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# Under the Influence: The Alberta Court of Appeal and the Test for Discrimination

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**Cases commented on:**

*Wright v College and Association of Registered Nurses of Alberta (Appeals Committee),* 2012 ABCA 267, leave to appeal denied, 2013 CanLII 15573 (SCC); *Lethbridge Regional Police Service v Lethbridge Police Association*, 2013 ABCA 47, leave to appeal application filed, April 15, 2013, SCC

On March 28, 2013 the Supreme Court of Canada denied leave to appeal in the case of *Wright v College and Association of Registered Nurses of Alberta*. Linda McKay-Panos blogged on that case here; it involves a claim of discrimination by two nurses with opioid addictions who were disciplined by their professional association after stealing narcotics from their employers. A majority of the Alberta Court of Appeal (per Slatter, JA, Ritter JA concurring) held that there was no discrimination and thus no duty to accommodate the nurses, using an approach that focused on stereotyping, prejudice and arbitrariness. Writing in dissent, Justice Berger undertook a traditional *prima facie* discrimination analysis and decided that the nurses had experienced discriminatory treatment. This split reflects a wider uncertainty about the appropriate test for discrimination under human rights law, and in particular the extent to which the approach to discrimination under section 15 of the *Charter* should have an influence. In the Supreme Court's most recent human rights judgment, *Moore v British Columbia (Education)*, 2012 SCC 61 (per Abella J), the Court declined to explicitly clarify the proper test, yet implicitly indicated that the traditional *prima facie* approach to discrimination is correct. Perhaps that is why the Court decided not to hear the appeal in *Wright*, which was decided before *Moore*. A more recent Court of Appeal decision, *Lethbridge Regional Police Service v Lethbridge Police Association,* was decided after *Moore,* yet Justices Martin, Watson and Slatter maintained a focus on stereotyping as the defining feature of discrimination. Worse, *Lethbridge Police* seems to impose additional burdens on complainants in human rights cases. This post will critically consider the Alberta Court of Appeal's approach to discrimination and argue that the Supreme Court should grant leave to appeal in *Lethbridge Police* to clarify the proper test.

## The Test(s) for Discrimination

In *Ontario Human Rights Commission and O'Malley v Simpsons-Sears*, [1985] 2 SCR 536, the Supreme Court established the *prima facie* approach to discrimination under human rights legislation. What a claimant 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" (at para 12). In *Moore*, this approach was described as a three step test (at para 33): "complainants are required to show [1] that they have a characteristic protected from

discrimination under the *Code*; [2] that they experienced an adverse impact with respect to the service; and [3] that the protected characteristic was a factor in the adverse impact."

*O'Malley* was cited in *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, where the Supreme Court first developed the test for discrimination under section 15 of the *Charter*. In *Andrews*, Justice McIntyre noted that while there were important differences between human rights legislation and the *Charter*, "In 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)" (at para 38). 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 justifications of discriminatory actions were to be kept separate from the discrimination analysis. The Court rejected an approach to section 15 that that would have protected against only unreasonable discrimination, and instead defined discrimination in terms of disadvantage related to enumerated and analogous grounds, which was not much of a departure from the traditional *prima facie* approach under human rights legislation.

*Andrews* provided the governing approach to equality rights for some time, 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)*, [1999] 1 SCR 497, which focused on "human dignity" as the measure of discrimination. Whether there was a violation of human dignity was assessed with regard to four contextual factors, some of which – contrary to *Andrews* – imported section 1 *Charter* considerations such as the connection between the purpose of the law and the claimant's needs and circumstances (i.e. a consideration of arbitrariness) into the test for discrimination. The *Law* test prevailed from 1999 to 2008, and several Alberta human rights cases applied that test during this period, rather than the more traditional *prima facie* approach to discrimination (see e.g. *Gwinner v Alberta (Human Resources and Employment)*, 2002 ABQB 685, aff'd 2004 ABCA 210; leave to appeal denied, [2004] SCCA No 342; *Alberta (Minister of Human Resources and Employment) v Weller*, 2006 ABCA 235; leave to appeal denied [2006] SCCA No 396). Cases in other jurisdictions did so as well (see e.g. *British Columbia Government and Service Employees' Union v British Columbia (Public Service Employee Relations Commission)*, 2002 BCCA 476 (*Reaney*)). In other human rights cases, courts declined to follow *Law*, particularly when the claim involved private rather than government action (see e.g. *Vancouver Rape Relief Society v Nixon et al*, 2005 BCCA 601; leave to appeal denied, [2006] SCCA No 365).

