshrined in s.15 of the *Charter* supports a pragmatic argument for persisting with trying to make the language of equality meaningful and effective for those marginalized and oppressed people who continue to experience multitudes of inequalities in their daily lives and for persisting in trying to craft equality analyses that expose and offer ways out of systemic inequality.[88]

In both the *Kapp*[89] case and even more specifically in *Withler v Canada (AG)*[90], the Supreme Court of Canada acknowledged many of the academic critics and signalled a retreat from the rigid comparator analysis that evolved out of the *Law* case. The Court did not abandon the assertion articulated in *Andrews*[91] that equality is a comparative concept, but it did call for a more flexible and less structured application of the comparator group analysis. The Court also left open the possibility that comparators are not always needed.

Nonetheless, as late as 2011 some academics were still expressing concern about the comparator analysis generally.[92] Nathan Irving, in a report for the Council of Canadians with Disabilities, echoes these concerns and suggests that the most glaring illustration of the *Charter*'s comparator analysis infecting human rights code jurisprudence is illustrated in the lower court decisions in *Moore*.[93]

B. THE *MOORE* CASE

Indeed, the comparator problem is directly confronted in the *Moore v British Columbia*[94] case. This compelling case involved a claim that Jeffrey Moore, who has severe dyslexia, was denied equal access to education in the British Columbia

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[88] Diana Majury, "Equality Kapped: Media Unleashed" (2009) 27 Windsor YB Access Just 1 at 7.

[89] *Supra* note 28.

[90] *Supra* note 63.

[91] *Supra* note 1.

[92] Hart Schwartz, "Making Sense of Section 15 of the Charter" (2011) 29 NJCL 201. He lamented the focus of section 15 *Charter* cases on comparator goups as turning the jurisprudence into an arcane and tedious game.

[93] Nathan Irving, "An Overview of the Comparator Group Analysis in Human Rights Jurisprudence" (6 September 2009): Council of Canadians with Disabilities <http://www.ccdonline.ca/en/socialpolicy/poverty-citizenship/legal-protections/human-rights-jurisprudence-group-analysis>.

[94] *Moore*, *supra* note 9.

education system. His father argued on his behalf that significant cuts to the services offered to learning disabled students, including this son, were discriminatory and resulted in a denial of equal access to an appropriate education. During the long process of litigation, starting with a human rights complaint in 1997 and culminating in a Supreme Court of Canada victory on November 9, 2012, Jeffrey Moore pursued his education in a private school.

Both the reviewing Divisional Court in *Moore* and Mr. Justice Low speaking for the majority of the British Columbia Court of Appeal defined the relevant service as "special education."[95] The definition of the service and the use of comparators were the central issues in *Moore*.

In *Eaton v Brant Co.*[96] special education was regarded as the reasonable accommodation necessary to give disabled children valuable access to the larger public education. In contrast to this case, *Wynberg v Ontario (Education)*[97] defined the claim on behalf of autistic children as a claim to special education. Thus, the proper comparator group(s) was other categories of disabled students. On the basis of this analysis the claim in *Wynberg* was defeated.

As we were completing this article the Supreme Court of Canada rendered its landmark decision in *Moore*.[98] In an expansive and compelling decision Justice Abella agrees with the original human rights tribunal decision that Jeffrey Moore was discriminated against by the relevant school board.[99] The core of her decision was the broad definition of the relevant "services" under the human rights code, as a meaningful access to education and not just to a sub category of "special education." Justice Abella states as follows:

> The preamble to the *School Act*,[1] the operative legislation when Jeffrey was in school, stated that "the purpose of the British Columbia school system is to enable all learners to develop their individual potential and to acquire the knowledge, skills and attitudes needed to contribute to a healthy, democratic and pluralistic society and a prosperous and sustainable economy". This declaration of purpose is an acknowledgment by the government that the reason all children are entitled to an education, is because a healthy democracy and economy require their educated

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[95] *British Columbia (Ministry of Education) v Moore*, 2008 BCSC 264, 81 BCLR (4th) 107; *Supra* note 21 at para 168.

[96] *Eaton v Brant County Board of Education*, [1997] 1 SCR 241.

[97] *Wynberg v Ontario*, [2006], OJ No 2732, 269 DLR (4th) 435. The Ontario Court of Appeal relied upon the earlier decision of *Auton*, *supra* note 85.

[98] *Moore*, *supra* note 9.

[99] The Court did not agree with the tribunal's broad award of systemic remedies against the provincial Department of Education but rather laid the blame on the school board.

> contribution. Adequate special education, therefore, is not a dispensable luxury. For those with severe learning disabilities, it is the ramp that provides access to the statutory commitment to education made to *all* children in British Columbia.[100]

In reaching this conclusion Justice Abella is in agreement with the dissenting approach of Justice Rowles in the British Columbia Court of Appeal, as is clearly articulated in the following passages from the Supreme Court decision.

> In dissent, Rowles J.A. would have allowed the appeal. In her view, special education was the means by which "meaningful access" to educational services was achievable by students with learning disabilities. She found that a comparator analysis was both unnecessary and inappropriate. The Tribunal's detailed evidentiary analysis showing that Jeffrey had not received sufficiently intensive remediation after the closing of the Diagnostic Centre, justified the findings of discrimination.[101]
> . . .
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> A central issue throughout these proceedings was what the relevant "service . . . customarily available to the public" was. While the Tribunal and the dissenting judge in the Court of Appeal defined it as "general" education, the reviewing judge and the majority defined it as "special" education.
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> I agree with Rowles J.A. that for students with learning disabilities like Jeffrey's, special education is not the service, it is the *means* by which those students get meaningful access to the general education services available to all of British Columbia's students:
>
> > It is accepted that students with disabilities require accommodation of their differences in order to benefit from educational services. Jeffrey is seeking accommodation, in the form of special education through intensive remediation, to enable him equal access to the "mainstream" benefit of education available to all. … *In Jeffrey's case, the specific accommodation sought is analogous to the interpreters in* Eldridge: *it is not an extra "ancillary" service, but rather the manner by which meaningful access to the provided benefit can be achieved*. Without such special education, the disabled simply cannot receive equal benefit from the underlying service of public education. [Emphasis added; para. 103.][102]

In these critical passages, the Supreme Court of Canada established two important principles. First, that a comparator analysis may be unnecessary and even inappropriate in some circumstances. It will be interesting to see if this observation

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[100] *Moore, supra* note 9 at para 5.

[101] *Ibid* at para 25.

[102] *Ibid* at paras 27-28.

will be extended to the section 15 *Charter* analysis, as well as the human rights code context (the applicable one in *Moore*). Second, it agrees with Justice Rowles of the British Columbia Court of Appeal, that special education is the means by which disabled students can gain meaningful access to a general education, and is not itself the relevant "service" under the human rights code. The implications of this is that the adequacy of the special education services are more appropriately considered as a matter of reasonable accommodation at the justification stage of the human rights analysis. Broadly defining the services covered by human rights codes also promotes a broad and purposive interpretation of equality.

