EQUALITY RIGHTS

An ebook collection of
ABlawg posts about section
15 of the *Charter*

AUGUST 17, 2015

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Introduction: By Jonnette Watson Hamilton and Jennifer Koshan

The Supreme Court of Canada has developed three different analytical frameworks for the analysis of claims under section 15 of the *Canadian Charter of Rights and Freedoms* since the equality guarantee came into force just over thirty years ago. During the first era, 1989 to 1999, *Andrews v Law Society of British Columbia,* [1989] 1 SCR 143, was the leading case. Between 1999 and 2008, the test crafted in *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 prevailed. The third and current era began in June of 2008 with the Court's decision in *R v Kapp*, 2008 SCC 41. *Kapp* simplified the test for determining whether there has been a violation of section 15(1) — (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? — and created a separate approach to claims under section 15(2). Although there was no ABlawg post on the *Kapp* decision when it was first released, most of the posts focusing on the *Charter*'s equality guarantee are comments on the application of the *Kapp* analytical framework. For a review of Supreme Court section 15 equality jurisprudence from *Andrews* to *Quebec (Attorney General) v A*, 2013 SCC 5 (CanLII), readers are referred to Jennifer Koshan and Jonnette Watson Hamilton "The Continual Reinvention of Section 15 of the *Charter*" (2013) 64 University of New Brunswick Law Journal 19, available on SSRN.

When it was first handed down, it was not clear that *Kapp* did set out a new analytical framework for all *Charter* equality claims. The case very deliberately set out a new approach to section 15(2), the affirmative action subsection. However, the Court's brief comments on the approach to section 15(1) initially had little impact on lower courts. Re-reading the posts written in the two years immediately following *Kapp* offers numerous reminders that courts were still using the test from *Law v Canada*. See, for example, Differential Treatment of Equality Law post-*Kapp*, commenting on *Woodward v Council of the Fort McMurray No. 468 First Nation*, 2010 FC 337 (CanLII) and the trio of posts about the Alberta Court of Appeal decision in *Morrow v Zhang*, 2009 ABCA 215 (CanLII): Some Questions about the Decision to Reinstate the Cap on Damages for Soft Tissue Injuries, More Questions about the Decision to Reinstate the Cap on Damages for Soft Tissue Injuries and Supreme Court denies equality claimants leave to appeal insurance cap. A post about the Supreme Court's 2009 decision in *Ermineskin Indian Band and Nation v Canada,* 2009 SCC 9 (CanLII), argued that decision made it clear that the legal framework for analyzing section 15(1) claims would be very different than it has been for the past decade: The End of *Law*: A New Framework for Analyzing Section 15(1) *Charter* Challenges.

By January 2010, *Kapp*'s status had solidified enough that it was nominated on ABlawg as the leading equality rights case of the 2000s: A Vote for *R v Kapp* as the Leading Equality Case of the Past Decade. And so it has proven to be, with the addition of two further Supreme Court decisions elaborating on the framework for section 15(1) claims and one decision concerning underinclusive section 15(2) claims.

With respect to section 15(1), the Court's decision in *Withler v Canada (Attorney General)*, 2011 SCC 12, can be seen as a companion case to *Kapp*. Numerous ABlawg posts comment on Alberta cases that applied — or misapplied— the *Kapp*/*Withler* framework. See, for example, Non-Fatal Exclusion: The *Fatal Accidents Act*, Stepchildren, and Equality Rights, A Vital

Judgment: Upholding Transgendered Rights in Alberta, and Fowl Play? A Look into Recent Canadian Reform Efforts for Backyard Chicken Legislation. For an extended critique of the *Withler* decision itself, see Jennifer Koshan and Jonnette Watson Hamilton, "Meaningless Mantra: Substantive Equality after *Withler*" (2011) 16:1 Review of Constitutional Studies 31, available on SSRN.

The Supreme Court's second major elaboration of the *Kapp* approach can be found in *Quebec (Attorney General) v A*, 2013 SCC 5, commented on in Roundtable on *Quebec v A*: Searching for Clarity on Equality. That case expanded the approach to discrimination beyond *Kapp*'s focus on prejudice and stereotyping, but also referenced "arbitrary discrimination", which became an emphasis in the Supreme Court's latest section 15(1) decision in *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 (CanLII); see The Supreme Court's Latest Equality Rights Decision: An Emphasis on Arbitrariness.

As already mentioned, *Kapp* was clearer in instituting a new approach to section 15(2), giving that section independent status to protect ameliorative laws, programs and activities For a comment on a case applying the new approach from *Kapp* to save the Aboriginal Court Worker Program under section 15(2), see Access to Justice and Representation by Agents.