In 2008, the Supreme Court abandoned the discrimination as human dignity approach under section 15 of the *Charter* in *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 (for ABlawg comments on *Kapp* see here and here). In doing so, the Court recognized commentators' criticisms about the formalism of *Law* and the added burden on claimants to prove a violation of their human dignity (at para 22). In a decision penned by McLachlin CJ and Abella J, the Court purported to return to *Andrews* in *Kapp* by adopting a definition of discrimination that focused on the perpetuation of disadvantage by prejudice and stereotyping (at para 18). The Court also suggested that the contextual factors from *Law* were relevant to prejudice and stereotyping, thus maintaining a consideration of arbitrariness in the section 15 analysis. Jonnette Watson Hamilton and I have argued that *Kapp* is not actually a return to *Andrews*, and that a test of discrimination that focuses on prejudice, stereotyping and arbitrariness is a narrow one that may not capture the harms of unintentional, effects based discrimination and improperly considers section 1 matters under section 15 (see Jennifer Koshan and Jonnette Watson Hamilton, "The Continual Reinvention of Section 15 of the *Charter*", forthcoming, University of New Brunswick Law Journal; available on SSRN). Others have been critical of the *Kapp* approach to

discrimination as well (see e.g. 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).

Unfortunately, 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 (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] 1 SCR 161, is significant in this regard. In a concurring judgment in *McGill*, Justice Abella stated that "At 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, *arbitrariness* of the barriers imposed, whether intentionally or unwittingly" (at para 48, emphasis added).

Since *McGill* and *Kapp,* tribunals and courts have tried to make sense of the proper approach to discrimination in human rights cases. For example, in *Ontario (Disability Support Program) v Tranchemontagne*, 2010 ONCA 593, 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." However, prejudice and stereotyping were not "freestanding requirement[s]" (at para 84), 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" (at para 90). See also *Armstrong v British Columbia (Ministry of Health)*, 2010 BCCA 56; leave to appeal refused [2010] SCCA No 128.

The consequences of importing the *Charter* approach to equality into human rights analysis were discussed by Leslie Reaume in "Postcards from *O'Malley*: Reinvigorating Statutory Human Rights Jurisprudence in the Age of the *Charter*", in Fay Faraday, Margaret Denike and Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006) 373. Writing at the time of *Law*, Reaume noted that it increased the burden on human rights complainants 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* (at 374-376). More recently, Denise Réaume, in "Defending the Human Rights Codes from the *Charter*" (2012) 9 Journal of Law and Equality 67 at 68-69, argued that applying the *Kapp* approach to discrimination under human rights legislation "produce[s] a different conception of discrimination", which obscures the legislature's intent that "the important normative work of determining the scope of liability" should take place at the stage of defences. In other words, "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" (at 82). 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 choices. Where the test for discrimination is too onerous, the analysis never gets to the stage of considering the respondent's duty to accommodate the claimant, which should normally be the focus of human rights claims.

There are many arguments in favour of keeping the tests for discrimination under human rights codes and the *Charter* distinct. Human rights legislation is a statutory protection against discrimination, and although considered quasi-constitutional, it is easier to amend than the *Charter* if the legislature decides to shift the burden away from the traditional *prima facie* approach. Human rights legislation is also restricted to those grounds and those areas of conduct that a particular legislature sees fit to protect, and with respect to the defences and exemptions it makes available in different contexts. In contrast, section 15 of the *Charter* applies to laws and other government actions in all areas, and to both enumerated and analogous grounds, and *Charter* discrimination can only be saved by an ameliorative programs defence under section 15(2) or the reasonable limits justification under section 1. Another key difference is that human rights legislation binds private and public actors, while the *Charter* only applies to government actors and actions (thus involving policy considerations that may not apply under human rights legislation). Concerns that governments should not be subjected to different tests for discrimination depending on whether the claim against them comes under human rights codes or the *Charter* can be better resolved by what Réaume calls "local adjustments" to human rights legislation (at 100), rather than by letting private respondents such as employers and landlords off the hook via an overly stringent burden on claimants to prove discrimination.