The retreat by the Supreme Court of Canada from the formalism of the comparator group analysis is made even more explicit in the following passage, as is the link to the section 15 *Charter* re-evaluation of comparators in *Withler*. This suggests that much of the logic in *Moore* would be equally applicable in a section 15 *Charter* context.

> To define 'special education' as the service at issue also risks descending into the kind of "separate but equal" approach which was majestically discarded in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). Comparing Jeffrey only with other special needs students would mean that the District could cut *all* special needs programs and yet be immune from a claim of discrimination. It is not a question of who else is or is not experiencing similar barriers. This formalism was one of the potential dangers of comparator groups identified in *Withler v. Canada (Attorney General)*, 2011 SCC 12 (CanLII), [2011] 1 S.C.R. 396.[103]

Instead of the problematic analysis above that the Supreme Court rejected, Justice Abella asserts that the core question is whether Jeffrey Moore and other disabled students, were given "meaningful access" to the general education services available in the province. In support of this proposition she cites various sources.[104] The possible impact of this expansive Supreme Court ruling is that human rights code jurisprudence may lead the way to more expansive rulings in respect to section 15 *Charter* cases as well. We will return to this mutually enriching aspect of the marriage between human rights codes and the *Charter* in the final section of this article.

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[103] *Ibid* at para 30.

[104] *Ibid* at para 34, where she references the following sources - *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624, at para 71; *University of British Columbia v. Berg*, [1993] 3 SCR 353, at 381-82. (See also *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, [2000] 1 SCR 665, at para 80; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 SCR 650, at paras 121 and 162; A. Wayne MacKay, "Connecting Care and Challenge: Tapping Our Human Potential" (2008), 17 *Educ & LJ* 37, at 38 and 47.).

C. CHILD WELFARE SERVICES FOR FIRST NATIONS CHILDREN

How far courts will extend the *Moore* analysis even in the human rights code context remains to be seen. An interesting test case would be the challenge to child welfare services to on-reserve First Nations students as exemplified in *Canada (Human Rights Commission) v Canada (AG)*.[105] The factual context for this case was the considerably lower level of child welfare services provided to First Nations' children living on a reserve in comparison to the child welfare services provided to children living off reserve. An added complication is that the federal government was the service provider for those on the reserve, while the various provinces were the relevant service provider for those living off the reserves. Thus the question of whether the child welfare services were a "service" within the meaning of section 5 of the *Canadian Human Rights Act*[106] was a complex one.

The case was referred to a tribunal by the Canadian Human Rights Commission. The tribunal's decision is succinctly summarized by the reviewing Federal Court Trial Division as follows:

> The Tribunal then considered whether two different service providers could be compared to each other in order to find adverse differentiation under subsection 5(b) of the Act. Specifically, the Tribunal asked itself whether it could compare the child welfare services provided by the Government of Canada to those provided by the provinces in order to determine whether the Government of Canada had committed a discriminatory practice in the provision of services.
>
> In concluding that such a comparison could not be made, the Tribunal held that subsection 5(b) required a comparison to be made to services provided to others by the same service provider. Given that the Government of Canada did not provide child welfare services to recipients other than First Nations children living on reserves, it followed that there could be no adverse differentiation in the provision of services under subsection 5(b) of the Act. As a result, the Tribunal dismissed the complaint.[107]

The reviewing Federal Court reversed the human rights tribunal decision. In fact, the Court concluded that the tribunal's decision was "unreasonable and flies in the face of the scheme and purposes of the Act, and leads to patently absurd results that could not have been intended by Parliament."[108] The Federal Court then addressed the proper role of comparator groups in a discrimination analysis in the following passages.

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[105] *Canada (Human Rights Commission) v Canada (Attorney General)* 2012 FC 445 (Trial Division).

[106] *Canadian Human Rights Act*, RSC 1985, c H-6.

[107] *Supra* note 105 at paras 106-107.

[108] *Supra* note 105 at para 251.

> While not a universally accepted proposition2, the Supreme Court of Canada has long held that equality is an inherently comparative concept, and that determining whether discrimination exists in a given case will often involve some form of comparison: *Law Society British Columbia v. Andrews*, [1989] 1 S.C.R. 143, [1989] S.C.J. No. 6 (QL) at para. 26.
>
> This does not mean, however, that there must be a formal comparator group in every case in order to establish discrimination under subsection 5(b) of the Act.
>
> The onus is on a complainant to establish a *prima facie* case of discrimination under the *Canadian Human Rights Act*. The test for establishing a *prima facie* case of discrimination is a flexible one, and does not necessarily contemplate a rigid comparator group analysis.[109]

In addition to the above reasons for reversing the decision of the human rights tribunal, the Federal Court referred to the dissenting reasons of Justice Rowles in the British Columbia Court of Appeal decision in *Moore*.[110] This is the reasoning that has now been upheld by the Supreme Court of Canada in *Moore* as well.[111] The Federal Court also rejects the "similarly situated" approach to equality, in line with earlier Supreme Court rulings on this point.[112] It also draws support from the general concern about comparators expressed by the Supreme Court of Canada.

> As was noted earlier, the use of comparator groups in the statutory human rights context has been imported from the section 15 Charter jurisprudence. However, the Supreme Court of Canada has recently expressed real concern with respect to the role of comparator groups in the evaluation of section 15 claims. As will be discussed in the next section of these reasons, the recent decision in *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396 lends further support for the view that the Tribunal's interpretation of subsection 5(b) of the Act is unreasonable.[113]

In general the Federal Court calls for flexibility rather than rigidity in interpreting human rights. It appears to be in line with the thinking of the Supreme Court of Canada as expressed in *Moore*.[114] At present the First Nations' Children's Services Case has been sent back to the human rights tribunal to hold a new hearing on the case. As this case winds its way through the legal process, it may provide an

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[109] *Supra* note 105 at paras 281-283.

[110] *Supra* note 105 at para 287.

[111] *Moore*, *supra* note 9.

[112] *Supra* note 105 at paras 294-295.

[113] *Supra* note 105 at para 315.

[114] *Moore*, *supra* note 9.

interesting test of how far the de-emphasizing of comparator analysis will go. It certainly appears that the comparator analysis threat to human rights interpretation has been substantially reduced, if not eliminated completely.

V. AMELIORATIVE PRACTICES AND PROGRAMS UNDER SECTION 15(2) OF THE CHARTER AND UNDER HUMAN RIGHTS CODES

A. THE DANGERS OF A TOUGH LOVE APPROACH

Tranchemontagne indirectly raises some section 15(2) kind of issues like *Kapp*[115] and *Cunningham*,[116] although the court of appeal does not reference these cases or section 15(2) itself. In *Tranchemontagne* the argument is that putting those addicted to alcohol under temporary welfare legislation[117] is better for them in the long term than putting them on the disability program. It is a "tough love" approach of putting the alcoholics on lower benefits and thereby getting them back into the workforce more quickly. In that regard, it is analogous to the *Gosselin v Quebec* case where putting the claimants on lower benefits was justified as a kind of equity (ameliorative) program. It is also important to note that in *Gosselin* these good intentions of the legislators' was a critical factor in allowing McLachlin for the majority, to conclude that there was no violation of section 15(1) at all. While this was done under the *Law* test much the same result could be reached using the *Kapp* analysis by trying to argue that this is a section 15(2) situation. In both cases there is no need to resort to section 1 of the *Charter* for justification.

