UNDER THE INFLUENCE: DISCRIMINATION UNDER HUMAN RIGHTS LEGISLATION AND SECTION 15 OF THE *CHARTER*

Jennifer Koshan[1]

In this paper, I review the approaches to discrimination under human rights legislation and the Charter, considering the Supreme Court of Canada's historical approaches through to its most recent decisions in Moore v British Columbia and Québec v A. I argue that the Supreme Court of Canada's judgment in Moore was a missed opportunity to clarify the proper test for discrimination under human rights legislation in light of the uncertainty in this area which has been caused in large part by debate over whether the Charter should influence the test for discrimination in the human rights context. I then present a case study – Wright v College and Association of Registered Nurses of Alberta – to illustrate the impact the different approaches may have. Lastly, I review the arguments for keeping the tests under human rights legislation and the Charter distinct and conclude that these arguments have continued merit.

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Dans cet article, j'analyse la législation sur les droits de la personne et la Charte canadienne des droits et libertés ainsi que leurs approches en matière de discrimination, en examinant plus spécifiquement les approches adoptées historiquement par la Cour suprême du Canada jusqu'à ses plus récentes decisions dans Moore c Colombie-Britannique et Québec c A. D'abord, je soutiens que dans Moore, la Cour suprême a manqué une occasion de clarifier le critère juridique approprié en matière de discrimination au terme des lois sur les droits de la personne, vu l'incertitude dans ce domaine, incertitude attribuable en grande partie au débat sur la question à savoir si la Charte devrait influer sur le critère juridique en matière de discrimination dans le contexte des droits de la personne. Je présente ensuite une étude de cas sur Wright c College and Association of Registered Nurses of Alberta, afin d'illustrer l'impact que les différentes approches pourraient avoir. Finalement, j'examine les arguments en faveur du recours à des critères juridiques distincts, ceux de la législation sur les droits de la personne et ceux de la Charte, et je conclus que ces arguments sont toujours valables.

I. Introduction

In the Supreme Court of Canada's recent human rights judgment, *Moore v British Columbia (Education)*, the Court declined to explicitly clarify the proper test for discrimination.[2] This was a missed opportunity in light of the uncertainty over the appropriate test for the last several years. This uncertainty flows, in large part, from debate about the extent to which the approach under section 15 of the *Canadian Charter of Rights and Freedoms* should influence the test for discrimination under human rights legislation.[3]

In this paper, I will review the approaches to discrimination over time, under both human rights legislation and the *Charter*, considering the Supreme Court's historical approaches through to its most recent decisions in *Moore* and *Québec v A* as well as appellate level decisions interpreting those cases.[4] This review will help elucidate the interplay and tensions between the tests for discrimination in both contexts. I will then present a case study from the Alberta Court of Appeal – *Wright v College and Association of Registered Nurses of Alberta (Appeals Committee)* – to illustrate the impact that the different approaches to discrimination may have on case outcomes.[5] Lastly, I will review the arguments for keeping the approaches under human rights legislation and the *Charter* distinct, or perhaps more appropriately, for shielding human rights analysis from some of the stricter requirements under section 15 of the *Charter*. I will argue that regardless of the prevailing approach under the *Charter*, the test for discrimination under human rights legislation should remain the traditional, *prima facie* approach, and that the Supreme Court of Canada should take the next available opportunity to make this clear.

II. The Test(s) for Discrimination: A Brief History

A. From *O'Malley* to *Andrews* to *Law* to *Meiorin* and *Grismer*

It must be recalled that human rights legislation pre-dates the *Charter*, so the statutory human rights context provided the first opportunity for Canadian courts to flesh out a test for discrimination.[6] One of the earliest statements from the Supreme Court of Canada on the proper approach under human

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[2] *Moore v British Columbia (Ministry of Education)*, 2012 SCC 61, [2012] 3 SCR 360 [*Moore*].

[3] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK) 1982, c 11 [*Charter*].

[4] *Québec (Attorney General) v A*, 2013 SCC 5, [2013] 1 SCR 61 [*Québec v A*].

[5] *Wright v College and Association of Registered Nurses of Alberta (Appeals Committee)*, 2012 ABCA 267, [2013] 1 WWR 235 [*Wright*].

[6] Most provinces had human rights legislation in place by the 1970s, while the *Charter's* equality provision, section 15, did not come into effect until 1985.

rights legislation was made in *Ontario Human Rights Commission v Etobicoke*, where Justice McIntyre indicated that "[o]nce a complainant has established… a *prima facie* case of discrimination… he is entitled to relief in the absence of justification by the employer."[7] The *prima facie* approach to discrimination was elaborated upon by Justice McIntyre in *Ontario Human Rights Commission and O'Malley v Simpsons-Sears* as follows: "A *prima facie* case… is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent…"[8] What the complainant must prove is that the conduct of the respondent has the effect of imposing "obligations, penalties, or restrictive conditions not imposed on other members of the community".[9]

The Court's adoption in *O'Malley* of a broad, effects-based approach to discrimination that recognized the adverse impact of neutral laws and policies was significant and was based on the quasi-constitutional and remedial nature of human rights legislation.[10] The Court focused on the claimant's burden, noting that to "hold that intent is a required element of discrimination… would seem… to place a virtually insuperable barrier in the way of a complainant seeking a remedy."[11] It also referenced American cases holding that requiring proof of intent to discriminate would create "injustice and discrimination by the equal treatment of those who are unequal".[12]

O'Malley was cited in *Andrews v Law Society of British Columbia*, where the Supreme Court first developed the test for discrimination under section 15 of the *Charter*.[13] Writing for the Court once again, Justice McIntyre noted in *Andrews* that while there are important differences between human rights legislation and the *Charter*, "[i]n general, it may be said that the principles which have been applied under the Human Rights Acts are equally applicable in considering questions of discrimination under s. 15(1)."[14] Those principles included the points that discrimination need not be intentional and could be based on the adverse impact or effects of a law or policy and that justifications of discriminatory actions were to be kept separate from the discrimination analysis – the Court rejected an approach that would have protected against only "unreasonable" discrimination.[15] "Drawing upon" *O'Malley*, discrimination was defined in *Andrews* as:

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7 *Ontario Human Rights Commission v Etobicoke*, [1982] 1 SCR 202 at 208, 132 DLR (3d) 14.

8 *Ontario Human Rights Commission and O'Malley v Simpsons-Sears*, [1985] 2 SCR 536 at para 28, 17 Admin LR 89 [*O'Malley* cited to SCR].

9 *Ibid* at para 12.

10 *Ibid* at para 12.

11 *Ibid* at para 14.

12 *Ibid* at para 14, citing *Griggs v Duke Power Co.*, 401 US 424 (1971) and *Dennis v United States*, 339 US 162 (1950), at 184.

13 *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 34 BCLR (2d) 273 [*Andrews* cited to SCR].

14 *Ibid* at para 20.

15 *Ibid* at paras 8, 27, 37 and 42.

> 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.[16]

The Court's definition of and overall approach to discrimination in *Andrews* was thus not much of a departure from its traditional approach under human rights legislation.

At the same time, the Court did recognize some key differences between human rights legislation and the *Charter,* namely the focus of the former on private as well as public actions and the closed list of grounds under human rights statutes.[17] Moreover, the existence of exemptions, defences, and definitional limits under human rights legislation, which "generally have the effect of completely removing the conduct complained of from the reach of the Act", was distinguished from the balancing exercise required by courts under section 1 of the *Charter*.[18] Overall though, "discrimination under s. 15(1) will be of the same nature and in descriptive terms will fit the concept of discrimination developed under the Human Rights Acts".[19]

Andrews provided the governing approach to equality rights for some years, but differences began to develop within the Supreme Court on the proper test for discrimination under the *Charter*. Those differences were seemingly resolved in *Law v Canada (Minister of Employment and Immigration)*, where Justice Iacobucci, writing for a unanimous Court, re-stated the test for discrimination as a three step inquiry requiring proof of (1) differential treatment, (2) membership in a group protected by the grounds under section 15, and (3) discrimination in a substantive sense.[20] The third stage of analysis focused on the violation of "human dignity" as the measure of discrimination and whether there had been a violation of human dignity was conducted having regard to four contextual factors: (1) "[p]re-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue"; (2) "[t]he correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others"; (3) "[t]he ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society", and (4) "[t]he nature and scope of the interest affected by the

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[16] *Ibid* at para 19. McIntyre J also cited another human rights decision, *Canadian National Railway Co v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114, 27 Admin LR 172, in support of his definition of discrimination.

[17] *Andrews*, *supra* note 12 at para 20.

[18] *Ibid* at para 21.

[19] *Ibid*.