Although there are good reasons for keeping distinct the human rights and *Charter* approaches to discrimination, at the time of *Wright* the proper test was still a matter of debate.

### *Wright v College and Association of Registered Nurses of Alberta*

As noted, *Wright* involved a claim of discrimination by two nurses with opioid addictions who were disciplined for "unprofessional conduct" by their professional association after 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 a discriminatory adverse impact on them on the basis of their addiction-related disabilities. They also argued that the College and Association of Registered Nurses of Alberta had a duty to accommodate their disabilities by using alternatives to the disciplinary process. In particular, the College had access to an Alternative Complaints Resolution Process that allowed for treatment and rehabilitation rather than discipline for nurses who were addicted to alcohol or drugs.

The majority's statement of the test for discrimination in *Wright* is unclear at best. Justice Slatter writes (at para 55) 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 abandoned in *Kapp*. Justice Slatter also suggests that the issue in the case is "whether the College's conduct (in laying professional misconduct charges) is legally connected to the appellant's [sic] disability, so as to raise the College's conduct to the level of discrimination in law" (at para 57). This sounds more like the test for *prima facie* discrimination set out in *Moore*. However, in upholding the tribunal's decision that the College's conduct was not discriminatory, the majority relies on several factors that go beyond the *prima facie* approach, including dignity, the College's motivation or intent, stereotyping, and arbitrariness (at para 58). Interestingly, the majority does not cite *Kapp* at all, but relies on *McGill* for the requirements of stereotyping and arbitrariness, and on *Law*-era section 15 and human rights cases for the notion that discrimination engages human dignity. The gist of the majority decision is that the nurses were disciplined for their criminal conduct rather than for their addictions, which is not an arbitrary or stereotypical application of the discipline process that engages their dignity. In

other words, the nurses were treated the same as anyone else who stole drugs from their employer (at para 62). As for the argument that the failure to take their addictions into account amounted to adverse effects discrimination, Justice Slatter states that "the mere presence of a disproportionate effect on a protected group is not conclusive if it does not engage artificial and stereotypical assumptions" (at para 61). There is no recognition in the majority decision that it will be very difficult in adverse effect cases to establish stereotyping and arbitrariness, given that these concepts normally relate to direct, intentional discrimination. Nor is there recognition that dignity has fallen into disfavour in the equality rights context. The majority decision seems motivated by its concern over the "far-reaching" consequences of "excusing criminal behaviour because of addictions" (at para 66), and its sense (not supported by evidence) that "there are a great many addicts who do not commit criminal acts" and that those who do should be "[held] accountable for their actions" (at para 67). Relatedly, the majority fails to find a sufficient causal link between the addictions and the nurses' thefts, contrary to the expert evidence that their addictions were at least a factor in their actions (para 61).

In contrast, Justice Berger's dissenting opinion applies the *prima facie* test for discrimination, and considers whether the appellants had a disability, received adverse treatment, and if the disability was a factor in the adverse treatment (at para 118). He finds all of these elements to be present in the case at hand: the nurses had addiction related disabilities, they received adverse treatment in the form of discipline for professional misconduct, and the evidence established a causal connection between the disability, the thefts, and the adverse employment consequences (at paras 119-123). Justice Berger recognizes that the issue is whether "neutral performance standards have a disproportionately adverse impact on a nurse suffering from a disability, namely an addiction, which causes her to steal narcotics" (at para 116), and refutes the majority's position, stating that "treating all nurses the same creates serious inequality" (at para 123). His 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 (at paras 128-9). Because this issue was not explored at the tribunal level, he would have remitted the matter for reconsideration.