This kind of analysis, whether in the *Gosselin* context or the one in *Tranchemontagne*, emphasizes that the *Kapp* section 15(2) approach allows the government to have an early opportunity to justify their actions or omissions. The government can do this on the bases of good purposes or intentions on their part and thereby make an early exit from the *Charter* equality analysis. As both *Kapp* and *Cunningham* reinforce, the rational link between the ameliorative purpose and the means adopted to pursue that purpose does not have to be strong. The beneficial effects of the ameliorative program are largely left to the legislative and executive branches of the state, as a matter of public policy. This emphasizes a deferential role for courts, at both the violation and justification stages of *Charter* analysis.

This is even more concerning in the *Charter* context after the court's decision in *Cunningham*.[118] In *Cunningham*, several members of the Peavine Métis

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[115] *Supra* note 28.

[116] *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37, 2 SCR 670.

[117] *Ontario Works Act*, 1997, SO 1997, c 25, Schedule A.

[118] *Supra* note 116.

Settlement challenged the constitutionality of certain provisions of Alberta's *Métis Settlements Act* (MSA).[119] Sections 75 and 90(1) of the MSA prevented membership in a Métis settlement community to individuals who had registered for status under the *Indian Act*.[120] The Court held that the purpose of the MSA was ameliorative, that being "to establish a Métis land base to preserve and enhance Métis identity, culture and self-government, as distinct from Indian identity, culture and modes of governance."[121] Significantly, the Court held that if the "government relies on s. 15(2) to defend the distinction, the analysis proceeds immediately to whether the distinction is saved by s. 15(2)".[122] This degree of deference is of particular concern given that the "ameliorative program" forced the claimants to select one "identity", and limited rather than expanded the rights of the individuals based on that sole identity. Arguments that section 15(2) should not allow an early exit from section 15 *Charter* analysis, if the effect was limiting rather than advancing minority rights, failed to convince the Supreme Court.

What remains to be seen is the extent to which section 15(2) considerations will be taken into account by commissions and tribunals in the course of deciding the merits of human rights claims. An interesting and as of yet unresolved issue, is whether the respondent in a human rights case would first have the opportunity to invoke the equity defence before being required to justify the alleged discriminatory practice as satisfying the criteria for reasonable accommodation. As noted above, in *Cunningham*, the Supreme Court of Canada held that an equality claim should proceed directly to an analysis of section 15(2) if government relies on the provision.[123] Interestingly, the language here appropriately focuses on the "government" as the actor – but what this means in terms of human rights claims is unclear. Absent the *Charter* context, if a respondent in a human rights case is relying on section 15(2), would the analysis also immediately move to whether the distinction is justified?

While the "tough love" explanation for putting alcoholics on short term welfare benefits, rather than the higher paying disability benefits, was not tied to importing either the *Gosselin* interpretation of *Law*, or the *Kapp* interpretation of section 15(2), it could have been. Thus in this section we raise a caution about possible future interpretations, whereby, section 15(2) analysis is imported into the interpretation of ameliorative / special statutory programs in human rights codes. One major danger of such an approach would be to focus the analysis on the purposes or intentions of the public or private services providers and to downplay the effects or effectiveness of such special programs under statutory human rights codes.

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[119] *Métis Settlements Act*, RSA 2000, c M-14.

[120] *Indian Act,* RSC, 1985, c I-5, s 6.

[121] *Supra* note 116 at para 69.

[122] *Supra* note 116 at para 44.

[123] *Supra* note 116 at para. 44.

B. PURPOSES VERSUS EFFECTS

The first source of concern in the possible misapplication of section 15(2) in the human rights context is that its' language suggests that the "legislative goal rather than actual effect" is the "paramount consideration in determining whether or not a program qualifies for section 15(2) protection."[124] Granted, there is no reason to blindly or "slavishly accept the government's characterization of its purpose."[125] There is nothing to prevent judges from critically examining the relevant legislation to "ensure that the declared purpose is genuine."[126] In this way, "a bald declaration by government that it has adopted a program" which has as its object the amelioration of conditions of disadvantage "does not ipso facto meet the requirements to sanctify the program under section 15(2) of the *Charter*. The government cannot employ such a naked declaration as a shield to protect an activity or program which is unnecessarily discriminatory."[127]

However, despite this well-intentioned and cautious judicial approach outlined in *Kapp*, there is an inherent and undeniable danger in adopting a mentality that seeks to privilege purpose above effect. Commissions may be well positioned to identify the gravest of injustices, but may have little recourse when private employers' conduct is somewhat suspect but sufficiently protected by a plausibly positive and ameliorative purpose. The mere fact that courts will refuse to allow governments to hide behind smokescreens in order to "protect discriminatory programs on colourable pretexts"[128] does little to calm fears about the ability of employers to operate as they please within a wide range of tolerable conduct.

C. RATIONAL CONNECTION

Courts are encouraged to look for a nexus or correlation between the "program and the disadvantage suffered by the target group."[129] This would suggest that there is at least some basis for judicial intervention and some opportunity for judicial remedies to respond to discriminatory treatment. However, the Court in *Kapp* insisted on preserving an "intent-based analysis"[130] and explicitly sought to avoid turning any

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[124] *Supra* note 28 at para 44.

[125] *Supra* note 28 at para 46.

[126] *Supra* note 28 at para. 46.

[127] *Apsit Manitoba Rice Farmers Association v. Human Rights Commission (Man.)*, [1987] 50 Man R (2d) 92 (QB) at para 51.

[128] *Supra* note 28 at para 54.

[129] *Supra* note 28 at para 49.

[130] *Supra* note 28.

analysis of the "means employed by the government" into an assessment of the program's effects. This would seem to limit in scope any meaningful review of the respondent's conduct. Respondents are afforded a great measure of flexibility and discretion in deciding how to structure their programs.

The mere demonstration of a rational connection between the impugned program and a section 15(2) object renders unnecessary much if any, "attention to the position of the rights claimant" and wholly negates any "insistence on proportionality of government action."[131] There is no means of evaluating alleged affirmative action programs in the absence of "structured balancing."[132]

In *Tranchemontagne*, there was a distinction drawn between persons suffering from substance dependence and those afflicted with more traditionally accepted forms of disability. This distinction was seen as "necessary" and appropriate to create a program which provides financial assistance only to those disabled persons "sharing key features such that they may be grouped together" under the governing legislation.[133] These features are said to be "related to the program's purpose."[134] By "expressly referencing the eligibility restrictions in its legislated objective, the statute effectually circumscribes the scope of the benefit it intends to confer on persons identified as experiencing specific disadvantage and needing specific support."[135]

The distinction in *Tranchemontagne* was supported by the government on the general, vague, and largely subjective grounds that the governmental program caters to the specific needs, capacities, and circumstances of the targeted group. On this analysis an employer would be free to design an (un)intentionally discriminatory workplace scheme drawn along equally arbitrary lines.[136] A rational connection is a dangerously low standard for an employer to meet. Inasmuch as the government is presumed to act in the best interests of society, or is at least expected to operate with a broader public purpose in mind, the same cannot be said of private employers, who are more likely to be motivated by profit margins or bottom line considerations. In this sense, employers are arguably more likely to stretch, manipulate, and exploit what could be considered a rational connection.