[20] *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 39, 170 DLR (4th) 1 [*Law* cited to SCR].

impugned law."[21]

Contrary to *Andrews*, the second contextual factor – which is essentially a consideration of arbitrariness – imported section 1 *Charter* considerations into the test for discrimination.[22] This approach to discrimination was thus criticized for the burden it imposed on equality rights claimants to disprove the arbitrariness of government action.[23] Others critiqued *Law* for its focus on human dignity and the indeterminacy of that particular touchstone for discrimination.[24]

The *Law* test prevailed from 1999 to 2008, and was applied in a number of human rights cases during this period, rather than the more traditional *prima facie* approach to discrimination mandated by *O'Malley*.[25] As noted by Claire Mummé, most of these cases involved human rights challenges in the context of government services in which government lawyers advocated for the application of the *Charter* framework for discrimination.[26] In one such case, *Gwinner v Alberta (Human Resources and Employment)*, the Alberta Court of Queen's Bench explained the rationale for using the *Charter* test for discrimination under human rights legislation.[27] Justice Greckol reviewed the interplay between approaches to discrimination in *O'Malley* and *Andrews*, and noted that the *Andrews* test had been applied in subsequent human rights decisions.[28] She found that "it will be appropriate in some human rights cases" to apply the *Charter* approach to discrimination, at that time represented by *Law*, "bearing in mind that flexibility should be maintained."[29] *Gwinner* itself was seen to be one

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[21] *Ibid* at paras 51-54 and 88.

[22] This approach arguably had its genesis in the "equality trilogy" from 1995 where several members of the Supreme Court relied on "irrelevant personal characteristics" to identify discrimination under section 15 of the Charter. See *Egan v Canada*, [1995] 2 SCR 513, 124 DLR (4th) 609; *Miron v Trudel*, [1995] 2 SCR 418, 124 DLR (4th) 693; *Thibaudeau v Canada*, [1995] 2 SCR 627, 1 CTC 382.

[23] Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" (2001) 80 Can Bar Rev 299 at 328; Sheila McIntyre, "Deference and Dominance: Equality Without Substance" in Sheila McIntyre and Sanda Rodgers, eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Butterworths, 2006) 95 at 102-105; Jennifer Koshan and Jonnette Watson Hamilton, "The Continual Reinvention of Section 15 of the Charter" (2013) 64 UNB LJ 19 at 31-32.

[24] See e.g. Martin, *supra* note 23 at 328-330; Koshan and Watson Hamilton, *supra* note 23 at 32.

[25] See e.g. *British Columbia Government and Service Employees' Union v British Columbia (Public Service Employee Relations Commission)*, 2002 BCCA 476, [2002] BCWLD 922 [*Reaney*]; *Gwinner v Alberta (Human Resources and Employment)*, 2002 ABQB 685, 217 DLR (4th) 341 [*Gwinner*]; *Alberta (Minister of Human Resources and Employment) v Weller*, 2006 ABCA 235, [2006] AWLD 3020; leave to appeal denied [2006] SCCA No 396; *Braithwaite v Ontario (Attorney General)* (2007), 88 OR (3d) 455, 62 CHRR D/315 (Div Ct).

[26] Claire Mummé, "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 105.

[27] *Gwinner*, *supra* note 25 at paras 94 to 105. Mummé, *supra* note 26 at 139, notes that *Gwinner* "initiated the trend of importing the constitutional analysis into the statutory context." It should be noted, however, that *Reaney*, *supra* note 25, decided a few days before *Gwinner*, took the same approach (at para 12). *Reaney* involved the argument that a collective agreement between the British Columbia Government and Service Employees' Union and the BC government violated that province's human rights legislation.

[28] *Gwinner*, *supra* note 25 at para 97, citing *Battlefords and District Co-operative Ltd. v Gibbs*, [1996] 3 SCR 566, [1997] 1 WWR 1, and *Brooks v Canada Safeway Ltd.*, [1989] 1 SCR 1219, 59 DLR (4th) 321.

[29] *Gwinner*, *supra* note 25 at para 103.

of those cases where the *Charter* test should have been applied since it involved a challenge to government benefits legislation similar to *Law*.[30] Moreover, one of the differences between human rights legislation and the *Charter* articulated in *Andrews* – the unique role of section 1 of the *Charter* – was less significant in *Gwinner* given the existence of a defence provision similar to section 1 under Alberta's human rights legislation.[31] This approach was affirmed by the Alberta Court of Appeal in a very brief judgment.[32]

In contrast, in other human rights cases during this era, courts questioned whether it was appropriate to follow *Law*, particularly when the claim involved private rather than government action. For example, in *Vancouver Rape Relief Society v Nixon,* the British Columbia (BC) Court of Appeal was faced with opposing decisions at the BC Human Rights Tribunal and on judicial review as to whether the *Charter* test for discrimination should apply in a human rights case involving employment and the provision of services by a non-government actor.[33] Justice Saunders noted that the Tribunal had decided that the *Charter* test, "designed to address challenges to law or government action... may overpower the relatively discreet event, the nature of the relationship (often between private parties) and the personal affront that is the subject of the human rights complaint, and in this way may have a narrowing consequence unsuited to a human rights context".[34] She also reviewed other human rights decisions which had and had not applied the *Charter* approach to discrimination, and concluded that "[t]he broad application of the *Law* framework in a case without [a] governmental overtone is not obvious to me".[35] It was unnecessary for the Court to explicitly rule on this point, however, as it found that the group rights exemption in the BC *Human Rights Code* provided a complete answer to the claim.[36]

It might appear from the discussion so far that the key consideration in whether to apply the *Charter* framework for discrimination in human rights cases is whether the claim involves a government respondent. However, in two leading human rights decisions involving government actors released the same year as *Law*, the Supreme Court did not apply the *Charter* test. In *British Columbia (Public Service Employee Relations Commission) v BCGSEU* (*Meiorin*), the Court

[30] *Ibid* at paras 101 and 103.

[31] *Ibid* at para 101, referencing section 11.1 of the *Human Rights, Citizenship and Multiculturalism Act*, RSA 1980, c H-11.7 (now section 11 of the *Alberta Human Rights Act*, RSA 2000, c A-25.5).

[32] *Gwinner v Alberta (Human Resources and Employment)*, 2004 ABCA 210 at para 6, [2004] AWLD 447. The Supreme Court of Canada denied leave to appeal, [2004] SCCA No 342, [2005] 336 NR 397 (note).

[33] *Vancouver Rape Relief Society v Nixon et al*, 2005 BCCA 601, 47 BCLR (4th) 203 [*Nixon*]. The Supreme Court of Canada denied leave to appeal, [2006] SCCA No 365, 147 CRR (2d) 376 (note).

[34] *Nixon*, *supra* note 33 at para 35.

[35] *Ibid* at para 39. The Court did note the opposite conclusion it had reached in *Reaney*, *supra* note 25, but indicated that *Reaney* was analogous to a section 15 case (at para 36), and that it had failed to consider the recent Supreme Court decisions in *Meiorin* and *Grismer*, *infra* notes 37 and 43 respectively (which will be discussed below).

[36] *Nixon*, *supra* note 32 at paras 50-59.

revisited the traditional approach to dealing with claims of adverse effects and direct discrimination differently when it came to the defence stage of analysis.[37] Noting the difficulty of categorizing adverse effects and direct discrimination claims and the groups affected, as well as the need to approach all discrimination claims systemically, Justice McLachlin (as she then was) articulated a new, unified approach for analyzing *bona fide* occupational requirements following a finding of *prima facie* discrimination.[38]

In adopting this approach, Justice McLachlin also noted that the traditional method of distinguishing between direct and adverse effect discrimination at the justification stage of human rights claims was inconsistent with the focus on effects under section 15 of the *Charter*.[39] Interestingly, the Court used section 15 jurisprudence to buttress the effects-based approach to discrimination that actually originated under human rights legislation.[40] However, nowhere in *Meiorin* does the Court indicate that *Law*'s three step test for discrimination should be imported into human rights legislation.[41] Instead, Tawney Meiorin was able to discharge the burden of proving a *prima facie* case of discrimination simply by establishing that her employer's physical fitness standard had the effect of adversely impacting women "because of their generally lower aerobic capacity."[42]

In *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, the unified approach from *Meiorin* was extended to apply in the government services context.[43] Henceforth, claims of *bona fide* justifications for the denial of services that were *prima facie* discriminatory were also to be analyzed under the unified approach.[44] The *Grismer* case is particularly analogous to *Charter* claims as it dealt with an allegation of discrimination in the provision of government services, but the Supreme Court did not apply the *Charter* test for discrimination in *Grismer* either.[45] Instead, the Court's approach sounds very much like *O'Malley*, finding that a *prima facie* case of discrimination was established "by showing that [Grismer]

[37] *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3, 10 WWR 1 [*Meiorin* cited to SCR]. For an argument that Meiorin could usefully influence the test for discrimination under the Charter, see Melina Buckley, "*Law v Meiorin*: Exploring the Governmental Responsibility to Promote Equality Under Section 15 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) 179.

[38] *Meiorin*, *supra* note 37 at paras 27-42. Most significantly, this new approach required respondents to prove that discriminatory workplace standards were reasonably necessary and that it was impossible to accommodate the claimant group without undue hardship; see also *ibid* at para 54).

[39] *Ibid* at paras 47-48.

[40] *Ibid* at para 49.

[41] *Ibid* at para 48.