*Moore* was pending when the Alberta Court of Appeal decided *Wright*, and was released just before the leave to appeal application in *Wright* was filed. In *Moore*, the Court was urged to clarify the test for discrimination by interveners such as West Coast LEAF. While it did not take the opportunity to provide that clarification explicitly, the Court does apply the traditional *prima facie* approach and does not import the concepts of stereotyping and prejudice. However, Justice Abella uses the language of arbitrariness at several points in her judgment in *Moore*. For example, at para 59, she states that "the focus is always on whether the complainant has suffered *arbitrary adverse effects* based on a prohibited ground" (emphasis added). This suggests that a consideration of arbitrariness is part of the test for discrimination, which is contrary to the traditional *prima facie* approach that the Court seems to support elsewhere in the judgment. At other points in *Moore*, Justice Abella's references to arbitrariness suggest that she may consider it relevant to the justification stage of analysis, although this is not entirely clear. For example, at para 60, she writes that "The question in every case is the same: does the practice result in the claimant suffering *arbitrary — or unjustified — barriers* on the basis of his or her membership in a protected group. Where it does, *discrimination will be established*" (emphasis added; see also paras 26 and 61). 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.

Returning to *Wright*, I consulted with counsel for the applicants in the leave to appeal application. The application raised three issues. First, how should professional bodies such as the

College apply human rights principles in the context of disciplinary proceedings? Although it is clear that human rights laws apply to such bodies (see section 9 of the *Alberta Human Rights Act*, RSA 2000, cA-25.5), the Court of Appeal suggests 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 sometimes involve an element of volition" (at para 51). The application cited other cases where this issue was raised as well, including *British Columbia (Public Service Agency) v British Columbia Government and Service Employees' Union*, 2008 BCCA 357, leave refused [2008] SCCA no 460 ("*Gooding").* Third, what is the proper test for discrimination, particularly in cases involving claims of adverse effects? 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. The application connected these three issues to show the compounded difficulties faced by claimants alleging addiction-related disabilities in the context of professional regulation.

Subsequent to the filing of the leave application in *Wright*, but before a decision on leave was rendered, the Supreme Court released its most recent section 15 decision, *Quebec (Attorney General) v A*, 2013 SCC 5 on January 25, 2013. Writing for the majority on section 15 (at paras 325-8), Justice Abella indicates 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. The majority acknowledges that the concepts of prejudice and stereotyping reflect negative attitudes, whereas legal protections against discrimination are also meant to capture discriminatory conduct or effects, apart from intentional actions. This is a hopeful indication that at least some members of the Supreme Court are willing to look beyond prejudice and stereotyping as definitions of discrimination, even under section 15 of the *Charter*. However, the members of the Court who dissented on section 15 (Justices LeBel, Fish, Rothstein, and Moldaver) maintain a focus on stereotyping and prejudice as "crucial factors" for identifying discrimination (at paras 169, 185), and even Justice Abella reverts to the language of "arbitrary disadvantage" at one point in her judgment (at para 331). As Jonnette Watson Hamilton and I suggest in "Continual Reinvention" (at note 209), this reference may have been a slip of the pen rather than evidence of intent to retain a focus on arbitrariness. However, this and the close split in *Quebec v A* confirm that questions remain about the proper approach to discrimination under section 15 of the *Charter*. Even if the *Charter* should have some influence in human rights cases, it is unclear in substance what that influence should be.

It was therefore very disappointing when Justices McLachlin, Abella and Cromwell denied the leave to appeal application in *Wright*, especially since McLachlin CJ and Abella J were the major architects of the *McGill* / *Kapp* / *Moore* / *Quebec v A* decisions. While they may have believed the law on discrimination is clear enough that the appeal in *Wright* was not a matter of national importance, my human rights and constitutional law students, and perhaps readers of this post, might beg to differ.