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[131] Jess Eisen, "Rethinking Affirmative Action Analysis in the Wake of Kapp: A Limitations-Interpretation Approach" (2008) 6:1 JL & Equality 1.

[132] *Ibid.*

[133] Daniel Del Gobbo and Stephanie DiGiuseppe, "Transposing Tranchemontagne into the Charter Context: S. 15(2)" *The Court* (23 March 2010), online: The Court <http://www.thecourt.ca/>.

[134] *Ibid*.

[135] *Ibid*.

[136] *Ibid*.

D. AMELIORATIVE OBJECT

Further, the *Kapp* test does not require that the ameliorative object be the sole object. Rather, it must simply be "one of several."[137] The Court reasons that it is unlikely that a "single purpose will motivate any particular program."[138] This is because "any number of goals are likely to be subsumed within a single scheme."[139] According to this logic, programs should not be prematurely denied section 15(2) protection on the grounds that they contain other, possibly competing, objectives.

While it is true that a "purpose-based approach" best positions state actors to do "whatever they wish" in eliminating discrimination, it does not automatically follow that such an approach allows the government to most effectively tackle discrimination.[140] If a "well-intentioned program nevertheless has discriminatory effects, then intervention from a court which required the government to redesign the program would seem to help the government achieve its goal of combating discrimination, rather than to hinder it."[141] The exclusive focus on the government's intended purpose rather than the program's actual effects means that disadvantaged groups are without recourse "where a program has an ameliorative purpose but is under-inclusive" or where the program indirectly stigmatizes or harms some other disadvantaged group.[142]

The need for a section 15(1) analysis is easily avoided so long as the respondent can meet the low bar of showing the program has an ameliorative purpose and targets a disadvantaged group.[143] Once this minimal requirement is satisfied, there is no consideration of whether the program is "appropriately inclusive" or whether it has "deleterious effects" on other vulnerable members of society.[144] Yet a program can be simultaneously ameliorative in purpose and harmful in its effect.[145]

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[137] *Supra* note 28 at para 50.

[138] *Supra* note 28 at para 51.

[139] *Supra* note 28 at para. 51.

[140] Sophia Moreau, "R v Kapp: New Directions for Section 15" (2008-2009) 40 Ottawa L Rev 283 at 295.

[141] *Ibid*.

[142] *Ibid*.

[143] *Ibid*.

[144] *Ibid* at 296.

[145] *Ibid*.

Kapp offers a clear example of a judicial body invoking a respondent's "affirmative action argument" under the section 15(2) umbrella, for the purposes of bypassing the "rest of the s. 15(1) process."[146] The test to meet to escape a "reversion" to a section 15 review is "unnervingly low."[147] The focus on the purposes of the program means that "sincerity" and "plausibility" become the relevant standards, with the effect that "significant deference" is consciously afforded to the legislature.[148] Such a deferential attitude demands little in the way of governmental justification or judicial review.[149]

In both a *Charter* and a human rights code context, the more sincere or plausible the justification, the more likely it is that employers can hide behind a policy that has adverse consequences for members of its workforce. The employer can rely on the fact that it is best positioned to respond to problems at its workplace – that its oversight of the daily operations, its knowledge of the everyday problems which arise make it uniquely capable of promoting fairness at its facilities. This argument becomes all the more convincing and all the more attractive to administrative bodies when sincerity and plausibility are relied on as primary screening factors.

E. AMELIORATIVE/SPECIAL PROGRAMS

In *Cunningham*, Chief Justice McLachlin states that the goal of section 15 is to "enhance substantive equality."[150] She explains that this is achieved in two ways. First, section 15(1) "is aimed at *preventing* discrimination."[151] Second, section 15(2) is "aimed at permitting governments to *improve* the situation of members of disadvantaged groups that have suffered discrimination in the past, in order to enhance substantive equality."[152] Importantly, the Court states that section 15(2) accomplishes this by:

> [A]ffirming the validity of ameliorative programs that target particular disadvantaged groups, which might otherwise run afoul of s. 15(1) by excluding other groups. It is unavoidable that ameliorative programs, in seeking to help one group, necessarily exclude others.
>
> The purpose of s. 15(2) is to save ameliorative programs from the charge of "reverse discrimination". Ameliorative programs function by targeting

[146] *Supra* note 88 at 10.

[147] *Supra* note 88 at 11.

[148] *Supra* note 88.

[149] *Supra* note 88.

[150] *Supra* note 116 at para 38.

[151] *Supra* note 116 at para 39.

[152] *Supra* note 116 at para 40.

> specific disadvantaged groups for benefits, while excluding others. At the time the *Charter* was being drafted, affirmative action programs were being challenged in the United States as discriminatory — a phenomenon sometimes called reverse discrimination. The underlying rationale of s. 15(2) is that governments should be permitted to target subsets of disadvantaged people on the basis of personal characteristics, while excluding others. It recognizes that governments may have particular goals related to advancing or improving the situation of particular subsets of groups. Section 15(2)affirms that governments may not be able to help all members of a disadvantaged group at the same time, and should be permitted to set priorities. If governments are obliged to benefit all disadvantaged people (or all subsets of disadvantaged people) equally, they may be precluded from using targeted programs to achieve specific goals relating to specific groups. The cost of identical treatment for all would be loss of real opportunities to lessen disadvantage and prejudice.[153]

Importantly, both the *Charter* and a variety of human rights codes have in place provisions that allow for affirmative action or "special programs." Both section 15(2) and these special program provisions in human rights codes recognize the "importance of dealing with historical disadvantage by protecting special programs to assist marginalized groups."[154]

Some of the special programs provisions in human rights codes across Canada seem to align more with the *Charter* approach to focus on the purposes of the ameliorative program as opposed to the practical effects. For example, the *Nova Scotia Human Rights Act* special program provisions states:

> 6 Subsection (1) of Section 5 does not apply
> (i) to preclude a law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or classes of individuals including those who are disadvantaged because of a characteristic referred to in clauses (h) to (v) of subsection (1) of Section 5.[155] (emphasis added)

Alternatively, other human rights codes do not use the language of "has as its object", but utilize potentially broader language that could be interpreted to implicate more effects or impact-based analyses. The Ontario *Human Rights Code* states:

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[153] *Supra* note 116 at para 40-41.

[154] Ontario Human Rights Commission, "Special Programs and the Ontario Human Rights Code: A Self-Help Guide", *OHRC* (11 November 2012), online: Ontario Human Rights Commission < http://www.ohrc.on.ca>

[155] *Supra* note 22 at s 6(i).