[42] *Ibid* at para 69.

[43] *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868, [2000] 1WWR 565 [*Grismer* cited to SCR].

[44] *Ibid* at paras 19-22.

[45] For a discussion of the evolution of government services cases, see Mummé, *supra* note 26.

was denied a licence that was available to others, and that the denial was made on the basis of a physical disability."[46]

The Supreme Court's failure to apply the *Law* framework in *Meiorin* and *Grismer* was cited in *Nixon* as another basis for declining to import the *Charter* test for discrimination into human rights claims.[47] Yet in other cases, as noted above, the *Charter* test was applied in spite of *Meiorin* and *Grismer*.[48] Throughout most of the 2000s, the uncertainty over the proper approach to discrimination in human rights cases prevailed and may have become more entrenched given the increasing use of human rights claims to challenge government actions as a result of the difficulties in mounting *Charter* equality rights claims in this context, particularly after *Law*.[49] Courts that adopted the *Charter* test in the human rights context often relied on the interplay between human rights and the *Charter* without noting that *Andrews* was significantly altered by *Law*, moving the *Charter* approach to discrimination much further away from cases like *O'Malley*.[50] As argued by several commentators, importing *Law* into human rights analysis increased the burden on human rights claimants well beyond the burden imposed by *O'Malley*'s *prima facie* test; it also interfered with the proper relationship between the *prima face* discrimination and defence stages of analysis, and resulted in a "formal, mechanistic approach" to discrimination that was contrary to the "open, contextual" approach of *O'Malley*.[51]

B. *Kapp* and *McGill*: A Focus on Stereotyping, Arbitrariness and Prejudice

In 2008, the Supreme Court recognized some of the criticisms mounted by commentators about *Law*'s approach to discrimination under section 15 of the *Charter* in *R v Kapp*.[52] Writing for the Court, Chief Justice McLachlin and Justice Abella recognized the formalism of *Law* and the added burden

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[46] *Grismer*, *supra* note 43 at para 23.

[47] *Nixon*, *supra* note 33 at para 37, noting the BCCA's earlier failure to reference the import of these cases in *Reaney*.

[48] In *Gwinner*, *supra* note 25 at para 104, Justice Greckol noted the failure to apply *Law* in *Meiorin* and *Grismer* as support for her point that, "[i]n many, if not most, cases under human rights legislation, the elaborate third step scrutiny to determine if the dignity interest of the Claimant is truly engaged, will neither be necessary nor appropriate" (though it was found to be appropriate in *Gwinner* for the reasons stated above).

[49] See Mummé, *supra* note 26 at 134-135.

[50] See e.g. *Gwinner*, *supra* note 25 at para 98.

[51] Leslie Reaume, "Postcards from *O'Malley*: Reinvigorating Statutory Human Rights Jurisprudence in the Age of the *Charter*" in Faraday, et al, *supra* note 37, 373 at 374-376. See also Denise Réaume, "Defending the Human Rights Codes from the *Charter*" (2012) 9 JL & Equality 67 at 68-69, 80-82; 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 45-49.

[52] *R v Kapp*, 2008 SCC 41 at para 22, [2008] 2 SCR 483.

on claimants to prove a violation of their human dignity as a legal test.[53] The Court purported to return to *Andrews* in *Kapp* by adopting a definition of discrimination that focused on the perpetuation of disadvantage by way of prejudice and stereotyping.[54] The Court also suggested that the four contextual factors from *Law* were relevant to prejudice and stereotyping, thus maintaining a consideration of arbitrariness in the section 15 analysis through the second "correspondence" factor.[55]

Jonnette Watson Hamilton and I have questioned whether *Kapp* actually amounts to a return to *Andrews*.[56] *Andrews* did state that "[d]istinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed" and to that extent, could be seen to incorporate notions of stereotyping and arbitrariness.[57] However, stereotyping and arbitrariness were less of a focus in *Andrews* than acceptance of effects-based, unintentional discrimination that left questions of government objectives and justification to section 1. A test of discrimination that dwells on prejudice, stereotyping and arbitrariness is a narrow one that may not capture the harms of discrimination and improperly imports section 1 considerations under section 15.[58] Others have been critical of *Kapp's* approach to discrimination as well.[59]

The concepts of prejudice, stereotyping and arbitrariness have also had an influence in the human rights sphere. The Supreme Court's decision in *McGill University Health Centre (Montréal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal* is significant in this regard.[60] Although the majority of the Court assumed a *prima facie* case of discrimination and focused its decision on the duty to accommodate, the concurring judgment of Justice Abella in *McGill* stated:

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[53] *Ibid* at para 21. The Court did note that it continued to see human dignity as a value underlying section 15.

[54] *Ibid* at para 18.

[55] *Ibid* at para 23. *Kapp* also deals with the proper interpretation of the affirmative action clause in section 15(2) of the *Charter*. This aspect of *Kapp*, as well as the Court's decision in *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37, [2011] 2 SCR 670, may also have implications for the interpretation of human rights legislation. See Wayne MacKay, "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" (2013) 64 UNBLJ 54 at 83 et seq. A consideration of this argument is beyond the scope of this paper.

[56] Koshan and Watson Hamilton, *supra* note 23 at 38-39.

[57] *Andrews*, *supra* note 13 at para 19.

[58] Koshan and Watson Hamilton, *supra* note 23 at 39.

[59] See e.g. Diana Majury, "Equality Kapped: Media Unleashed" (2009) 27 Windsor YB Access Just 1; Sophia Moreau, "*R v Kapp*: New Directions for Section 15" (2008-2009) 40 Ottawa L Rev 283; Margot Young, "Unequal to the Task: 'Kapp'ing the Substantive Potential of Section 15" in Sanda Rodgers & Sheila McIntyre, eds, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham: LexisNexisCanada, 2010) 183.

[60] *McGill University Health Centre (Montréal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] 1 SCR 161 [*McGill*].

> [a]t the heart of these definitions [of discrimination] is the understanding that a… practice, standard, or requirement cannot disadvantage an individual by attributing stereotypical or arbitrary characteristics… The essence of the discrimination is in the arbitrariness of its negative impact, that is, the arbitrariness of the barriers imposed, whether intentionally or unwittingly.[61]

Applying this test, Justice Abella found that a clause in a collective agreement providing for termination of employment where an employee was absent longer than a specified period of time did not "target individuals arbitrarily and unfairly because they are disabled; it balances an employer's legitimate expectation that employees will perform the work they are paid to do with the legitimate expectations of employees with disabilities that those disabilities will not cause arbitrary disadvantage."[62]As noted by Dianne Pothier, the concurring judgment in *McGill* "blurs [the] distinction" between the *prima facie* discrimination and *bona fide* occupational requirement stages of analysis under human rights legislation.[63] At the discrimination stage, the focus should be on the effects of the respondent's actions, and questions of the arbitrariness (or rationality) of those actions should be addressed only at the defence stage. Pothier argues that by failing to reach the stage of accommodation, the concurring justices failed to consider the more systemic aspects of the claim.[64]

The only authority cited by Justice Abella for her test in *McGill* is the passage from *Andrews*, cited above, which speaks of the improper attribution of personal characteristics and the proper consideration of individuals' actual merits and capacities.[65] As noted, while this passage could be seen to accept notions of stereotyping and arbitrariness, that was not the focus of *Andrews*. To the extent that it imports these considerations, Justice Abella's *McGill* test more closely resembles the Court's decisions in *Law* and *Kapp*. And regardless of which section 15 case it most closely resembles, there was no discussion in *McGill* of the propriety of using a *Charter*-like test for discrimination. Justice Abella's decision is also remarkable in that *McGill* was not a case involving government services, which seemed to be the most explicit basis for importing the *Charter* test into human rights cases in the *Law* era (with some exceptions,

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[61] *Ibid* at para 48 [emphasis added]. See further references to arbitrary discrimination at paras 49, 51, 53, 54 and 56. Chief Justice McLachlin and Justice Bastarache concurred with Justice Abella's reasons; Justice Deschamps wrote for the majority.

[62] *Ibid* at para 63.

[63] Dianne Pothier, "Tackling Disability Discrimination at Work: Toward a Systemic Approach" (2010) 4 McGill JL & Health 17 at 31; see also Oliphant, *supra* note 51 at 53.

[64] Pothier, *supra* note 63 at 32. See also Karen Schucher, "Human Rights as a Tool to Eliminate and Prevent Discrimination: Reflections on the Supreme Court of Canada's Jurisprudence" in Rodgers and McIntyre, *supra* note 59, 387 at 397, 401-402.

[65] *McGill*, *supra* note 60 at para 47, citing *Andrews*, *supra* note 13 at pp 174-5 (para 37). Stereotyping and arbitrariness have been used in other human rights cases, however; see Schucher, *supra* note 64 at 397.

as noted above).[66]

The concurring opinion in *McGill* was given some heft by a majority of the Supreme Court in *Honda Canada Inc v Keays*.[67] *Keays* was a wrongful dismissal claim where the issue of discrimination was relevant to the question of damages. Writing for the majority, Justice Bastarache indicated that discriminatory conduct by an employer did not constitute an "independent actionable wrong" that could ground a punitive damages award and, in any event, there had been no discriminatory conduct by the employer.[68] To support the latter point, the majority considered the objective of the disability policy at issue in the case and, citing Justice Abella's reasons in *McGill*, noted "[t]here is no stereotyping or arbitrariness here."[69] There was no analysis of the appropriate test for discrimination in *Keays*.

