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.
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 attributable 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. 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.

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.

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.

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. One of the earliest statements from the Supreme Court of Canada on the proper approach under human rights legislation was in Lawrence v. Canada (Minister of Health) (1988), where the Court held that section 15 of the Charter should be interpreted as requiring “amina, neutral, objective consideration of any statutory classification.”

In the context of human rights legislation, the test for discrimination was often described as a “prima facie” test. This means that the plaintiff must first establish a prima facie case of discrimination, and then the defendant must provide a legitimate justification for the discrimination.

In Andrews v. British Columbia, the Court held that section 15 of the Charter should be interpreted in a manner consistent with the statutory framework under which the act in question was enacted. This approach was later critiqued by Justice Law in National Energy Board v. National Health and Welfare Council, where she argued that the Charter should be interpreted independently of the statutory framework.

The Court’s approach in Meiorin v. Correctional Officers’ Association was that section 15 of the Charter should be interpreted in a manner consistent with the ends and purposes of the Charter itself, rather than the purposes of the act in question.

In the case of Grismer v. British Columbia (Education), the Court held that section 15 of the Charter should be interpreted in a manner that reflected the “undiscovered宪”

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

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. 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.” 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.”

*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*. 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).” 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. “Drawing upon” *O’Malley*, discrimination was defined in *Andrews* as:

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9 Ibid at para 12.
10 Ibid at para 12.
11 Ibid at para 14.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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”.\textsuperscript{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.\textsuperscript{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


\textsuperscript{17} Andrews, supra note 12 at para 20.

\textsuperscript{18} Ibid at para 21.

\textsuperscript{19} Ibid.

\textsuperscript{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.”

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

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. 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. 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. 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. 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.”

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21 Ibid at paras 51-54 and 88.
24 See e.g. Martin, supra note 23 at 328-330; Koshan and Watson Hamilton, supra note 23 at 32.
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 Romney, supra note 25, decided a few days before Gwinner, took the same approach (at para 12). Romney 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.
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

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\(^{30}\) Ibid at paras 101 and 103.


\(^{34}\) 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 \textit{bona fide} occupational requirements following a finding of \textit{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 \textit{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 \textit{Meiorin} does the Court indicate that \textit{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 \textit{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 \textit{British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)}, the unified approach from \textit{Meiorin} was extended to apply in the government services context.\(^{43}\) Henceforth, claims of \textit{bona fide} justifications for the denial of services that were \textit{prima facie} discriminatory were also to be analyzed under the unified approach.\(^{44}\) The \textit{Grismer} case is particularly analogous to \textit{Charter} claims as it dealt with an allegation of discrimination in the provision of government services, but the Supreme Court did not apply the \textit{Charter} test for discrimination in \textit{Grismer} either.\(^{45}\) Instead, the Court’s approach sounds very much like \textit{O’Malley}, finding that a \textit{prima facie} case of discrimination was established “by showing that [Grismer]...  


\(^{38}\) \textit{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 \textit{ibid} at para 54).

\(^{39}\) \textit{Ibid} at paras 47-48.

\(^{40}\) \textit{Ibid} at para 49.

\(^{41}\) \textit{Ibid} at para 48.

\(^{42}\) \textit{Ibid} at para 69.


\(^{44}\) \textit{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.”

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. Yet in other cases, as noted above, the Charter test was applied in spite of Meiorin and Grismer. 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. 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. 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 facie 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.