> 14. (1) A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.[156] (emphasis added)

Further, the *Canadian Human Rights Act* also defines special programs as:

> 16. (1) It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be based on or related to the prohibited grounds of discrimination, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.[157] (emphasis added)

Special programs in human rights codes are protected in order to "protect affirmative action programs from challenge by people who do not experience disadvantage" and to "promote substantive equality, to address disadvantage and discrimination in all its forms."[158] While the current trend in section 15 jurisprudence, as exemplified by *Kapp* and *Cunningham*, is to afford significant deference to the legislature, it remains to be seen whether or not this approach will transfer over to the human rights context. It is our view that the *Charter* approach to section 15(2) should not be imported into the analysis of special programs in a human rights code context. As with the section 15(1) analysis discussed earlier, there can be some useful overlap and cross fertilization but the *Charter* and human rights code structures should be kept separate. The different constitutional and statutory contexts justify maintaining separate and distinct approaches. Merging the two would likely result in a limitation on the potential scope of statutory human rights jurisprudence.

VI. JUSTIFICATIONS FOR DISCRIMINATION: SECTION 1 OF THE CHARTER AND BONA FIDE JUSTIFICATIONS

The differences between a section 15 *Charter* challenge and one arising under a human rights code do not end at the violation stage discussed earlier. In some ways the differences are even more pronounced and the second stage of justification. In *Meiorin,*[159] Chief Justice McLachlin eliminated the distinction between direct and

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[156] *Human Rights Code*, RSO 1990, c H 19, s 14(1).

[157] *Supra* note 106 at s 16(1).

[158] *Supra* note 154.

[159] [*British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (BCGSEU) (Meiorin Grievance)*, [1999] 3 SCR 3 at para 25, SCJ No 46.

indirect discrimination (adverse effects) by making reasonable accommodation a vital aspect of a bona fide justification. In doing so (on behalf of the Supreme Court), she cited as one of the reasons an unsatisfactory "dissonance" between *Charter* and human rights jurisprudence. As Justice Rowles points out in *British Columbia v Moore*[160] even the desire to produce a greater unity between *Charter* and human rights jurisprudence, did not lead the Supreme Court to import the *Law* standard into the violation stages in *Meiorin* or *Grismer*. Furthermore, there was no suggestion that the approach to a section 1 *Charter* analysis should be imported into the human rights context.

A. MEIORIN/GRISMER ANALYSIS

The *Meiorin/Grismer* test as the appropriate approach to justifying discrimination complaints in a human rights code context has been reinforced consistently in the cases. *Coast Mountain Bus Co. v National Automobile, Aerospace, Transportation and General Workers of Canada (CAW- Canada), Local 111*[161] confirms *Meiorin/Grismer* as the correct approach, with a possible modification of the third step, commenting as follows:

> The adjudicator in the present case did not make the error made by the Quebec Court of Appeal in *Hydro-Québec*. She did not say the Employer was required to demonstrate it was impossible to accommodate employees with disabilities. Rather, she stated that the issue was whether the Employer had demonstrated it was impossible to accommodate them without experiencing undue hardship. Hence, the adjudicator was not incorrect in her formulation of the legal test, and the chambers judge erred in finding her to have been incorrect.[162]

In the hot off the press decision in *Moore v British Columbia*, Justice Abella, for a unanimous Supreme Court of Canada, reaffirms that *Meiorin/Grismer* provide the relevant test for justifying complaints of discrimination. Any reference to parallels with section 1 *Charter* analysis is absent. Having found that the School Board District had violated Jeffrey Moore's rights under the human rights code, Justice Abella makes the following observations about the approach to justifications under the statute.

This same approach was also applied in the services context in *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 ["Grismer"].

[160] *Supra* note 21 at paras 46-48.

[161] 2010 BCCA 447.

[162] *Ibid.* at para. 90. The Québec Court of Appeal was reveresed in *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ),* [2008] 2 SCR 561, 2008 SCC 43.

> The next question is whether the District's conduct was justified. At this stage in the analysis, it must be shown that alternative approaches were investigated *(British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*"), at para. 65). The prima facie discriminatory conduct must also be "reasonably necessary" in order to accomplish a broader goal *(Ontario Human Rights Commission v. Borough of Etobicoke*, [1982] 1 S.C.R. 202, at p. 208; *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, at p. 984). In other words, an employer or service provider must show "that it could not have done anything else reasonable or practical to avoid the negative impact on the individual" (*Meiorin*, at para. 38; *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489, at pp. 518-19; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, at para. 130).[163]

Justice Abella in *Moore* did comment upon the unifying approach of the *Meiorin* analysis and the fact that it allowed not just for accommodations within the set standard, but also for a broader evaluation of the standard itself at a broader systemic level.

> … But in *Meiorin*, McLachlin J. observed that since few rules are framed in directly discriminatory terms, the human rights issue will generally be whether the claimant has suffered adverse effects. Insightfully, she commented that upholding a remedial distinction between direct and adverse effect discrimination "may, in practice, serve to legitimize systemic discrimination" (para. 39). The *Meiorin*/*Grismer* approach imposed a unified remedial theory with two aspects: the removal of arbitrary barriers to participation by a group, and the requirement to take positive steps to remedy the adverse impact of neutral practices.
>
> *Meiorin* and *Grismer* also directed that practices that are neutral on their face but have an unjustifiable adverse impact based on prohibited grounds will be subject to a requirement to "accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them" (*Grismer*, at para. 19).[164]

B. PARALLELS BETWEEN REASONABLE ACCOMMODATION AND SECTION 1 *CHARTER* ANALYSIS

While the problems of importing the limiting section 1 *Charter* analysis into the justification stage of human rights code analysis has generally not emerged, there were some early hints that it might. These came in the form of some observations of

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[163] *Moore*, *supra* note 9 at para 49.

[164] *Ibid* at paras 61-62.

Justice Laforest in *Eldridge v British Columbia (Attorney General)* in the form of the following two passages.

> It is also a cornerstone of human rights jurisprudence, of course, that the duty to take positive action to ensure that members of a disadvantaged groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation… In my view, in s. 15(1) cases this principle is best addressed as a component of the s. 1 analysis. Reasonable accommodation, in this context, is generally equivalent to the concept of "reasonable limits". It should not be employed to restrict the ambit of s. 15(1).
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> …
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> In summary, I am of the view that the failure to fund sign language interpretation is not a "minimal impairment" of the s. 15(1) rights of deaf persons to equal benefit of the law without discrimination on the basis of their physical disability… Stated differently, the government has not made a "reasonable accommodation" of the appellants' disability. In the language of this Courts' human rights jurisprudence, it has not accommodated the appellants' needs to the point of "undue hardships"; see *Simpsons-Sears, supra,* and *Central Alberta Diary Pool, supra*.[165]

While Justice La Forest was in no way suggesting that the section 1 *Charter* analysis and the duty of reasonable accommodation under human rights codes were always a similar process, he did feel that they in part converged in that particular case. If there was any doubt about the Supreme Court of Canada's position on the convergence of the *Charter* and human rights code justification systems, it was clarified by Chief Justice McLachlin in *Alberta v Hutterian Brethren of Wilson County*.