In spite of the brevity of analysis of *McGill* in *Keays*, several cases have followed Justice Abella's reasons in *McGill* as though it represented a majority decision.[70] For example, in *Armstrong*, a case involving a claim of gender discrimination against the government, the BC Court of Appeal began with *O'Malley* as the starting point for discrimination and indicated that to make out a *prima facie* case of discrimination claimants must establish that they had (or were perceived to have) a protected characteristic, that they received adverse treatment, and that their protected characteristic was a factor in the adverse treatment.[71] On the third step, the Court noted, "[t]he parties made extensive submissions… with respect to the issue of whether, on the basis of *McGill*… there is now a requirement to show that the adverse treatment was based on arbitrariness or stereotypical presumptions."[72] The Court of Appeal found that there was no such "separate requirement", rather, the need to show a linkage between the adverse treatment and the protected ground at step three of the *prima facie* discrimination test incorporated "the goal of protecting people from arbitrary or stereotypical treatment."[73] On the basis of this approach, the Court

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[66] The focus on arbitrariness also hearkens back to an article written by Justice Abella while she sat on the Ontario Court of Appeal, where she repeatedly defined discrimination in terms of the attribution of "arbitrary barriers." Justice Rosalie Silberman Abella, "A Generation of Human Rights: Looking Back to the Future" (1998) 36 Osgoode Hall LJ 597 at 605-06, 612.

[67] *Honda Canada Inc v Keays*, 2008 SCC 39, [2008] 2 SCR 362.

[68] *Ibid* at paras 67-68.

[69] *Ibid* at para 71.

[70] See Oliphant, *supra* note 51 at 49.

[71] *Armstrong v British Columbia (Ministry of Health)*, 2010 BCCA 56 at para 21, 2 BCLR (5th) 290 [*Armstrong*] citing *Health Employers Assn. of British Columbia v British Columbia Nurses' Union*, 2006 BCCA 57 at para 38, 264 DLR (4th) 478 [*BC v BCNU*]. Leave to appeal the BCCA's decision in *Armstrong* was refused, [2010] SCCA No 128, 410 NR 383 (note).

[72] *Armstrong*, *supra* note 71 at para 27. The Court noted that *McGill* has been "referred to with approval" in *Keays* (at para 25). In addition to *McGill*, the parties cited *British Columbia (Public Service Agency) v British Columbia Government and Service Employees' Union*, 2008 BCCA 357, [2008] 83 BCLR (4th) 299 [*Gooding*] as raising the issue of whether arbitrariness and stereotyping must be proved. The SCC denied leave to appeal in *Gooding*, [2008] SCCA No 460, [2009] 395 NR 389 (note).

[73] *Armstrong*, *supra* note 71 at para 27.

of Appeal concluded that the adjudicator had not erred in finding that a *prima facie* case of discrimination was not made out.[74]

Similarly, in *Ontario (Disability Support Program) v Tranchemontagne*, a claim of disability discrimination in the context of government services, the Ontario Court of Appeal stated that "showing a *prima facie* case of discrimination involves demonstrating a distinction based on a prohibited ground that creates a disadvantage by perpetuating prejudice or stereotyping".[75] The Court could see "no principled reason for adopting a different meaning for the term discrimination as it appears in… the Code than has been ascribed to that term in the *Charter* context."[76] However, prejudice and stereotyping were not considered "freestanding requirement[s]"; they were seen as being "incorporated into two stages of the *prima facie* case analysis: i) determining whether the treatment in issue truly creates a disadvantage; and ii) determining whether the protected ground or characteristic truly played a role in creating the disadvantage."[77] The Court of Appeal supported its approach to discrimination by reference to Justice Abella's reasons in *McGill*.[78] It went on to find that it was appropriate to infer that the legislative scheme was discriminatory, as it perpetuated prejudice and disadvantage and stereotyped the respondents by depriving them of benefits available to persons with other disabilities.[79]

On the other hand, the Alberta Court of Appeal continued to apply the *Law* test for discrimination even after *Kapp* and *McGill* were decided. For example, in *Walsh v Mobil Oil Canada*, the Court formulated the test for discrimination as "whether, from the perspective of a reasonable person, in circumstances similar to those of the claimant, taking into account contextual factors relevant to the claim (e.g., pre-existing/historical disadvantage), the differential treatment has the effect of demeaning his or her dignity." [80] The Court cited *Gwinner* is support of this approach, but did not consider that *Walsh* involved a private employer rather than a government respondent.[81]

It was in this climate of uncertainty as to the proper test for discrimination under human rights legislation that *Moore* was decided. Significantly, the Supreme Court had denied leave to appeal in several of the cases discussed in this section, making *Moore* the first opportunity provided by the Court to

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[74] *Ibid* at para 39.

[75] *Ontario (Disability Support Program) v Tranchemontagne*, 2010 ONCA 593 at para 84, 102 OR (3d) 97 [*Tranchemontagne*].

[76] *Ibid*.

[77] *Ibid* at paras 84, 90 and 104.

[78] *Ibid* at para 92 (noting that Abella J's definition of discrimination had been "approved" in *Keays* (at para 94)).

[79] *Ibid* at para 121. For a series of articles on this case, see Mummé, *supra* note 26; Oliphant, *supra* note 51, and Denise Réaume, *supra* note 51.

[80] *Walsh v Mobil Oil Canada*, 2008 ABCA 268 at para 62, [2008] 94 Alta LR (4th) 209.

[81] *Ibid* at para 62.

clarify this uncertainty.[82]

C. *Moore*: Returning to the Traditional Approach?

Moore involved a student with a learning disability who made a human rights claim that he had been denied remedial services in the context of the BC government's provision of public education. His family eventually enrolled him in a private school where he was able to obtain the needed services, but at great cost to his family. Moore's claim was successful at the tribunal level, but was overturned on judicial review.[83]

At the Supreme Court, the parties and interveners offered different approaches to the test for discrimination consonant with the tensions in the case law. For example, the BC Ministry of Education, one of the respondents in the case, relied heavily on the concurring judgment of Justice Abella in *McGill*, reasons that were critiqued in the factum of the West Coast Women's Legal Education and Action Fund for importing *Charter* considerations into the human rights context.[84] However, and in contrast to its decision in *Kapp*, the Court did not take the opportunity to provide an explicit clarification of the test; the Court simply reiterated the traditional *prima facie* approach to discrimination. According to Justice Abella, "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."[85]

However, echoing her judgment in *McGill*, Justice Abella used the language of arbitrariness at several points in *Moore*. For example, she stated that whether claims relate to individual or systemic discrimination, "the focus is always on whether the complainant has suffered arbitrary adverse effects based on a prohibited ground."[86] This assertion indicates that a consideration of arbitrariness is part of the test for discrimination, which is contrary to the traditional *prima facie* approach that she set out elsewhere. At other points in *Moore*, Justice Abella's references to suggests that she may consider arbitraryness relevant to the justification stage of analysis, but this is not entirely clear. For example, she wrote that, "[t]he question in every case is the same: does the practice result in the claimant suffering arbitrary — or

[82] See *Gwinner*, *supra* note 25; *Nixon*, *supra* note 33; *Armstrong*, *supra* note 71; *Gooding*, *supra* note 72.

[83] *Moore*, *supra* note 2 at paras 1-4, 23-24.

[84] *Moore*, *supra* note 2 (Factum of the BC Ministry of Education at paras 57-77) on-line: Supreme Court of Canada, <http://www.scc-csc.gc.ca/factums-memoires/34041/FM030_Respondent_Her-Majesty-the-Queen-in-Right-of-the-Province-of-British-Columbia%20.pdf>; *Moore*, *supra* note 2 (Factum of the West Coast Women's Legal Education and Action Fund at paras 7 and 16) on-line: West Coast LEAF, <http://www.westcoastleaf.org/userfiles/file/Intervener%20West%20Coast%20LEAF%20Factum.pdf>.

[85] *Moore*, *supra* note 2 at para 33.

[86] *Ibid* at para 59 [emphasis added].

unjustified — barriers on the basis of his or her membership in a protected group. Where it does, discrimination will be established."[87] At the stage of applying the test, Justice Abella stated that the issue was whether there was "an unjustified denial of meaningful access to the general education to which students in British Columbia are entitled and, as a result, discrimination?"[88] The suggestion here is that only unjustified denials will be seen as discriminatory. But Justice Abella articulated the test without reference to arbitrariness or justifiability as well: "if the evidence demonstrates that the government failed to deliver the mandate and objectives of public education such that a given student was denied meaningful access to the service based on a protected ground, this will justify a finding of *prima facie* discrimination."[89] So, in spite of reiterating the traditional test for *prima facie* discrimination, the Supreme Court's support for that test is not particularly clear.[90] It is also surprising that *O'Malley*, typically thought to be the leading case on the test for *prima facie* discrimination, was not cited in *Moore*.