The question of whether that new approach to section 15(2) would also apply to claims of underinclusive ameliorative programs was answered in the affirmative in *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37 (CanLII). A series of four ABlawg posts commented on the Alberta Court of Appeal decision in that case —the first judgment of the Court of Appeal to consider section 15 since *Kapp* — as well as the appeal to the Supreme Court of Canada: Evidence of Amelioration: What Does *Kapp* Require of Governments Under s.15(2) of the *Charter*? What Will Courts Permit?; Another Take on Equality Rights by the Court of Appeal; Leave to Appeal Granted by the SCC in Métis Status Case; and Interpreting Section 15(2) of the *Charter*: LEAF's Intervention in *Alberta (Minister of Aboriginal Affairs and Northern Development) v Cunningham*.

In addition to collecting the cases that apply and extend the *Kapp* framework, the compilation also brings to light a few themes. Topics include the extension of the equality guarantee to grounds analogous to those enumerated in section 15; adverse effects discrimination claims challenging facially neutral laws; and the Supreme Court's preference for deciding cases on section 2 or section 7 grounds, rather than under section 15.

A fairly large number of the cases featured in this collection focus on one particular aspect of the first step in the *Kapp* test: (1) Does the law create a distinction based on an enumerated or analogous ground? The contentious issue here is often whether a new ground on which a claim is advanced is analogous to the grounds enumerated in section 15. Two posts celebrate anniversaries of the Supreme Court's decision in *Vriend v Alberta*, [1998] 1 SCR 493 — Vriend Ten Years Later and The Vriend Case 15 Years Later — and remind us that sexual orientation had to be recognized as an analogous ground. The issue of homelessness as an analogous ground is discussed in Should Homelessness be an Analogous Ground? Clarifying the Multi-Variable Approach to Section 15 of the *Charter* and Can the Homeless Find Shelter in the Courts?. Whether the status of stepchildren could be an analogous ground was the question in Non-Fatal

Exclusion: The Fatal Accidents Act, Stepchildren, and Equality Rights and whether the status of parent should include a non-biological gay male who intended to be a parent is discussed in Non-biological Father from Separated Same-Sex Couple Declared a Legal Parent. As noted in A Vital Judgment: Upholding Transgendered Rights in Alberta, section 15 claims can include multiple, intersecting grounds of discrimination, some enumerated and some analogous, such as sex, mental or physical disability, gender identity, and transgender status.

Some of the claims under section 15(1) have been adverse effects discrimination claims, rather than claims of direct discrimination. In an adverse effects claim, the challenged legislation is neutral on its face and, as a result, evidence linking the legislation and the adverse impact is often a stumbling block for claimants. Notably, two 2015 judgments of the Supreme Court includes adverse effects section 15 claims: *Carter v Canada (Attorney General)*, 2015 SCC 5 (CanLII) and *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 (CanLII). The *Carter* case was decided by the Supreme Court on section 7, rather than on section 15, but the equality claim made and allowed at the trial level was the subject of two ABlawg comments: Assisted Suicide and Adverse Effects Discrimination: Where Will the Supreme Court Go in Carter?, and Supreme Court of Canada Strikes Down Ban on Physician Assisted Death. The Supreme Court did decide the *Taypotat* case on section 15, the only *Charter* claim brought in that case, as discussed in The Supreme Court's Other Opportunity to Revisit Adverse Effects Discrimination under the *Charter*: *Taypotat v Taypotat* and The Supreme Court's Latest Equality Rights Decision: An Emphasis on Arbitrariness. Another adverse effects case that failed because the evidentiary record was found to fall short is noted in National Day of Remembrance and Action on Violence Against Women and the Failed Challenge to the Repeal of the Long Gun Registry.

A number of the posts comment on the Supreme Court's preference for deciding cases on claims other than those brought under section 15. Assisted Suicide and Adverse Effects Discrimination: Where Will the Supreme Court Go in *Carter*?, for example, acknowledged that the Court was far more likely to decide *Carter* on section 7 grounds. The post on Teaching *Bedford*: Reflections on the Supreme Court's Most Recent *Charter* Decision, also speaks to the relative success that section 7 claims have had in the Supreme Court in comparison to the lack of success of section 15 claims. The Supreme Court decided *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 on freedom of religion, spending only one paragraph on the section 15(1) claim: see Security Trumps Freedom of Religion for Hutterite Drivers. Nonetheless, *Hutterian Brethren* has been cited numerous times by the Supreme Court and other courts as a leading precedent on section 15.

Finally, it should be noted that we have not included posts about the exclusion of farm workers from Alberta labour and employment legislation even though section 15 arguments were made in some of those posts; see, for example, The Statutory Exclusion of Farm Workers from the Alberta Labour Relations Code. The primary hurdle for a section 15 challenge in this context is to establish occupational status as an analogous ground, and the Supreme Court has not been receptive to such arguments in the past — or in 2015. See The Supreme Court's New Constitutional Decisions and the Rights of Farm Workers in Alberta. The posts commenting on the farm workers exclusions will be collected in a separate ebook.