It is in this context of uncertainty that the Alberta Court of Appeal decided *Lethbridge Regional Police Service v Lethbridge Police Association.*

***Lethbridge Regional Police Service v Lethbridge Police Association***

Justices Martin, Watson and Slatter, writing as "The Court", released their decision in *Lethbridge Police* on February 12, 2013 – after both *Moore* and *Quebec v A*. The case involved a probationary police officer, Lester, who suffered workplace injuries, was given modified duties, and then experienced depression during his period of probation, leading to further problems which both he and the Police mishandled in different respects. His employment with the Lethbridge Police was terminated at the end of the probationary period, and his union filed a grievance and a human rights complaint. The parties agreed to have a labour arbitrator resolve both sets of issues. The arbitrator recognized that probationary employees have no right to permanent employment status, and that a refusal to continue probationary employment "can only be challenged if it is arbitrary, discriminatory, or done in bad faith" (ABCA at para 16). Applying a *prima facie* approach, the arbitrator found that discrimination based on disability was a factor in the termination of Lester, based on inferences of stereotyping drawn from the evidence. He remitted the matter to the parties to try to resolve. The arbitrator's decision was overturned on judicial review, and the Lethbridge Police Association appealed to the Court of Appeal.

The Court of Appeal finds that the arbitrator was correct in holding that a decision not to continue a probationary employee can be reviewed if it is "driven by discriminatory considerations" (at para 30). Reminiscent of its decision in *Wright*, the Court contends that "discrimination focusses on affronts to human dignity", citing *McGill* (at para 33), which (I note again) does not mention dignity. *Kapp, Moore* and *Quebec v A* are not cited in *Lethbridge Police*.

The Court then states that "Distinctions based on disability fall in a subtly different category, because some employees have actual limitations based on their disability. Drawing distinctions based on actual inability to do the work is not discrimination" (at para 34). The Court does not cite any authority for this point. Indeed, it is contrary to the well-established principle that an employee's inability to meet an employer's standards because of a protected ground is to be considered at the justification stage: *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 (*Meiorin*). The Court cites *Meiorin* (at para 66) for the point that "An individual assessment of the characteristics of a particular employee is what the law requires", but fails to note that this is a matter relating to a *bona fide* occupational requirement justification, not to discrimination.

The Court dilutes the *prima facie* test for discrimination further when it states that instead of establishing that a protected ground was <u>a factor</u> in the adverse treatment (step 3 of *Moore*), the better approach is as follows (at para 37):

> (a) first, determine if there was justification for the decision, absent the consideration of the prohibited ground, and
>
> (b) if so, then examine whether the discrimination was so egregious, or of sufficient magnitude, to warrant nullifying the entire decision because of it.

This approach essentially means that if there is <u>a factor</u> to justify the adverse treatment, it will not amount to discrimination. Put another way, an employer only needs to come up with one good reason to dismiss a probationary employee, even if it had other reasons that were discriminatory, unless the discrimination had a "significant causative effect" (at para 37).

According to the Court, "in cases like this it is legitimate to consider all the motivations and reasons behind any particular decision before deciding if discriminatory considerations so taint the decision that it should be set aside" (at para 38). Again, this approach is contrary to *Meiorin* and cases such as *Lincoln v Bay Ferries Ltd*, 2004 FCA 204, where it was held that employer motivations should not be considered until after the *prima facie* discrimination analysis. The Court of Appeal effectuates a major shift in the burden of proof here.

The Court also continues to focus on stereotyping as the definition of discrimination, notwithstanding the Supreme Court's decision in *Quebec v A*. And it finds that the arbitrator's inferences of stereotyping are not reasonable on the evidence, ultimately dismissing the appeal. As in *Wright*, the case never gets to the stage of considering what would be appropriate accommodation for the employee's disabilities.

It is to be hoped that the Supreme Court will grant leave to appeal in *Lethbridge Police*. *Moore* did not sufficiently clarify the approach to discrimination in human rights cases, nor has *Quebec v A* sufficiently clarified the approach to discrimination under the *Charter*. The Alberta Court of Appeal continues to interpret this uncertainty in ways that present insurmountable difficulties for claimants. The Court of Appeal 's treatment of disability discrimination, raised as an issue in the *Wright* leave application, persists as a problem as well, and now it has been extended to create a possible hierarchy between all forms of disability and other protected grounds. The Court seems to have lost sight of the fundamental principle that human rights legislation is to be given a broad, purposive interpretation that protects the interests of disadvantaged members of society in crucial areas such as employment. The influence of *Charter* equality jurisprudence is certainly a factor in this morass, but the Court of Appeal has created new problems as well. There is no pun intended when I say that it is high time for the Supreme Court to resolve the issues surrounding the proper approach to discrimination in human rights cases.

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