Furthermore, at the stage of considering whether there was *prima facie* discrimination, Justice Abella considered the government's objectives and goals in delivering educational services and suggested that it was appropriate that those goals should inform the question of whether there was discrimination.[91] In other words, the government's conduct will be assessed for discrimination to the extent that its delivery of a particular service (for example education) does not comport with its objectives – i.e., is arbitrary. In addition, Justice Abella indicated that "[a] margin of deference is… owed to governments and administrators in implementing [the] broad, aspirational policies" that they develop in contexts such as education.[92]

Ultimately the Supreme Court in *Moore* upheld the Tribunal's decision that a *prima facie* case of discrimination had been made out. The first and third steps of the test were clearly met: Moore had a disability, dyslexia, and any adverse treatment he received was related to his disability. According to the Court, the crucial question was whether Moore had received adverse treatment by being denied meaningful access to public education.[93] The Court found that the Tribunal properly based

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[87] *Ibid* at para 60 [emphasis added]; see also paras 26 and 61.

[88] *Ibid* at para 32 [emphasis added]. See also para 34.

[89] *Ibid* at para 36 [emphasis in original omitted].

[90] I therefore disagree with Wayne MacKay's argument that *Moore* is an "expansive and compelling" judgment, although I do agree that the outcome of the case is generally positive. See MacKay, *supra* note 55 at 78.

[91] *Moore*, *supra* note 2 at paras 37-39. Mona Paré argues that this aspect of *Moore* is a positive adaptation of the test for discrimination in the unique context of educational services. See Mona Paré, "Refining the Test for Discrimination in the Context of Special Education: *Moore v British Columbia*" (2013) 10 JL & Equality 71 at 75. It may be that the consideration of the arbitrariness of the government's actions in light of its objectives assisted the Moores' case, but I maintain that this analysis belongs at the justification stage.

[92] *Moore*, *supra* note 2 at para 35.

[93] *Ibid* at para 34. Justice Abella uses the language of "without reasonable justification" in her formulation of this question as well.

its affirmative decision on that question on factors related to the School District's recognition that Moore required intensive remediation to have meaningful access to education, as well as the closing of services that would have provided that remediation and the indication to the Moores that these services could not be provided by the District in another way.[94] Turning to justification, the Court affirmed the Tribunal's decision that the District's failure to consider alternatives to accommodate students such as Moore could not meet the requirements of *Grismer*, especially because the Tribunal had found that the District had other options for dealing with its fiscal problems yet disproportionately cut services for children with disabilities.[95]

Moore is a significant victory for students with disabilities and consideration of and deference to government objectives did not appear to prejudice the outcome of the case – at least in terms of finding discrimination and a lack of sufficient accommodation – although it may have played a role in the Court's decision to overturn the systemic remedies granted by the Tribunal.[96] Justice Abella's comments about the "budgetary crisis" facing the school district are reminiscent of the Court's deferential *Charter* decision in *Newfoundland v NAPE*.[97] Her references to government objectives and deference are also reminiscent of the Court's approach in other section 15 cases such as *Withler v Canada (Attorney General)*.[98] To the extent that these considerations came into play at the discrimination stage of analysis, they can be linked back to the correspondence factor from *Law* and the reliance on arbitrariness in *McGill*. As argued above, analysis of government goals and their rationality should not come into play until the justification stage when the burden shifts to the respondent to explain or defend its actions.[99]

It is, therefore, difficult to see *Moore* as having resolved the question of what test for discrimination should be applied in the human rights context and, in particular, whether there remains a requirement to show the arbitrariness of the respondent's actions in light of its objectives.

On the other hand, *Moore* can be seen as a positive development for its treatment of comparator groups.[100] Since the time of *Andrews*, the Supreme

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[94] *Ibid* at para 48.

[95] *Ibid* at para 53. The Court overturned the Tribunal's finding that the District's actions could be attributed to the Province, as the failure to consider options was the District's (*ibid* at para 54).

[96] *Ibid* at para 57. For other critiques of this aspect of *Moore*, see MacKay, *supra* note 55 at 96; Paré, *supra* note 91 at 77-79; Joanna Birenbaum and Kelly Gallagher-Mackay, "From Equal Access to Individual Exit: The Invisibility of Systemic Discrimination in *Moore*" (2013) 10 JL & Equality 93.

[97] *Moore*, *supra* note 2 at para 65; *Newfoundland (Treasury Board) v Newfoundland and Labrador Assn of Public and Private Employees*, 2004 SCC 66, [2004] 3 SCR 381. For a discussion of this issue more broadly see Hester A. Lessard, "'Dollars Versus [Equality] Rights': Money and the Limits on Distributive Justice" (2012) 58 Sup Ct L Rev (2d) 299.

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

[99] See e.g. *Lincoln v Bay Ferries Ltd.*, 2004 FCA 204 at para 22, [2004] 322 NR 50.

[100] For a detailed discussion on this aspect of *Moore* see Gwen Brodsky, "*Moore v British Columbia*: Supreme Court of Canada Keeps the Duty to Accommodate Strong" (2013) 10 JL & Equality 85.

Court has emphasized that equality is an inherently comparative concept in its section 15 *Charter* decisions.[101] Comparative analysis reached its most formulaic level in the cases of *Hodge v Canada (Minister of Human Resources Development)* and *Auton (Guardian ad litem of) v British Columbia (Attorney General)*.[102] In those cases, the Court applied a mirror comparator approach requiring that the claimants show they were denied a benefit as compared to members of a group that mirrored their characteristics in every way except on the basis of the ground claimed. The Court recognized the difficulties with mirror comparators in *Withler*, where Chief Justice McLachlin and Justice Abella stated that a rigid approach to comparison should be avoided in section 15 cases.[103]

The mirror comparator approach used under section 15 of the *Charter* also found its way into human rights cases.[104] For example, the lower courts in *Moore* held that Moore's circumstances should be compared to those of other special needs students. Because he could not prove that he was denied a benefit that they had received, his claim failed.[105]

At the Supreme Court, Justice Abella relied on *Withler* to critique the problems with this approach: "[c]omparing 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… If Jeffrey is compared only to other special needs students, full consideration cannot be given to whether he had *genuine* access to the education that all students in British Columbia are entitled to."[106] This is a rare example of how developments under section 15 of the *Charter* have had a positive influence on human rights jurisprudence. That being said, it was actually *Charter* cases, such as *Hodge*, that caused the comparator problem in the first place.

Some commentators see *Moore* as a positive development in human rights law because the Supreme Court did not explicitly import the section 15 test for discrimination.[107] I maintain that the Court should have been more explicit in addressing the appropriate test in light of the ongoing uncertainty in this

[101] *Andrews*, *supra* note 13 at para 8.

[102] *Hodge v Canada (Minister of Human Resources Development)*, 2004 SCC 65, [2004] 3 SCR 357; *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 SCR 657.

[103] *Withler*, *supra* note 98 at paras 63-65, citing a range of academic commentary.

[104] For critiques of the use of comparators in the human rights context, see Andrea Wright, "Formulaic Comparisons: Stopping the Charter at the Statutory Human Rights Gate" in Faraday, et al, *supra* note 37, 373 at 409; MacKay, *supra* note 55 at 76.

[105] *Moore v British Columbia (Ministry of Education)*, 2008 BCSC 264, [2008] 81 BCLR (4th) 107; *Moore v British Columbia (Ministry of Education)*, 2010 BCCA 478, [2011] 12 BCLR (5th) 246. For a discussion of the lower court judgments see *Moore*, *supra* note 2 at paras 23-25.

[106] *Moore*, *supra* note 2 at paras 30-31 [emphasis in original]. The Court made the related finding that the service that was at issue in the case was education generally and not special education – otherwise a "separate but equal" approach would be perpetuated (at paras 29-30).

[107] See e.g. Birenbaum and Gallagher-Mackay, *supra* note 96 at 93.

area and that the Court muddled the *prima facie* test in any event. A review of appellate level human rights cases decided after *Moore* will now be undertaken to see how these courts have interpreted *Moore*.

D. Post-*Moore* Human Rights Cases: Shedding Any Light on the Approach to Discrimination?

The role of comparator groups under human rights legislation was considered in a recent Federal Court of Appeal case, *Canada (Attorney General) v Canadian Human Rights Commission*.[108] This case involves a complaint by the First Nations Child and Family Caring Society and the Assembly of First Nations that the federal government has violated the *Canadian Human Rights Act* by failing to adequately fund child welfare services for on-reserve First Nations children.[109] The Attorney General filed a preliminary motion arguing that the complaint could not succeed, in part contending that it would fail at the comparative analysis stage. This argument was successful before the Canadian Human Rights Tribunal, but it was overturned by the Federal Court, relying in large part on *Withler*.[110] Interestingly, at the Federal Court of Appeal hearing, the Attorney General argued that the Federal Court had improperly considered cases under section 15 of the *Charter* rather than restricting itself to cases under the *CHRA*.[111] This is a rather surprising argument in light of the reality, recognized by Justice Mactavish at the Federal Court, that "the use of comparator groups in the statutory human rights context [was] imported from the section 15 Charter jurisprudence."[112] The Federal Court of Appeal dismissed the federal government's argument regarding comparators, relying on *Moore* as well as *Withler*.[113] The case is now before the Canadian Human Rights Tribunal on the merits.