This ebook is organized chronologically by date of post (oldest first) except that we have grouped together trial and appellate decisions so that any appellate decisions are printed immediately after the trial or first instance decision, as are other related posts. Where appropriate the text also includes any commentary and response received on the individual posts. There is no index to the volume but it should be readily searchable in this electronic form using key words and the "find" function in Adobe Acrobat or a similar program.

We are responsible for the selection of posts for this ebook. Evelyn Tang (JD 2016) is responsible for the hard work of weaving this all together.

March 10, 2008

Not on Their Backs: Cap on Damages for Soft Tissue Injuries Struck Down; Court Denies Stay of Remedy Pending Appeal

By: Jennifer Koshan

Cases Commented On: *Morrow v Zhang*, 2008 ABQB 125; *Morrow v Zhang and Pedersen v Thournout*, 2008 ABQB 98

On February 8, 2008, Associate Chief Justice Neil Wittmann of the Alberta Court of Queen's Bench struck down the $4000 cap on non-pecuniary damages for soft tissue injuries incurred in motor vehicle accidents. The cap was imposed in October 2004 via the Minor Injury Regulation, Alta. Reg. 123/2004 ("the MIR"). Justice Wittman's decision quickly became an election issue, with leaders of Alberta's major parties each staking out their territory on auto insurance. Premier Stelmach announced that the government would seek a stay of the ruling pending an appeal to the Alberta Court of Appeal. Liberal leader Kevin Taft countered that a Liberal government would not appeal the decision, and NDP leader Brian Mason used the opportunity to advocate for a public auto insurance system. On February 25, 2008, Justice Wittmann denied the stay application. This means that his original ruling, which struck down the cap without providing time for the government to amend the MIR, takes immediate effect.

The MIR was challenged by two different plaintiffs in the course of their civil actions for damages for injuries suffered in motor vehicle accidents. Their argument was that the MIR's cap on non-pecuniary damages (general damages for pain and suffering) violated their rights under sections 7 and 15 of the Canadian Charter of Rights and Freedoms. There was no issue as to the liability of the defendants in either case, and they played a minor role in the constitutional challenge, with the MIR being defended by the Alberta government and an intervener, the Insurance Bureau of Canada ("IBC").

Justice Wittman began his judgment by calculating the damages that each plaintiff would have received if not for the cap. He assessed the general damages of Peari Morrow, a 34 year old woman who sustained soft tissue injuries of the neck and upper back, at $20,000. Brea Pederson, a 32 year old woman with soft tissue injuries of the neck, shoulders and back and injury to her wrists, had her general damages assessed at $15,000. For both plaintiffs, then, the cap mattered, and so Justice Wittman was required to consider their Charter claims.

Before examining whether there were violations of sections 7 and / or 15 of the Charter, Justice Wittman undertook a lengthy overview of auto insurance in Canada, based on expert evidence and judicial notice of the legislation in various jurisdictions. He categorized Alberta's system as a "threshold no-fault" scheme, characterized by a cap on the level of damages that can be awarded in private lawsuits for particular injuries (typically minor injuries). Ontario, Newfoundland and Labrador, Nova Scotia, PEI and New Brunswick also have threshold no-fault systems with caps as low as $2500 for minor injuries (some of which are also being challenged constitutionally). Other provinces have either "pure no-fault" schemes, or "add-on no-fault" systems which permit no-fault benefits as well as the right to sue third parties for pain and

suffering. The MIR was part of a package of reforms passed in 2004 in light of concerns about high premiums, along with new obligations on insurers not to refuse new contracts or renewal of existing ones (The Fair Practices Regulation), and restricting their ability to withdraw from the auto insurance business (Insurance Act, R.S.A. 1980, c. I-3, s. 661.2).

Turning to the Charter issues, the first question was whether section 6 of the MIR, which imposed the $4000 cap on damages for soft tissue injuries, violated section 7 of the Charter, which guarantees "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." A number of interesting arguments were considered by the Court.

First, it was alleged by the plaintiffs that the cap violated their physical and psychological integrity, contrary to their right to security of the person. Justice Wittman rejected this argument, relying on the decision of the B.C. Court of Appeal in *Whitbread v. Walley*, (1988), 51 D.L.R. (4th) 509, appeal dismissed [1990] 3 S.C.R. 1273. In that case, Justice Beverley McLachlin, before her elevation to the Supreme Court of Canada, found that limitations on liability and damages for personal injury under the Canada Shipping Act did not violate section 7. McLachlin, J. noted that the framers of the Charter had not included property rights under section 7, and thus found that they did not intend the Charter to protect purely economic interests of this kind.