> The broader societal context in which the law operates must inform the s. 1 justification analysis. A law's constitutionality under s. 1 of the *Charter* is determined, not by whether it is responsive to the unique needs of every individual claimant, but rather by whether its infringement of *Charter* rights is directed at an important objective and is proportionate in its overall impact… The question the court must answer is whether the *Charter* infringement is justifiable in a free and democratic society, not whether a more advantageous arrangement for a particular claimant could be envisioned.[166]

This contrast between the focus on the individual parties in a human rights complaint and the broader social and societal nature of a *Charter* complaint was also raised in the earlier case of *Multani v Commission Scolaire Marguerite-Bourgeoys* where Justices Abella and Deschamps explain as follows.

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[165] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624 at paras 79 and 94 respectively.

[166] *Alberta v Hutterian Brethren of Wilson Country*, [2009] 2 SCR 567 at para. 69.

> The process required by the duty of reasonable accommodation takes into account the specific details of the circumstances of the parties and allows for dialogue between them. This dialogue enables them to reconcile their positions and find common ground tailored to their own needs. [para. 131][167]

The differences between the process under a section 15 *Charter* analysis and a discrimination complaint under a human rights code were also recognized in *Ontario v Tranchemontagne* in the following paragraphs.

> However, fundamental differences exist between the *Charter* and the Code, including differences in: the nature of the legislation (constitutional versus quasi-constitutional); the scope of the guarantees provided (the *Charter* contains a broad equality guarantee while the Code creates a limited right to be free of discrimination in prescribed areas); the circumstances in which the guarantees will apply (the *Charter* is restricted to government conduct while the Code applies to both private and public actors); and, finally, the specific exemptions or defences that are available (s. 15 of the *Charter* contains an absolute prohibition against discrimination but s. 1 of the *Charter* provides a limited defence of justification, while the Code prohibits discrimination absolutely but also contains some absolute exemptions and defences): see *Andrews* at pp. 175-176.
>
> Because of these differences, the precise nature of the evidence to be led and the stringency of the test to be applied to establish discrimination may vary and ultimately will depend significantly on the context. …
>
> I find support for my conclusion about the meaning of discrimination in the human rights context in the concurring reasons of Abella J. in *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*, [2007] 1 SCR 161.[168]

C. DEFERENCE IS CRITICAL

The balancing processes involved in justifying both violations of section 15 of the *Charter* and discrimination under human rights codes have similarities. However the critical difference is the degree of deference (or margin of appreciation) that should be shown to the rights violator. The need for a considerable degree of deference in the section 15 *Charter* context is well established and the following passage from *Wynberg v Ontario* makes this point clearly.

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[167] *Multani v Commission Scolaire Marguerite-Bourgeoys,* 2006 SCC 6, [2006] 1 SCR 256.

[168] *Ontario (Disability Support Program) v Tranchemontagne*, 2010 ONCA 593, at paras 88, 89 and 92 respectively.

> The Supreme Court of Canada has held repeatedly that where the government has made a difficult policy choice regarding the claims of competing groups, or the evaluation of complex and conflictng research, or the distribution of public resources, or the promulgation of solutions which concurrently balance benefits and costs for many different parties, then the proper course of judicial conduct is deference.[169]

The issue of deference is not as clear in a human rights code context. First, the codes apply to both private and public respondents, unlike the *Charter*, which only applies to the public sector. The case for deferring to the private economic decisions of an employer or private service provider is not clear. Second, even in the public sector, the legislation which creates the human rights structure has built in balances between the claimants and the respondents and if either party is not happy with the balance they can lobby through the political process to get an amendment. The *Charter* is entrenched and any changes require a much more difficult constitutional amendment process.

That does not mean that deference has no relevance in a human rights process. This is demonstrated to some extent, in the Supreme Court of Canada decision in *Moore v British Columbia*[170], when Justice Abella addresses the issues of justification in the human rights code context.

> More significantly, the Tribunal found, as previously noted, that the District undertook *no* assessment, financial or otherwise, of what alternatives were or could be reasonably available to accommodate special needs students if the Diagnostic Centre were closed. This was cogently summarized by Rowles J.A. as follows:
>
> > The Tribunal found that prior to making the decision to close [the] Diagnostic Centre, the District did not undertake a needs-based analysis, consider what might replace [the] Diagnostic Centre, or assess the effect of the closure on severely learning disabled students. The District had no specific plan in place to replace the services, and the eventual plan became learning assistance, which, by definition and purpose, was ill-suited for the task. The philosophy for the restructuring was not prepared until two months after the decision had been made (paras. 380-382, 387-401, 895-899). *These findings of fact of the Tribunal are entitled to deference, and undermine the District's submission that it discharged its obligations to investigate and consider alternative means of accommodating severely learning disabled students before cutting services for them.* Further, there is no evidence that the District considered cost-reducing alternatives for the continued operation of [the] Diagnostic Centre. [Emphasis added; para. 143.]

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[169] *Supra* note 97 at para 184.

[170] *Moore*, *supra* note 9.

> The failure to consider financial alternatives completely undermines what is, in essence, the District's argument, namely that it was justified in providing no meaningful access to an education for Jeffrey because it had no economic choice. In order to decide that it had *no* other choice, it had at least to consider what those other choices were. [171]

This unwillingness to defer to the financial choices made by the District School Board were in part counter balanced by a greater show of deference to the need for financial cuts by the Department of Education at the provincial level. Indeed, the Supreme Court of Canada reversed the first level human rights tribunal on its broad award of systemic remedies against the province. It did this not as a matter of principle, but because the Court felt that the link between the provincial cuts to education and the discrimination suffered by Jeffrey Moore, was too remote a link.

The above conclusion was not stated in terms of deference but that appeared to be a factor, at least between the lines of the decision. As in the earlier *Charter* equality challenge in *Newfoundland (Treasury Board) v NAPE*,[172] the Supreme Court of Canada was sensitive to the needs of the legislatures to respond to matters of financial crisis. It is one thing to require school boards to manage even reduced budgets, in a way that does not discriminate; it is quite another to second guess the legislative and the executive branches, as to the need for and extent of budget cuts. Thus deference can have some role to play even in the human rights context.

In the *Moore* case Abella J. for the Supreme Court of Canada recognises that even in respect to a human rights code challenge to government benefits, such as education, some degree of deference is owed to the service provider. She does not directly address whether the "margin of deference" should be different in a section 15 *Charter* context and the human rights code context presented in *Moore*.

> … As with many public services, educational policies often contemplate that students will achieve certain results. But the fact that a particular student has not achieved a given result does not end the inquiry. In some cases, the government may well have done what was necessary to give the student access to the service, yet the hoped-for results did not follow. Moreover, policy documents tend to be aspirational in nature, and may not reflect realistic objectives. A margin of deference is, as a result, owed to governments and administrators in implementing these broad, aspirational policies.[173]

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[171] *Moore*, *supra* note 9 at para 52.

[172] *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66, 3 SCR 381.

[173] *Moore, supra* note 9 at para 35.