In another appellate level decision considering the implications of *Moore*, *Pieters v Peel Law Association*, the Ontario Court of Appeal dealt with a claim of discrimination by two black lawyers who were denied access to a lawyers' lounge in the Brampton courthouse.[114] One of the issues on appeal was whether the Divisional Court had applied the appropriate test for discrimination in requiring "a. a distinction or differential treatment; b. arbitrariness based on a prohibited ground; c. a disadvantage; and d. a causal nexus between the arbitrary distinction based on a prohibited ground and the disadvantage

[108] *Canada (Attorney General) v Canadian Human Rights Commission*, 2013 FCA 75, [2013] 226 ACWS (3d) 813 [*First Nations Child and Family Caring Society, FCA*].
[109] *Canadian Human Rights Act*, RSC 1985, c H-6 [*CHRA*].
[110] *Canada (Human Rights Commission) v Canada (Attorney General)*, 2012 FC 445 at para 315, [2012] 3 CNLR 79 [*First Nations Child and Family Caring Society, FCTD*].
[111] *First Nations Child and Family Caring Society, FCA*, *supra* note 108 at para 19.
[112] *First Nations Child and Family Caring Society, FCTD*, *supra* note 110 at para 315.
[113] See *First Nations Child and Family Caring Society, FCA*, *supra* note 108 at paras 1-22.
[114] *Pieters v Peel Law Association*, 2013 ONCA 396, [2013] 116 OR (3d) 81 [*Pieters*].

suffered."[115] The Court of Appeal noted that *Moore* had applied the "traditional definition" of discrimination and that it did not require a causal nexus between the ground and the disadvantage suffered.[116] Rejecting the "causal nexus" approach, the Court stated that "[a]ll that is required is that there be a 'connection' between the adverse treatment and the ground of discrimination. The ground of discrimination must be a 'factor' in the adverse treatment."[117] The Court did not remark upon the Divisional Court's requirement of arbitrariness, nor the references to arbitrariness in *Moore*.

In a number of other appellate decisions, *Moore* has been cited as support for the traditional *prima facie* approach to discrimination without any discussion of the role of section 15 of the *Charter* or the preceding debate about the appropriate test. For example, in *Telecommunications Workers Union v Telus Communications Inc.*, a claim of disability discrimination in the employment context, the Alberta Court of Appeal indicated that the three step test articulated in *Moore* is the proper approach for discrimination in adverse effects cases, even where the respondent is unaware of a claimant's disability.[118] The Court thus overturned the lower court's ruling that an employer's conduct cannot be found discriminatory unless the employer had knowledge that the employee had a disability requiring accommodation.[119] This is an interesting outcome given that the Supreme Court had considered the School District's knowledge of Moore's disability as one of the factors relevant to showing discrimination in that case.[120] The Court did not suggest that knowledge was a requirement, however.

Similarly, in *NWT (WCB) v Mercer*, the Northwest Territories Court of Appeal relied on *Moore* for the proposition that "a claimant seeking to establish *prima facie* discrimination in the provision of services need not establish the purpose behind the allegedly discriminatory conduct."[121] Again, the Supreme Court's actual consideration of the government objectives at play in *Moore* was not addressed by the Court of Appeal – rather the paragraph setting out

[115] *Ibid* at para 53.
[116] *Ibid* at para 55.
[117] *Ibid* at para 59.
[118] *Telecommunications Workers Union v Telus Communications Inc.*, 2014 ABCA 154 at paras 28-29, 2014 CarswellAlta 717 (WL Can). See also *Québec (Procureur général) c Commission des droits de la personne et des droits de la jeunesse*, 2013 QCCA 141 at note 30, [2013] ACWS (3d) 736; *Land v Law Enforcement Review Board*, 2013 ABCA 435 at para 49, [2014] 235 ACWS (3d) 540; and *Okanagan College Faculty Association v Okanagan College*, 2013 BCCA 561 at paras 61-62, [2014] 54 BCLR (5th) 231. All cases cite the *prima facie* test for discrimination from *Moore*, *supra* note 2 at para 33, but do not discuss the test for discrimination in any detail.
[119] See *Telecommunications Workers Union v Telus Communications Inc.*, 2013 ABQB 298 at para 39, [2013] AWLD 2773 (applying *Burgess v Stephen W. Huk Professional Corp.*, 2010 ABQB 424, [2010] AWLD 5002, where the Court found that the burden is on the claimant to establish that a respondent knew or ought to have known of the circumstances (i.e. the disability) leading to a claim of discrimination).
[120] See discussion above at note 94 and accompanying text.
[121] *NWT (WCB) v Mercer*, 2014 NWTCA 1 at para 42, [2014] 4 WWR 301 [*Mercer*], citing *Moore*, *supra* note 2 at para 33.

the test for *prima facie* discrimination is the sole reference to *Moore*. The Court did distinguish *Withler* and its reliance on government objectives on the basis that that case was decided under section 15 of the *Charter* rather than human rights legislation.[122]

These are certainly positive decisions from the perspective of human rights claimants, as they apply the traditional test for discrimination without incorporating questions of arbitrariness, stereotyping, and government objectives at this stage. It may be that lower courts are so relieved to have a statement from the Supreme Court that appears to accept the traditional *prima facie* approach to discrimination that they avoid looking into the more contradictory references to arbitrariness, government objectives and deference in *Moore*.

This is not the end of the story, however. Decisions of the Supreme Court subsequent to *Moore* indicate that there are ongoing concerns about the proper test for discrimination under section 15 of the *Charter* and the extent to which *Charter* considerations should apply under human rights legislation.

E. Continuing Confusion: *Québec v A* and *McCormick*

The Supreme Court of Canada split deeply in its most recent decision dealing with section 15 of the *Charter*, *Québec v A*.[123] This case considered whether the exclusion of *de facto* spouses from the Québec Civil Code's provisions on spousal support and property rights unjustifiably violated section 15 of the *Charter*.[124]

Writing for the majority on section 15, at least in terms of outcome, Justice Abella indicated that *Kapp* was not intended to impose "additional requirements" on equality claimants, and that prejudice and stereotyping should simply be seen as two indicia of discrimination, along with disadvantage more broadly.[125] She acknowledged that the concepts of prejudice and stereotyping reflect negative attitudes; whereas legal protections against discrimination are also meant to capture discriminatory conduct or effects, even those that are unintentional.[126] Her reasons also reiterated the importance of keeping a section 15 analysis distinct from the section 1 justification stage, noting that it is only at the latter stage that a consideration of government purpose and the reasonableness of the

[122] *Mercer*, *supra* note 121 at para 41.

[123] *Québec v A*, *supra* note 4. For an excellent discussion of this decision, see the Roundtable moderated by Sonia Lawrence with commentary by Robert Leckey, Hester Lessard, Bruce Ryder and Margot Young, (2014), on-line: Institute for Feminist Legal Studies, <http://ifls.osgoode.yorku.ca/category/thinkingabout/roundtable/eric-lola/>.

[124] *Civil Code of Québec*, SQ 1991, c 64, arts 401-430, 432, 433, 448-484 and 585.

[125] *Québec v A*, *supra* note 4 at paras 325-8.

[126] *Ibid* at paras 328 and 333.

differential treatment should be undertaken.[127]

Justice Abella's reasons resound positively for the analysis of discrimination under the *Charter* and potentially under human rights legislation as well. However, her interpretation of equality rights did not necessarily have the full support of all the other justices who were in the majority on the section 15 issue. Justice Deschamps (writing also for Justices Cromwell and Karakatsanis) stated that she agreed with Justice Abella's analysis and her statement of the test for discrimination seems to be in line with her colleague's, focusing on whether "the exclusion… perpetuates a historical disadvantage."[128] Chief Justice McLachlin also indicated that she agreed with Justice Abella's section 15 analysis.[129] However, rather than simply accepting disadvantage as a marker of discrimination, Chief Justice Mclachlin returned to the four contextual factors from *Law*.[130] As noted above, those factors require a consideration of the arbitrariness of government actions in light of government intent, therefore Chief Justice McLachlin's judgment does not fully repudiate the problems with the previous section 15 case law.[131]

In fact, even Justice Abella reverted to the language of "arbitrary disadvantage" at one point in her judgment.[132] This reference may have been inadvertant rather than evidence of intent to retain a focus on arbitrariness, especially given Justice Abella's admonition to keep questions of reasonableness out of section 15.[133] Yet in her application of section 15 to the facts, Justice Abella focused on the "functional similarity" between *de facto* and married spouses, which could be seen to bring into play the arbitrariness and unreasonableness of the distinction.[134] Questions, therefore, remain about the proper approach to discrimination under section 15 of the *Charter*, even for those in the majority on this issue in *Québec v A*.