A second section 7 argument was that the cap restricts plaintiffs' ability to afford legal counsel, thereby denying them access to justice. Here, Justice Wittman referred to the recent and "unequivocal" ruling of the Supreme Court of Canada in *British Columbia v. Christie*, 2007 SCC 21, where the Court held that the rule of law does not confer a "general constitutional right to counsel in proceedings before courts and tribunals dealing with rights and obligations" (at para 123). While Christie was not a section 7 case, Wittman A.C.J. used it as support for his conclusion that "the sole fact that a right will lead to a damage award, which will not cover or only partly cover legal representation is certainly not sufficient to conclude that there was a denial of access to justice" (at para 124). There was also no evidence that the plaintiffs had been denied access to justice in the circumstances of the case, as both were represented by counsel.

The final section 7 argument dealt with another aspect of the insurance reforms, the Diagnostic and Treatment Protocols Regulation, Alta. Reg.122/2004 ("DTPR"), which requires a particular treatment protocol to be followed to avoid the application of the MIR. The plaintiffs argued that the DTPR deprived them of the ability to choose their own medical care, contrary to their right to security of the person. Justice Wittman distinguished a number of other cases, including *R v Morgentaler*, [1988] 1 S.C.R. 30, *Rodriguez v British Columbia*, [1993] 3 S.C.R. 519, and *Chaoulli v Quebec*, 2005 SCC 35, finding that the plaintiffs were still free to choose their own medical treatment, subject only to a potential penalty of having their damages capped. Again, this was found to be the sort of purely economic interest that was beyond the reach of section 7. Because there was no finding of a violation of the right to life, liberty or security of the person, Justice Wittman did not have to consider the principles of fundamental justice.

It is difficult to disagree with Justice Wittman's analysis of section 7 on the basis of the existing precedents. While there has been much criticism of the Supreme Court's failure to allow claims of social and economic rights under section 7, this critique has typically been mounted in response to cases such as *Gosselin v Quebec (A.G.)*, 2002 SCC 84, where a majority of the Supreme Court failed to find a positive obligation to provide adequate welfare benefits under section 7. Justice Wittman's application of Christie in the section 7 context is somewhat more worrying, given recent efforts to advocate a right to civil legal aid under section 7 (see *Canadian*

Bar Association v HMTQ et al, 2006 BCSC 1342, on appeal to the BCCA). However, the denial of the claims of Morrow and Pederson do not perpetuate a disregard for the interests of impoverished persons as in Gosselin and Christie, and are less open to criticism on that basis.

Justice Wittman then turned to the arguments under section 15 of the Charter. Section 15 provides for equality without discrimination on the basis of a number of protected grounds, including disability. As noted by Wittman, J., the leading section 15 case is *Law v Canada*, [1999] 1 S.C.R. 497. Applying the framework from Law, Justice Wittman confirmed that discrimination analysis is comparative, and found the appropriate comparator group in this case to be "accident victims who suffer injuries other than those set out in the MIR" (at para 181). Compared to this group, the plaintiffs were subject to differential treatment – i.e. to a cap on general damages that would not fully compensate their pain and suffering (to the extent that damages can ever do so). This was found to be a distinction based on physical disability, a protected ground under the Charter. Here, Wittman, A.C.J. rejected the IBC's argument that disability requires "obvious physical impairment", stating that "[t]he requirement that one's disability needs to be obvious in order to access the protection provided by s. 15(1) would significantly reduce its purpose" (at para 193).

The heart of a section 15 claim is whether there is substantive discrimination, which will be found where the purpose or effect of a law is to impair the claimant's essential human dignity. In Law, the Supreme Court set out a number of contextual factors that are supposed to assist courts in resolving this question, and Justice Wittman easily concluded that the factors supported a finding of substantive discrimination in this case. First, minor injury victims such as the plaintiffs were said to be subject to pre-existing disadvantage, stereotyping and prejudice. The Court referred to an excerpt from Hansard, a video on the IBC website, media reports, and expert evidence as support for the proposition that soft tissue injury victims "are often viewed as malingerers who exaggerate their injuries or their effects in an effort to gain financially" (at para 205). The MIR was found to reinforce this perception by implying that sufferers of soft tissue injuries are less worthy and deserving of compensation, a finding "suggestive of discrimination" even though the government did not intentionally perpetuate the stereotype. Second, Justice Wittman held that the cap did not align with the needs, capacities and circumstances of the plaintiffs in light of the fact that their damages would have been higher but for the cap, and because the government sought to finance the perceived insurance crisis "on the backs of a discrete group of injury victims" (at para 240). Third, the MIR was not found to ameliorate the circumstances of a vulnerable group, as young and senior drivers were rejected as being more disadvantaged than soft tissue injury victims. Lastly, Wittman, A.C.J. decided that the nature of the interest affected was sufficiently serious. The issue here was not the quantum of damages themselves, but the message the cap sent to victims of soft tissue injuries. Relying on the Alberta Court of Appeal decision in *Ferraiuolo Estate v Olson*, 2004 ABCA 281, where limitation of damages for grief and loss of care in the Fatal Accidents Act were struck down under the Charter, Justice Wittman concluded that "the deprivation of an equal share of resources, benefits or rights on the basis of an enumerated ground, goes to the heart of human dignity" (at para 255). Overall, then, a section 15 violation was made out in the circumstances.