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

Jonnette Watson Hamilton and I have questioned whether \textit{Kapp} actually amounts to a return to \textit{Andrews}.\textsuperscript{56} \textit{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.\textsuperscript{57} However, stereotyping and arbitrariness were less of a focus in \textit{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.\textsuperscript{58} Others have been critical of \textit{Kapp}’s approach to discrimination as well.\textsuperscript{59}

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

\begin{itemize}
  \item \textsuperscript{53} \textit{Ibid} at para 21. The Court did note that it continued to see human dignity as a value underlying section 15.
  \item \textsuperscript{54} \textit{Ibid} at para 18.
  \item \textsuperscript{55} \textit{Ibid} at para 23. \textit{Kapp} also deals with the proper interpretation of the affirmative action clause in section 15(2) of the Charter. This aspect of \textit{Kapp}, as well as the Court’s decision in \textit{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.
  \item \textsuperscript{56} Koshan and Watson Hamilton, \textit{supra} note 23 at 38-39.
  \item \textsuperscript{57} \textit{Andrews}, \textit{supra} note 13 at para 19.
  \item \textsuperscript{58} Koshan and Watson Hamilton, \textit{supra} note 23 at 39.
  \item \textsuperscript{60} \textit{McGill University Health Centre (Montréal General Hospital) v Syndicat des employés de l’Hôpital général de Montréal}, 2007 SCC 4, [2007] 1 SCR 161 [\textit{McGill}].
\end{itemize}
[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.
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.
The concurring opinion in McGill was given some heft by a majority of the Supreme Court in Honda Canada Inc v Keays. 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. 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.” 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. 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. 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.” 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.” On the basis of this approach, the Court

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68 Ibid at paras 67-68.
69 Ibid at para 71.
70 See Oliphant, supra note 51 at 49.
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* in 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.


\(^{81}\) Ibid at para 62.
clarify this uncertainty.\textsuperscript{82}

C. \textit{Moore}: Returning to the Traditional Approach?

\textit{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.\textsuperscript{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 \textit{McGill}, reasons that were critiqued in the factum of the West Coast Women’s Legal Education and Action Fund for importing \textit{Charter} considerations into the human rights context.\textsuperscript{84} However, and in contrast to its decision in \textit{Kapp}, the Court did not take the opportunity to provide an explicit clarification of the test; the Court simply reiterated the traditional \textit{prima facie} approach to discrimination. According to Justice Abella, “to demonstrate \textit{prima facie} discrimination, complainants are required to show that they have a characteristic protected from discrimination under the \textit{Code}; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact.”\textsuperscript{85}

However, echoing her judgment in \textit{McGill}, Justice Abella used the language of arbitrariness at several points in \textit{Moore}. For example, she stated that whether claims relate to individual or systemic discrimination, “the focus is always on whether the complainant has suffered \textit{arbitrary adverse effects} based on a prohibited ground.”\textsuperscript{86} This assertion indicates that a consideration of arbitrariness is part of the test for discrimination, which is contrary to the traditional \textit{prima facie} approach that she set out elsewhere. At other points in \textit{Moore}, Justice Abella’s references to suggests that she may consider arbitrariness 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 \textit{arbitrary} — or

\textsuperscript{82} See \textit{Gwinner}, supra note 25; \textit{Nixon}, supra note 33; \textit{Armstrong}, supra note 71; \textit{Gooding}, supra note 72.

\textsuperscript{83} \textit{Moore}, supra note 2 at paras 1-4, 23-24.


\textsuperscript{85} \textit{Moore}, supra note 2 at para 33.

\textsuperscript{86} \textit{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.”

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?” 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.”

So, in spite of reiterating the traditional test for prima facie discrimination, the Supreme Court’s support for that test is not particularly clear. 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. 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.

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. 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.\textsuperscript{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.\textsuperscript{95}

\textit{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.\textsuperscript{96} Justice Abella’s comments about the “budgetary crisis” facing the school district are reminiscent of the Court’s deferential \textit{Charter} decision in \textit{Newfoundland v NAPE}.\textsuperscript{97} Her references to government objectives and deference are also reminiscent of the Court’s approach in other section 15 cases such as \textit{Withler v Canada (Attorney General)}.\textsuperscript{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 \textit{Law} and the reliance on arbitrariness in \textit{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.\textsuperscript{99}

It is, therefore, difficult to see \textit{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, \textit{Moore} can be seen as a positive development for its treatment of comparator groups.\textsuperscript{100} Since the time of \textit{Andrews}, the Supreme