Writing in dissent on section 15, Justice LeBel (Justices Fish, Rothstein and Moldaver concurring) maintained a focus on stereotyping and prejudice as "crucial factors" for identifying discrimination.[135] Justice LeBel was critical of Justice Abella's approach to discrimination, alleging that "her analysis would tend to reduce the review of alleged infringements of the right to equality to a

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[127] *Ibid* at paras 323, 333-335.

[128] *Ibid* at para 385. Note, however, that Abella J often refers to disadvantage more broadly, and not just to historic disadvantage.

[129] *Ibid* at para 416.

[130] *Ibid* at para 418.

[131] McLachlin CJ's judgment is also subject to the critique that it is internally inconsistent, based on her holding that the discriminatory exclusion of *de facto* spouses could be justified under section 1 of the *Charter*. See Jennifer Koshan and Jonnette Watson Hamilton, "Roundtable on *Québec v A*: Searching for Clarity on Equality"; on-line: ABlawg, <http://ablawg.ca/2013/06/05/roundtable-on-Québec-v-a-searching-for-clarity-on-equality/>.

[132] *Québec v A*, *supra* note 4 at para 331.

[133] See Koshan and Watson Hamilton, *supra* note 22 at note 209.

[134] *Québec v A*, *supra* note 4 at paras 350-356. I am indebted to Jonnette Watson Hamilton for this point.

[135] *Ibid* at paras 169 and 185.

requirement that adverse distinctions be found. There would no longer be an analytical framework to guide the courts in considering such matters, and this could affect the legitimacy of their decisions in this regard."[136]

Without saying so explicitly, Justice LeBel's interpretation of Justice Abella's position likens it to the traditional test for discrimination under human rights legislation, suggesting that we may have come full circle to *O'Malley* and *Andrews*. Indeed, Justice Abella's articulation of the *Andrews* test for discrimination in *Québec v A* sounds remarkably close to the *prima facie* approach: "the claimant's burden under the *Andrews* test is to show that the government has made a distinction based on an enumerated or analogous ground and that the distinction's impact on the individual or group perpetuates disadvantage."[137] As noted, however, we cannot take this to be the definitive approach to equality rights under section 15 given the complicated split in *Québec v A*. Appellate level decisions considering *Québec v A* continue to apply the *Kapp* approach to discrimination, including consideration of stereotyping and prejudice.[138]

Even if the *Charter* continues to have some influence in human rights cases, it is unclear at this juncture what that will be. The Supreme Court's most recent human rights decision further muddies the waters. In *McCormick v Fasken Martineau DuMoulin LLP*, the Supreme Court held that human rights protections in the employment context do not extend to equity partners in law firms.[139] Writing for a unanimous Court, Justice Abella once again used the language of arbitrariness in her definitions of discrimination, stating that the purpose of human rights legislation "include[s] the prevention of arbitrary disadvantage or exclusion based on enumerated grounds", and that "the duty of utmost good faith in a partnership may well capture some forms of discrimination among partners that represent arbitrary disadvantage".[140] Although the Court was not called upon to apply the *prima facie* test for discrimination in this case, Justice Abella's continued references to arbitrariness suggest that these references are more than inadvertent language.

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[136] *Ibid* at para 268.

[137] *Ibid* at para 323.

[138] See for example *Fannon v Canada (National Revenue)*, 2013 FCA 99 at para 5, [2013] WDFL 2165 (stating that the *Charter* test for discrimination requires proof of "an adverse distinction based on an enumerated or analogous ground, and that the statutory distinction creates a disadvantage by perpetuating prejudice or stereotyping"); and see *Taypotat v Taypotat*, 2013 FCA 192 at para 44, [2013] 365 DLR (4th) 485. See also *Kinsel v Canada (Citizenship and Immigration)*, 2014 FCA 126, 2014 CarswellNat 1567 (WL Can) at para 93 (focusing more on perpetuation of historic disadvantage as "the most authoritative pronouncement as to what violates section 15", citing *Québec v A*, *supra* note 4 at para 332) and at para 94 (referring to "arbitrary disadvantage"). Other cases focus more on the role of comparators in *Québec v A* (see e.g. *First Nations Child and Family Caring Society, FCA*, *supra* note 108 at para 18) or its implications for other provincial laws excluding common law couples from benefits (see *Jackson v Zaruba*, 2013 BCCA 81 at paras 10-16, [2013] 28 RFL (7th) 289; *Lemoine v Griffith*, 2014 ABCA 46 at para 73, [2014] 93 Alta LR (5th) 381).

[139] *McCormick v Fasken Martineau DuMoulin LLP*, 2014 SCC 39, 2014 CarswellBC 1358 (WL Can).

[140] *Ibid* at paras 18 and 48 [emphasis added].

In light of this continued uncertainty, the next section presents a case study to show the need for clarification of the test, and the difference that the test for discrimination can make in practice.

III. Case Study: *Wright v College and Association of Registered Nurses of Alberta*

Wright involved a claim by two nurses with addictions to narcotics who were disciplined for "unprofessional conduct" for stealing drugs from their employers. The nurses argued that human rights principles precluded a finding of professional misconduct in the circumstances as application of the regular disciplinary procedures would have an adverse impact on them on the basis of their addiction-related disabilities. The nurses also argued that the College had a duty to accommodate them by using its Alternative Complaints Resolution Process which allowed for treatment and rehabilitation rather than discipline for nurses who were "incapacitated" because of addiction to alcohol or drugs.[141]

Justice Slatter wrote for a majority of the Alberta Court of Appeal and his statement of the test for discrimination is unclear at best. He stated that "discrimination [focuses] on affronts to human dignity", citing *McGill* (which does not actually refer to human dignity), and without acknowledging that *Law*'s focus on human dignity was problematized in *Kapp*.[142] Later, Justice Slatter indicated that the issue in the case was "whether the College's conduct (in laying professional misconduct charges) is legally connected to the [appellants'] disability, so as to raise the College's conduct to the level of discrimination in law."[143] This sounds more like the test for *prima facie* discrimination set out in *Moore*. However, in upholding the College Appeals Committee's decision that the College's conduct was not discriminatory, the majority relied on several factors that went beyond the *prima facie* approach, including the College's motivation or intent, stereotyping, and arbitrariness.[144] The majority did not cite *Kapp*, but relied on Justice Abella's reasons in *McGill* for the requirements of stereotyping and arbitrariness, and on *Law*-era section 15 and human rights cases for the notion that discrimination requires proof of a violation of human dignity.[145] The basis of the majority decision is that the nurses were disciplined for their criminal conduct rather than for their addictions, which was not an arbitrary or stereotypical application of the discipline process that violated their dignity. In other words, the nurses were

[141] *Wright*, *supra* note 5 at paras 29-30 and 41.
[142] *Ibid* at para 55.
[143] *Ibid* at para 57.
[144] *Ibid* at para 58.
[145] *Ibid* at para 64.

treated the same as anyone else who stole drugs from their employer and were not subjected to discriminatory treatment.[146]

As for the argument that the failure to take their addictions into account amounted to adverse effects discrimination, Justice Slatter stated that "the mere presence of a disproportionate effect on a protected group is not conclusive if it does not engage artificial and stereotypical assumptions."[147] There was no recognition in the majority decision that it may be very difficult in adverse effect cases to establish stereotyping and arbitrariness given that these concepts normally relate to direct, intentional discrimination (as noted by Justice Abella in *Quebec v A*). Nor was there recognition that dignity has fallen into disfavour as the test for discrimination. The majority seems motivated by its concern over the "far-reaching" consequences of "excusing criminal behaviour because of addictions" and its sense that "[t]here are a great many addicts who do not commit criminal acts", and that those who do should be "[held] accountable for their actions."[148]

In contrast, Justice Berger's dissenting opinion accepted the traditional *prima facie* test for discrimination and considered whether the appellants had a disability, received adverse treatment, and if the disability was a factor in the adverse treatment.[149] For Justice Berger, the issue was whether "neutral performance standards have a disproportionately adverse impact" on nurses suffering from addiction-related disabilities which caused them to steal narcotics.[150] He found that all of the elements required to establish discrimination on a *prima facie* basis were present – the nurses had addiction related disabilities, they received adverse treatment in the form of discipline for professional misconduct, and the evidence established a connection between the disability and the adverse treatment.[151] He refuted the majority's position, stating that "[t]reating all nurses the same creates serious inequality."[152] In contrast to the majority decision, Justice Berger's finding of *prima facie* discrimination required the College to defend its actions under the *bona fide* justification test, which necessitated proof that it was impossible to accommodate the nurses without undue hardship to the College.[153] He would have remitted the matter to the College's Appeal Committee for consideration of the accommodation issue.