Commentators have been highly critical of the Law case, arguing that the contextual factors are subjective and capable of being applied to achieve whatever outcome the judge supports. Since Law, the Supreme Court has denied section 15 claims involving survivor and spousal benefits, welfare entitlements, and access to medical treatment, to name just a few cases. Why was the section 15 claim in Morrow seemingly so straightforward by comparison? Perhaps it was because the case does not involve the expenditure of public funds. Or perhaps it is easier for

judges to put themselves in the shoes of those who suffer motor vehicle accidents than those who are poor, autistic, or dependent females. Wittman's section 15 judgment is replete with language that shows empathy for the plaintiffs, but it also supports a generous approach to section 15 more broadly. For example, he notes the importance of avoiding an interpretation of section 15 that renders equality rights "illusory" or "curtailed" (at para 185), and rejects the contention that the MIR should be considered in light of the other insurance reforms, as this might "shield [the MIR] from effective review" (at para 163). Justice Wittman thus distances himself from another discredited aspect of Law, its tendency to internally limit equality rights based on considerations of important government objectives.

It is at the section 1 stage of analysis that government objectives are to be examined, and Wittman, J. turns to this question next. Section 1 of the Charter requires that the government show the limits it imposed on Charter rights are "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Section 1 is to be considered using the criteria from *R v Oakes*, [1986] 1 S.C.R. 103.

The first criterion is a pressing and substantial government objective. Here, Justice Wittman again rejected the government's argument that the cap should be examined in light of the other insurance reforms. As noted by the Court, only the cap was being challenged by the plaintiffs, and so the objective of section 6 of the MIR was the only relevant consideration. According to Justice Wittman, the evidence led to the conclusion that the objective of the cap was to reduce insurance premiums in light of a perceived "insurance crisis". Noting that other courts had expressed concerns about permitting financial considerations alone to warrant violations of Charter rights, Justice Wittman nevertheless found the objective to be pressing and substantial in this case. He referred to the fact that at the time of the reforms, premiums had increased to offset higher claims costs (caused in large part by soft tissue injuries), and the number of uninsured drivers had risen (along with the number of convictions for driving without insurance, given that auto insurance is mandatory in Alberta). The government had received many letters and telephone calls from Albertans expressing concerns about high premiums, and auto insurance companies were declining to provide new coverage and threatening to move out of the province. Although Wittman, A.C.J. found that "burdens that may accompany the implementation of social policy legislation should not be concentrated on a few, as opposed to the many", this was a matter "best addressed under the proportionality branch of the s. 1 analysis" (at para 299).

The cap was ultimately found to fail at the minimum impairment stage of Oakes, where the government must show that the adopted measures were a reasonable way of implementing their objective. While the Court agreed with the government that it was entitled to "considerable deference" given that it was balancing the interests of multiple groups and relying upon complex actuarial and medical evidence, the level of deference did not reach that which would be appropriate in a case involving the allocation of scarce government resources, as this was not a case about government expenditures. And while the government showed that it had considered and rejected a number of alternative approaches, Justice Wittman still found that the cap on soft tissue injuries was unreasonable, as it "place[d] the burden of funding the Insurance Reforms primarily on the shoulders of Minor Injury Victims" (at para 322). As stated by the Court,

> social policy initiatives are often geared towards assisting the most vulnerable members of our society. This does not mean that they should be singled out to fund those costs for which they may be primarily responsible. This is particularly so when the defining characteristic of that group is personal in nature and is an enumerated or analogous ground (at para 333).

This is a significant holding. It stands in sharp contrast to *Newfoundland v N.A.P.E.*, 2004 SCC 66, where the Supreme Court permitted the Newfoundland and Labrador government to reduce its deficit on the backs of women workers by reneging on its pay equity obligations. Justice Wittman's decision got it right – governments should not be able to implement cost cutting measures in the public or private sector in a way that discriminates against groups protected under section 15 of the Charter.