\textsuperscript{94} Ibid at para 48.
\textsuperscript{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 (\textit{ibid} at para 54).
\textsuperscript{96} Ibid at para 57. For other critiques of this aspect of \textit{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 \textit{Moore}” (2013) 10 JL & Equality 93.
\textsuperscript{98} Withler v Canada (Attorney General), 2011 SCC 12, [2011] 1 SCR 396 [\textit{Withler}].
\textsuperscript{99} See e.g. \textit{Lincoln v Bay Ferries Ltd.}, 2004 FCA 204 at para 22, [2004] 322 NR 50.
\textsuperscript{100} For a detailed discussion on this aspect of \textit{Moore} see Gwen Brodsky, “\textit{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. 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). 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.

The mirror comparator approach used under section 15 of the Charter also found its way into human rights cases. 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.

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.” 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. I maintain that the Court should have been more explicit in addressing the appropriate test in light of the ongoing uncertainty in this

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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.
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

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


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.” 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. 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.” 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. 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. 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. 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.” 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

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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 NWTC 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.  

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.” Chief Justice McLachlin also indicated that she agreed with Justice Abella’s section 15 analysis. However, rather than simply accepting disadvantage as a marker of discrimination, Chief Justice McLachlin returned to the four contextual factors from *Law*. 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.

In fact, even Justice Abella reverted to the language of “arbitrary disadvantage” at one point in her judgment. 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. 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. 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*.

Written 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. 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.”

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.” 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.

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. 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”. 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.

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 Taqytot v Taqytot, 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; Lemieux v Griffith, 2014 ABCA 46 at para 73, [2014] 93 Alta LR (5th) 381).
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.\textsuperscript{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.”\textsuperscript{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 \textit{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 “[h]eld accountable for their actions.”\textsuperscript{148}

In contrast, Justice Berger’s dissenting opinion accepted the traditional \textit{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.\textsuperscript{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.\textsuperscript{150} He found that all of the elements required to establish discrimination on a \textit{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.\textsuperscript{151} He refuted the majority’s position, stating that “[t]reating all nurses the same creates serious inequality.”\textsuperscript{152} In contrast to the majority decision, Justice Berger’s finding of \textit{prima facie} discrimination required the College to defend its actions under the \textit{bona fide} justification test, which necessitated proof that it was impossible to accommodate the nurses without undue hardship to the College.\textsuperscript{153} He would have remitted the matter to the College’s Appeal Committee for consideration of the accommodation issue.

\textit{Moore} was pending when the Alberta Court of Appeal decided \textit{Wright} and

\begin{itemize}
  \item[\textsuperscript{146}] Ibid at para 62.
  \item[\textsuperscript{147}] Ibid at para 61.
  \item[\textsuperscript{148}] Ibid at paras 66-67.
  \item[\textsuperscript{149}] Ibid at para 118, citing \textit{BC v BCNU}, supra note 71.
  \item[\textsuperscript{150}] \textit{Wright}, supra note 5 at para 116.
  \item[\textsuperscript{151}] Ibid at para 119-123. Berger J actually found a causal connection at the third stage of the \textit{prima facie} test, even though that may not be required to prove discrimination. See \textit{Pieters}, supra note 114 at para 55.
  \item[\textsuperscript{152}] \textit{Wright}, supra note 5 at para 123.
  \item[\textsuperscript{153}] Ibid at paras 128-9.
\end{itemize}
was handed down just before the leave to appeal application in Wright was filed. 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. 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. 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. 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.

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.
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. 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. 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.”

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. 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.”

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*. 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.”  

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. 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.

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. 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, that concern would be better resolved by “local adjustments” to human rights legislation. 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.”

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.\textsuperscript{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 \textit{prima facie} discrimination.

\textbf{V. Conclusion}

Overall, there are good reasons for retaining the traditional \textit{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 \textit{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.

\textsuperscript{172} MacKay, \textit{supra} note 55 at 86.