Moore was pending when the Alberta Court of Appeal decided *Wright* and

[146] *Ibid* at para 62.
[147] *Ibid* at para 61.
[148] *Ibid* at paras 66-67.
[149] *Ibid* at para 118, citing *BC v BCNU*, *supra* note 71.
[150] *Wright*, *supra* note 5 at para 116.
[151] *Ibid* at para 119-123. Berger J actually found a causal connection at the third stage of the *prima facie* test, even though that may not be required to prove discrimination. See *Pieters*, *supra* note 114 at para 55.
[152] *Wright*, *supra* note 5 at para 123.
[153] *Ibid* at paras 128-9.

was handed down just before the leave to appeal application in *Wright* was filed.[154] The application raised three issues. First, how should professional bodies such as the College apply human rights principles in the context of disciplinary proceedings? It is clear that human rights laws apply to such bodies.[155] However, the Court of Appeal's majority decision suggested that there was a conflict between the traditional approach to discipline and a human rights approach, and this required clarification by the Supreme Court. The second issue was whether a different test for discrimination arises where the ground in question is an addiction-related disability. As argued in the leave application, *Wright* implies that there is a hierarchy of disabilities, with addiction-related disabilities subject to a higher level of scrutiny as they may involve an element of volition.[156] Third, what is the proper test for discrimination? The leave application argued that *Moore* did not resolve the debate about the appropriate test, particularly in the context of adverse effects discrimination, where the elements of stereotyping and arbitrariness are difficult to meet.

Chief Justice McLachlin, along with Justices Abella and Cromwell, denied the leave to appeal application in *Wright*.[157] This was a disappointing outcome, especially since Chief Justice McLachlin and Justice Abella were the architects of the decisions in *McGill, Kapp, Moore* and *Quebec v A*. While they may have believed the law on discrimination is clear enough that the appeal in *Wright* was not a matter of national importance, I would disagree.[158]

IV. Why to Avoid a Stringent Approach Under Human Rights Legislation

The first two parts of this paper have examined what the test for discrimination is under human rights legislation and the *Charter*, and the differences the test would have on outcomes. In this section, I argue that the test for discrimination under human rights legislation should remain the traditional *prima facie* approach, unencumbered by extra requirements that may be imported via section 15 of the *Charter*.

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[154] I consulted with counsel for the applicants in the leave to appeal application in *Wright*.

[155] See e.g. section 9 of the *Alberta Human Rights Act*, RSA 2000, c A-25.5.

[156] Leave to appeal application in *Wright v College and Association of Registered Nurses of Alberta*, at para 51 (on file with author). The application cited other cases where this issue was raised, such as *Gooding*, *supra* note 72.

[157] *Wright v College and Association of Registered Nurses of Alberta*, 2013 CarswellAlta 341, [2013] 452 NR 398 (note) (SCC).

[158] For another recent Alberta Court of Appeal decision where leave to appeal to the SCC on the proper test for discrimination was refused, see *Lethbridge Regional Police Service v Lethbridge Police Association*, 2013 ABCA 47, [2013] 355 DLR (4th) 484, leave denied 2013 CarswellAlta 1045 (WL Can), 2013 CanLII 35702 (LeBel, Karakatsanis and Wagner JJ).

In 2012, the Journal of Law and Equality published a special edition focused on the proper test for discrimination in the human rights context. The issue focused primarily on *Tranchemontagne*. Several articles were critical of the influence that section 15 of the *Charter* has had on human rights decisions.[159] For example, Denise Réaume argued that the importation of the *Charter*'s approach to discrimination into human rights legislation affected not only the burden of proof, but it also "produce[d] a different conception of discrimination" which obscured the legislature's intent that "the important normative work of determining the scope of liability" should take place at the stage of exemptions and defences.[160] Human rights legislation has been framed and traditionally interpreted in a way that puts the onus on the respondent to disprove a *prima facie* case of discrimination and it is only if the respondent fails to do so that substantive discrimination is made out. This differs significantly from the current approach under section 15 of the *Charter* where proof of substantive discrimination is on the claimant and is relatively onerous. As Réaume notes, where the focus is on stereotyping (as in *Kapp* and *Withler*), "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... the burden falls on respondents to prove that their generalizations are accurate."[161]

The same point could be made about the problems with introducing an element of arbitrariness into the test for discrimination as something that the claimant must prove, rather than requiring the respondent to prove the rationality of its differential treatment of the claimant.[162] This sort of shift means that human rights claims "may fail even though it was perfectly feasible [for respondents] to do things in a way that would not have excluded the subset of members of the excluded group who actually do need or merit the benefit."[163]

In addition to these considerations, importing section 15 requirements into the test for discrimination under human rights legislation raises access to justice issues. This was noted by Leslie Reaume in the context of the *Law* approach which increased the burden on human rights complainants beyond that imposed by *O'Malley*.[164] Access to justice concerns have been raised as well in relation to the importation of more modern manifestations of the section 15 test into human rights legislation. To the extent that section 15 requirements continue to impose a greater burden this "has real financial, temporal, and outcome-based consequences for the claimant pursuing a discrimination

[159] See e.g. Mummé, *supra* note 26; Oliphant, *supra* note 51; Denise Réaume, *supra* note 51.
[160] Denise Réaume, *supra* note 51 at 68-69.
[161] *Ibid* at 82.
[162] See the discussion of the problems with *McGill*, above, at notes 63-66 and accompanying text.
[163] Denise Réaume, *supra* note 51 at 82.
[164] Leslie Reaume, *supra* note 51 at 374-376.

claim."[165]

In light of these differences in approach and the implications of those differences, what are the arguments in favour of keeping the tests for discrimination under human rights legislation and the *Charter* distinct?

Although human rights legislation is considered quasi-constitutional, it is easier to amend a statutory scheme than the *Charter* should the legislatures decide to shift the burden away from the traditional *prima facie* approach. Although human rights legislation applies broadly to public and private actors, it is restricted in its application to those grounds and to those areas of conduct that a legislature sees fit to protect. Legislation in each Canadian jurisdiction differs with respect to the protected grounds and areas and with respect to the defences and exemptions that are available in different contexts. As noted by Réaume, these legislative choices evidence decisions to protect spheres where discrimination has been problematic.[166] Human rights legislation is also regulatory in nature and is administered by adjudicators with expertise in the area, incorporating a range of procedures, such as mediation, as a way of resolving disputes.[167]

In contrast, section 15 of the *Charter* protects against discrimination in relation to laws and other government actions based on both enumerated grounds (race, national or ethnic origin, colour, religion, sex, age or mental or physical disability) and analogous grounds (e.g. citizenship, marital status and sexual orientation), and is subject only to an ameliorative programs defence under section 15(2) and the reasonable limits justification under section 1.

Another key difference is that the *Charter* applies only to government actors and actions. As noted above, this consideration has sometimes been used as a rationale for using the section 15 test for discrimination in human rights cases.[168] However, if the concern is that governments should not be subjected to different tests for discrimination depending on whether the claim against them comes under human rights legislation or the *Charter*,[169] that concern would be better resolved by "local adjustments" to human rights legislation.[170] For example, Manitoba's *Human Rights Code* protects against discrimination on the ground of social disadvantage, a protection one might expect to be asserted most frequently against government respondents, and explicitly limits complaints on that ground to cases involving "negative bias or stereotype related to that social disadvantage."[171]

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[165] MacKay, *supra* note 55 at 97. See also Mummé, *supra* note 26 at 104.
[166] Denise Réaume, *supra* note 51 at 96.
[167] MacKay, *supra* note 55 at 61.
[168] See discussion above at notes 26 to 37 and accompanying text.
[169] Claire Mummé argues that *Charter* equality claims have become a last resort for challenging discrimination in government services. See Mummé, *supra* note 26 at 108.
[170] Denise Réaume, *supra* note 51 at 100.
[171] *The Human Rights Code*, CCSM c H175, section 9(2.1).

While we might assume that governments act in the public interest, and that that orientation should have some bearing on the approach to discrimination claims, the same cannot be said of private respondents.[172] It is, therefore, problematic to modify broadly the approach to discrimination in ways that might allow the conduct of private actors to go unchallenged. The lingering influence of section 15 cases and the *McGill* decision in the human rights context, evidenced most recently in *McCormick* – a case involving private actors – suggests that there is still a need to unequivocally reaffirm the traditional approach to *prima facie* discrimination.

V. Conclusion

Overall, there are good reasons for retaining the traditional *prima facie* approach to discrimination in the human rights context as distinct from the approach to equality rights under section 15 of the *Charter*. This is not meant to be an admission of defeat in terms of the *Charter* test for discrimination that simply seeks to preserve a fence around the area where discrimination claims can still have some hope of success. Many equality scholars have argued that the *Kapp/Withler* approach to discrimination under section 15 of the *Charter* requires refinement as well. There were signs in *Québec v A* that the Supreme Court is listening, but it is too soon to say what the impact of that decision on equality rights jurisprudence will be. In the meantime, human rights legislation should be spared the stringent requirements of section 15 cases such as stereotyping, prejudice, arbitrariness and the related consideration of and deference to government objectives.

[172] MacKay, *supra* note 55 at 86.