The last issue was that of remedy. The Court found that it was not appropriate to sever section 6 of the MIR, as the rest of the MIR could not survive without it. Accordingly, it struck down the MIR in its entirety pursuant to section 52 of the Constitution Act, 1982, which provides that any law inconsistent with the Constitution is of no force or effect. Interestingly, the government did not seek a temporary suspension of the remedy, stating that it would appeal and seek a stay in the event of a loss. The IBC did argue for a temporary suspension, but this was denied by Justice Wittman because the circumstances for this exceptional remedy (public danger, threat to the rule of law or deprival of benefits) were not present. The plaintiffs were thus awarded full damages for pain and suffering.

The government's stay application was heard by Justice Wittman on February 25 (*Morrow v Zhang*, 2008 ABQB 125). Under Rule 508(1) of the Alberta Rules of Court, "an appeal does not operate as a stay of enforcement or of proceedings under the decision appealed from unless the Court of Queen's Bench stays enforcement or proceedings of the decision pending appeal." A stay will only be granted if the following questions are answered in the affirmative:

1. Is there a serious issue arising on the appeal?
2. Will irreparable harm result if the stay is not granted?
3. Does the balance of convenience favour granting the stay?

The first factor was not contentious – it was agreed that given the complexity of the factual context and legal issues, there were serious issues to be determined on appeal. The second and third factors were considered together, as both involve questions of potential harm to the applicant and the public interest. Because the government conceded that it would not sustain harm if the stay was denied, only the public interest was relevant here. Justice Wittman found that the government's concerns – increased insurance premiums – were speculative. He noted the unlikelihood that plaintiffs would proceed with their claims until the future of the cap had been clarified on appeal, particularly because most hire their lawyers on a contingency basis. In the end, he held that the government had failed to satisfy its burden of demonstrating irreparable harm to the public interest if a stay was not granted, and that the balance of convenience did not favour granting a stay. However, Justice Wittman did grant the stay application of the Defendants in the Morrow action, and ordered that the damage award over and above the $4000 should be held in trust pending the outcome of the appeal. There was no application for a similar stay in Pederson, but it is likely that the judgment in Morrow 2 would be determinative of any such action.

Given the outcome of the provincial election on March 3, the appeal will now proceed. Justice Wittman's judgment on the constitutionality of the MIR provides the Court of Appeal with an excellent starting point – it is a well organized, thorough and compelling decision, and it will serve as an important benchmark in future equality rights cases both inside and outside the insurance context.

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Not on Their Backs: Cap on Damages for Soft Tissue Injuries Struck Down; Court Denies Stay of Remedy Pending Appeal

Comments:

Jonnette Watson Hamilton says:

July 10, 2008 at 5:40 pm

> The July 2008 edition of Canadian Lawyer has an article by Susan Hughes on "The ripple effect of Morrow." That article predicts that the decision by Associate Chief Justice Neil Whittman in Morrow v. Zhang "will open the floodgates for victims' rights across the country." According to Ms. Hughes, the Ontario Trial Lawyers Association is considering a Charter challenge to Ontario's Insurance Act based on Justice Whittman's reasoning in Morrow. Ontario's Insurance Act does not have a cap, as did Alberta's legislation, but it does have two liability-limiting restrictions.
>
> Hughes' article does not discuss possible challenges based on legislation in provinces other than Ontario, so it is difficult to understand her comment about the Morrow decision opening "the floodgates for victims' rights across the country" — unless, of course, Ontario is "the country."

June 22, 2009

Some Questions about the Decision to Reinstate the Cap on Damages for Soft Tissue Injuries

By: Jennifer Koshan

Case Commented On: *Morrow v Zhang*, 2009 ABCA 215, overturning 2008 ABQB 98

Last February, Associate Chief Justice Neil Wittmann of the Alberta Court of Queen's Bench found that the $4000 cap on non-pecuniary damages for soft tissue injuries violated the equality rights of motor vehicle accident victims, and could not be justified as a reasonable limit under section 1 of the *Charter* (see my earlier post on this case: Not on Their Backs: Cap on Damages for Soft Tissue Injuries Struck Down; Court Denies Stay of Remedy Pending Appeal). This decision was overturned by the Alberta Court of Appeal on June 12, 2009. Writing for a unanimous Court, Justice Patricia Rowbotham (with Justices Elizabeth McFadyen and Clifton O'Brien concurring) held that when viewed in the context of the overall scheme of insurance reforms, the cap did not violate section 15 *Charter* equality rights. In addition to its significance for the auto insurance industry and Alberta drivers, this decision is of interest as the first judgment of the Alberta Court of Appeal to consider section 15 since the Supreme Court of Canada set out a new approach to equality rights in *R v Kapp*, 2008 SCC 41.

Our faculty will hold a roundtable discussion of the Court of Appeal decision on June 30, and ABlawg will post a thorough review of the case after that. In the meantime, I have a couple of questions about the Court of Appeal's judgment: (1) Did the Court actually apply the new approach to section 15 of the *Charter*?, and (2) Was it appropriate for the Court to look at the legislative scheme more broadly in its *Charter* analysis?