Justice Abella concludes that even with a show of deference, discrimination occurred when there was a denial of "meaningful" access to education.[174]

At the end of the day, the justification processes and approaches in *Charter* and human rights contexts should continue to be treated differently. There are of course points of overlap in some particular cases and some convergence of the approaches may enrich the equality process. The range of different interests at stake in these two contexts, and the need to engage in a broader social balance in the *Charter* setting, emphasizes the need for separation at this stage as well as at the violation stage.

VII. PRACTICAL IMPLICATIONS FOR EQUALITY SEEKERS: REMEDIES OF LAST RESORT

Although the importation of the section 15 *Charter* framework into statutory human rights jurisprudence is troubling in terms of substantive equality theory, there are also significant practical implications for claimants that must be considered. The decision to import the section 15 analytical framework has real financial, temporal, and outcome-based consequences for the claimant pursuing a discrimination claim. As a result of these consequences, access to justice is devalued and considerably limited.

Hart Schwartz explains that "human rights should be clear and understandable", and that "Human Rights Commissions and Tribunals need to be accessible to many people, most of whom are not lawyers."[175] However, there is no definitive analytical structure in place that may be considered the standard to abide by in human rights jurisprudence. There is inconsistency between whether the *O'Malley* or section 15 *Charter* structure should be employed,[176] and this leads to unpredictability as to what the courts will require of claimants.

What are the consequences of unclear, or inconsistent, approaches to human rights in Canada? First, if section 15 tests are imported into human rights jurisprudence, it is obvious that the *Charter* standards will now be applicable to the

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[174] *Moore*, *supra* note 9 at para 36.

[175] *Supra* note 92 at 201-202.

[176] Examples of cases that discuss the appropriate analytical structure include *Canadian Human Rights Commission v Canada (Attorney General)*, 2012 FC 445, 2012 CarswellNat 1026; *Moore v British Columbia (Ministry of Education)*, 2010 BCCA 478, 326 DLR (4th) 77; *Ontario (Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593. These cases are explored at length earlier in this article.

private sector.[177] Second, if there is any uncertainty as to what is required of the claimant in proving discrimination, human rights are not "clear and understandable". If the inconsistencies remain, "accessibility" in a broad sense will also be at stake. Any claimant who is unsure of what is required of them to make a claim before a court or tribunal would not feel as if that system were "accessible". Ultimately, it is important to pause and consider – will claimants bear the burden of an unpredictable approach to the violation analysis or justification of discrimination?

Claire Mumme suggests that many claimants choose to pursue an equality claim via human rights commissions and tribunals rather than a constitutional challenge because "of the perceived formality and formulaic nature of the section 15 *Charter* analysis over the past few decades, as well as the time and cost involved. This has made a constitutional equality claim the last legal resort for many". She further notes that the *O'Malley* test is "arguably easier" for claimants to meet.[178] If, as Mumme suggests, the constitutional equality claim is the last legal resort for claimants, what effect does placing that formulaic test on human rights code claims have? Would this, in turn, result in both (and therefore, all) routes to pursuing a discrimination claim becoming the path of last resort?

In comparison to the *O'Malley* test, the section 15 structure is lengthy and onerous. This has direct and serious implications for claimants. For example, Maurina Beadle, the mother of 17-year-old Jeremy Meawasige from Pictou Landing First Nation, fought in the courts for her right to provide care at home to her son who has hydrocephaslus, autism, and cerebral palsy. Ms. Beadle had provided for all of Jeremy's care without government assistance, until she suffered a stroke in 2010. Upon applying for government funding for home health care, Ms. Beadle found herself in a jurisdictional conflict in which the Federal government would not pay for health care services unless Jeremy moved off the reserve and into a facility outside the Pictou community.[179]

As part of her challenge, Ms. Beadle and her lawyer, Paul Champ, submitted that denying a disabled First Nations child on-reserve the health care

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[177] Raj Anand & Tiffany Tsun, "Discrimination and Equality Rights: The Role of Human Rights Statutes in Advancing Equality" (2009) 25 NJCL 161. They argue that the *Charter* and human rights codes should supplement each other.

[178] *Supra* note 40. This argument is further fortified by the argument that the Supreme Court of Canada is becoming "Charter averse," K. Makin, "Supreme Court becoming "Charter averse" expert says" *Toronto Globe and Mail* (April 13, 2013).

[179] "Mother fights to keep disabled son on N.S. reserve" CBC News (12 June 2012), online: http://www.cbc.ca/news/canada/nova-scotia/story/2012/06/11/ns-health-care-pictou-landing-reserve.html. Ms. Beadle is looking to invoke "Jordan's Principle." Jordan's Principle is a child-first policy passed in the House of Commons in 2007, named in honour of Jordan River Anderson of Norway House Cree Nation. Jordan spent his entire life in a hospital while the province of Manitoba and the government of Canada engaged in a jurisdictional argument over who was responsible for funding his care at home.

services available to any child off reserve is in conflict with section 15 of the *Charter*.[180] Although Justice Mandimen, who heard the case, acknowledged its time-sensitive nature, the decision will still take time – which does not serve the interests of Jeremy. As Ms. Beadle acknowledged "this case won't necessarily change things for Jeremy, by the time it's over".[181]

As this article goes to press, the Federal Court decision of Justice Mandimen was released on April 4th, 2013. In that decision, the court quashed the decision that the funding could not be provided, and found that the Federal Government and Health Canada were responsible for reimbursement, of an unspecified amount, to the Pictou Landing Band Council (PLBC) for Jeremy's care. Interestingly however, the section 15 *Charter* arguments were not the ones that won the day. The Judge made the decision based on the application of a common law doctrine, known as Jordan's principle. This principle is meant to prevent access to service delays to First Nation children because of jurisdictional arguments.[182]

In the landmark case of Jeffrey Moore, his father, Mr. Frederick Moore, on behalf of his son, filed a human rights complaint against the Board of Education of School District #44 (North Vancouver) in May 1997. Jeffrey had begun kindergarten in September 1991 while at Braemar Elementary School, a British Columbia public school. While there, he was diagnosed as having severe dyslexia. By the end of grade two, Jeffrey was diagnosed as severely learning-disabled. This entitled the school district to supplemental funding from the Ministry of Education to support Jeffrey's learning. However, the specialized Diagnostic Center that was recommended for Jeffrey was closed due to financial reasons, before he could attend.

In 1999, Mr. Moore filed a second human rights complaint against the Ministry of Education. The hearing before the Tribunal took place in 2001, 2002 and 2005, with a decision being released in 2005. In response to the Tribunal's decision, the School District and Ministry brought petitions forward for judicial review of the case. The case was taken to the British Columbia Supreme Court in 2008 and the Court of Appeal for British Columbia in 2010.[183]

The case ultimately was appealed to the Supreme Court of Canada and a unanimous decision was released on November 9, 2012. Justice Abella, writing for

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[180] Moira Peters, "Boudreau is the Law": The legal nature of an exception, and health care for First Nations children" (19 June 2012): Halifax Media Co-op <http://halifax.mediacoop.ca/blog/moira-peters/11425>.

[181] *Ibid*.