1. Did the Court actually apply the new approach to section 15 of the *Charter*?

In the *Kapp* case, the Supreme Court of Canada acknowledged the critique that had been levelled against the governing case on equality rights from 1999 to 2008, *Law v Canada (Minister of Employment and Immigration*), [1999] 1 S.C.R. 497. *Law* focused the section 15(1) inquiry on whether the government action in question violated the equality claimant's essential human dignity, to be determined by reference to four contextual factors: (1) the presence of pre-existing disadvantage, vulnerability, stereotyping or prejudice against the person or group in question; (2) the correspondence between the ground of discrimination and the affected person's actual needs, capacities and circumstances; (3) whether the law ameliorated the position of another disadvantaged group; (4) the nature and scope of the interest affected.In *Kapp*, the Supreme Court reflected on *Law* as follows:

> … [S]everal difficulties have arisen from the attempt in *Law* to employ human dignity *as a legal test*. There can be no doubt that human dignity is an essential value underlying the s. 15 equality guarantee. In fact, the protection of all of the rights guaranteed by the *Charter* has as its lodestar the promotion of human dignity. …But as critics have pointed out, human dignity is an abstract and subjective notion that, even with the guidance of the

> four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be. Criticism has also accrued for the way *Law* has allowed the formalism of some of the Court's post-*Andrews* jurisprudence to resurface in the form of an artificial comparator analysis focussed on treating likes alike.The analysis in a particular case, as *Law* itself recognizes, more usefully focuses on the factors that identify impact amounting to discrimination. The four factors cited in *Law* are based on and relate to the identification in *Andrews* of perpetuation of disadvantage and stereotyping as the primary indicators of discrimination. Pre-existing disadvantage and the nature of the interest affected (factors one and four in *Law*) go to perpetuation of disadvantage and prejudice, while the second factor deals with stereotyping. The ameliorative purpose or effect of a law or program (the third factor in *Law*) goes to whether the purpose is remedial within the meaning of s. 15(2). (We would suggest, without deciding here, that the third *Law* factor might also be relevant to the question under s. 15(1) as to whether the effect of the law or program is to perpetuate disadvantage.)Viewed in this way, *Law* does not impose a new and distinctive test for discrimination, but rather affirms the approach to substantive equality under s. 15 set out in *Andrews* and developed in numerous subsequent decisions. The factors cited in *Law* should not be read literally as if they were legislative dispositions, but as a way of focussing on the central concern of s. 15 identified in *Andrews* – combatting discrimination, defined in terms of perpetuating disadvantage and stereotyping (at paras 21-24, emphasis in original).

This passage from *Kapp* is reproduced in *Morrow v Zhang* at para 51. The Court of Appeal then refers to Peter Hogg's *Constitutional Law of Canada*, vol. 2, 5th ed., looseleaf (Scarborough, Ont.: Thomson Carswell, 2007) as authority for the proposition that:

> since *Kapp*, for a section 15 challenge to succeed, it is still necessary for a claimant to establish *something in addition to disadvantage based on an enumerated or analogous ground*. The additional something (discrimination) is no longer an impairment of human dignity, but rather the perpetuation of disadvantage or stereotyping (at para 52, emphasis added).

I would suggest that the Court meant to say that "something in addition to a *distinction* based on an enumerated or analogous ground" is required, as disadvantage is itself suggestive of discrimination. That aside, the Court goes on to note that this approach was recently confirmed in *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9. Taking *Kapp* and *Ermineskin* into account, the Court of Appeal states as follows:

> I acknowledge that in light of *Kapp* and *Ermineskin* and the academic commentary on these cases, the focus of the discrimination analysis should be directed to two concepts: (1) the perpetuation of prejudice and disadvantage to members of a group on the basis of personal characteristics identified in the enumerated and analogous grounds, and (2) stereotyping on the basis of these grounds that do not correspond to a claimant's or group's actual circumstances and characteristics (at para 53).

In spite of this acknowledgement, however, the Court of Appeal seems to apply the old *Law v Canada* test in its section 15(1) analysis in *Morrow v Zhang*. At para 86 the Court begins its analysis of "substantive discrimination" by referencing *Law* (and *Law* alone), and then it proceeds to apply each of the four contextual factors from *Law*. This does not appear to be

simply a review of Justice Wittman's findings on the various stages of the *Law* test, which was the governing test at the time of trial. The Court of Appeal uses headings that mirror the four contextual factors from *Law*, and does not relate all of those factors to the notions of prejudice, disadvantage and stereotyping that are now to be "the focus of the discrimination analysis."

This approach is puzzling in light of the fact that the Court of Appeal appears to share the critique of the *Law* test articulated in *Kapp*:

> I am compelled to observe that much of the analysis which might logically form part of the section 1 analysis has become an important part of the analysis of the four contextual factors in *Law*, particularly, the second and fourth contextual factors (at para 134; see also para 148).