[182] *Pictou Landing Band Council and Maurina Beadle v Canada (Attorney General),* 2012 FC 342.

[183] *Moore*, *supra* note 95; *Supra* note 21.

the Court, was notably deferential to the findings of the human rights tribunal in affirming that Jeffrey had been discriminated against both individually and systemically. This approach of deference to the tribunal is reminiscent of Justice L'Heureux-Dube in *Mossop*. However, the difference is that Justice L'Heureux-Dube was dissenting in *Mossop*, and Justice Abella in *Moore* was writing for a unanimous court.[184]

Although the Supreme Court of Canada in *Moore* rejected systemic remedies against the Department of Education that were awarded by the Tribunal, the *Moore* case is a striking example of human rights commissions and tribunals leading the way on equality rights. The broad interpretation by Justice Abella of 'services' encompassing education generally and not just "special education", is an example of how a human rights tribunal can function as a leader in achieving substantive equality. The Supreme Court in Moore explained that "to define 'special education' as the service at issue also risks descending into the kind of 'separate but equal' approach."[185]One institutional structure should enhance the other and not impose new external limits. That is what happened in the *Moore* case.

The contrast between the Supreme Court of Canada decision in *Moore*[186] under the human rights code structure and its earlier decision in *Auton v British Columbia*[187] under section 15 of the *Charter*, is striking. In *Auton* the particular therapy sought for the children with autism was not a benefit encompassed within the British Columbia statutory structure. However, even if it had been included the Supreme Court compared the claimant group to other narrowly defined disabled groups, rather than the larger group of people seeking medically needed services. This could be construed as the "separate but equal" analysis that the Supreme Court rejected in *Moore*, albeit in a human rights code rather than a *Charter* context. As discussed earlier, the importation of a section 15 *Charter* narrower comparator analysis would have defeated Jeffrey Moore's claim. Indeed, this was the basis of the majority decision at the British Columbia Court of Appeal in *Moore*, where the relevant comparator was deemed to be other groups seeking different forms of special education.[188]

It will be interesting to watch whether the expansive approach to equality demonstrated in *Moore* will be used in future section 15 *Charter* claims to chart a broader course in the constitutional context. If so, this would be an example of the

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[184] *Canada (Attorney General) v Mossop*, [1993] 1 SCR 554, SCJ No 20.

[185] *Moore, supra* note 9 at para 30.

[186] *Moore*, *supra* note 9.

[187] *Supra* note 85.

[188] *Supra* note 21.

human rights code jurisprudence enriching the section 15 *Charter* analysis. This would be a positive development.

A. ACCESS TO JUSTICE

Although the *Moore* decision is to be commended, Jeffrey Moore is no longer enrolled in elementary school; he has long since completed both elementary and high school. He is now gainfully employed as a plumber in British Columbia.[189] Evidently, human rights commissions and tribunals are not without problems in cost and delay. For example, common complaints and concerns regarding the human rights process in British Columbia included "delays at intake and investigation" and "duration, complexity and costs of the process",[190] and the *Moore* case exemplifies these concerns. However, we should not shift towards importing a section 15 *Charter* analysis that increases complexity, extends the process, and raises the costs for claimants, as importing section 15 will do? Instead, we should focus on improving the human rights process in order to ensure an efficient, effective, and accessible system for any and all equality claimants.

Access to justice has been characterized as a crisis in Canada.[191] In 2007, during her remarks to the Canadian Bar Association, Chief Justice Beverley McLachlin stated that "access to justice is the essential foundation for our legal system to function and to maintain the confidence of the public it serves".[192] However, in 2010-2011, approximately 670,000 applications for legal aid were submitted to legal aid plans in ten provinces and territories (excluding Alberta, Northwest Territories and Nunavut) with civil matters making up over 56% of the applications.[193] In British Columbia, 90% of civil litigants are unrepresented.[194] If the importation of section 15 into human rights jurisprudence continues, this trend of self-representation may continue. The cost and length of pursing either a section 15 *Charter* claim or a human rights code claim could prove to be too much for most claimants to bear.

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[189] Kirk Makin, "Rights of special needs students upheld", *The Globe and Mail* (10 November 2012) A7.

[190] Deborah K. Lovett & Angela R. Westmacott, Human Rights Review: A Background Paper (Victoria: Administrative Justice Project, 2001), online: Administrative Justice Office <http://www.ag.gov.bc.ca/ajo/down/hrr.pdf> [Human Rights Review] at 67. The human rights process in British Columbia has been changed in response to such concerns by allowing direct tribunal access.

[191] The Canadian Bar Association, Canada's Crisis in Access to Justice (Ottawa: 2006), online: <http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/canadianbarassociation.pdf>.

[192] Chief Justice of Canada Beverley McLachlin, Remarks of the Right Honourable Beverley McLachlin, P.C. to the Council of the Canadian Bar Association at the Canadian Legal Conference (Calgary: 2007), online: <http://www.cba.org/cba/calgary2007/pdf/chiefjustice_remarkscouncil.pdf> at 4.

[193] Statistics Canada, Legal Aid in Canada: Resource and Caseload Statistics (Ottawa: 2012), online: <http://www.statcan.gc.ca/pub/85f0015x/85f0015x2011000-eng.pdf>.

[194] Sharon Matthews, Making the Case for the Economic Value of Legal Aid Briefing Note (2012), online: <http://cba.org/bc/practice_resources/pdf/Economic_Value_of_Legal_Aid-Briefing_Note.pdf>.

In the Ryder article, the authors note that "we need more investigation of the impact of legal decisions on political actors and policy development, and, perhaps, most importantly, we need more inquiries into how and in what ways policy changes generated by equality litigation, are actually having an impact on the lives of equality litigants and the groups they represent." [195] There needs to be more empirical analysis on the impact of changes in equality theory and practices on the everyday lives of the front line equality claimants. The law should be interpreted in a way that advances rather than limits their pursuit of equality.

The approaches under section 15 of the *Charter* and human rights jurisprudence are intrinsically linked by what they try to achieve: substantive equality. However, achieving substantive equality is a dynamic and complex pursuit, and complex pursuits require complex solutions. It is not enough to suggest that there is a one-size-fits-all test to determining or justifying discrimination. The approach to human rights under *O'Malley* is a model that allows for both contextualized claimant experiences and systemic discrimination complaints. Rather than making human rights equality claims more difficult for claimants by importing the section 15 *Charter* analysis, we should be actively working to achieve a multi-faceted approach to ending discrimination. We need an approach that works to solve the access to justice crisis, rather than perpetuate it.

Maintaining distinct but mutually reinforcing human rights codes and *Charter* structures is the best route to making equality claims more accessible to the most vulnerable members of Canadian society. In that vein, the Supreme Court of Canada will hopefully expand upon its advances for equality in *Moore*, in a way that maintains the distinct identities of the section 15 *Charter* and human rights code structures. The best marriages are those in which the individual partners maintain their own identities but also enrich rather than limit each other's lives. This is our hope for the marriage of human rights codes and section 15 of the *Charter*.

[195] Ryder, *supra* note 6 at 114.