However, the Court finds that *Kapp* and *Ermineskin* have not changed this reality (at para 134). Is the Court correct on this point? Recall that in *Kapp* the Supreme Court acknowledged the "additional burden" imposed by *Law*, and stated that the four contextual factors "should not be read literally as if they were legislative dispositions." In fairness to the Court of Appeal, the Supreme Court did not give any guidance as to how section 15(1) should be applied in *Kapp*, as that case turned on the application of section 15(2), the affirmative action provision. In *Ermineskin*, though, which post-dates *Kapp*, there is no reference to *Law* whatsoever in the Supreme Court's section 15(1) analysis (see Jonnette Watson Hamilton's and my post on *Ermineskin*, The End of Law: A New Framework for Analyzing Section 15(1) Charter Challenges).

At the trial level in *Morrow v Zhang*, Justice Wittman rejected the contention that the cap on damages should be considered in light of the other insurance reforms, as this might "shield [it] from effective review" (2008 ABQB 125 at para 163). Justice Wittman thereby distanced himself from *Law*'s tendency to internally limit equality rights based on the consideration of government objectives that are more properly examined under section 1. The critique of *Law* in *Kapp* opened the door for the Court of Appeal to support this aspect of Justice Wittman's decision, and it arguably missed a golden opportunity to do so.

2. Was it appropriate for the Court to look at the legislative scheme more broadly?

The cap is found in the *Minor Injury Regulation*, AR 123/2004 (*MIR*). Importantly, the *MIR* creates a $4000 cap on non-pecuniary damages, damages that are intended to compensate for general pain and suffering. Minor injuries are defined as sprains, strains and whiplash "that does not result in serious impairment" (*MIR*, section 1(h)).

The cap was enacted in 2004 as part of a package on insurance reforms, which also included a *Diagnostic and Treatment Protocols Regulation*, Alta Reg. 121/2004 (*DTPR*). The *DTPR* provides pre-authorized payments for treatment for accident victims without the need to seek the insurer's approval. Also noted by the Court of Appeal are several other regulations which set and cap auto insurance premium levels, and govern auto insurance coverage and disputes about coverage more broadly (see paras 17-23).

The Court of Appeal holds that Justice Wittman erred when he failed to give sufficient weight to the other reforms beyond the cap. In particular, the Court puts a fair amount of weight on the treatment options provided by the *DTPR*, which "promote and assist treatment" and provide for

"an individualized assessment of a claimant [that] cannot normally be characterized as perpetuating a stereotype" (at para 98).

The *DTPR*, however, provides relief for accident victims' costs of care. This is a form of pecuniary damages that differs from the non-pecuniary damages for pain and suffering that are capped at $4000 (now $4500 as adjusted for inflation). How can legislation that deals with a different head of damages that claimants would be entitled to in any event be relevant to whether the cap on general damages is discriminatory? While the claimants do get something, isn't it the case that all other accident victims also get individualized damages for their out of pocket expenses for the costs of care? That this is in fact the case seems to be acknowledged by the Court of Appeal at para 132. Given this fact, minor injury victims are still being treated differently than other accident victims when it comes to pain and suffering, which is assumed across the board to be worth no more than $4000. Their actual needs and circumstances as they pertain to general damages are not being taken into account, arguably constituting stereotyping on the basis of their category of injury. This is a categorization that Justice Wittman found to amount to differential treatment based on disability, a finding not disturbed by the Court of Appeal (at paras 79-85). While there are other statutes and case law that limit or extinguish claims to non-pecuniary damages (listed by the Court of Appeal at paras 132 and 133), they do not appear to do so on the basis of grounds protected under section 15 of the *Charter*, and can therefore be distinguished.

The Court of Appeal finds the *DTPR* to be significant on the basis that it provides pre-authorized payment for treatment that the plaintiff would previously pay for up front and seek reimbursement for from the insurer. There was evidence at trial that the *DTPR* had a positive impact: "more injured claimants were receiving health services in the first 12 weeks following their injuries, the costs per treatment had decreased, and fewer claims were unresolved after 26 weeks than had been the situation prior to the reforms" (at para 23). If the argument is that this somehow reduces pain and suffering and the need for general damages, this point is not made explicitly by the Court.

This discussion illustrates the problem with importing too much of the section 1 analysis into the test for section 15(1) of the *Charter*. Under section 1 the burden is on the government to justify its reasons for violating *Charter* rights, and the means it used to do so. Where the law's objective becomes the focus of determining whether there is a violation of *Charter* rights, this shifts the burden to the claimant, who is not in as good a position to speak to the objectives of the law as the government. It should be sufficient under section 15(1) for a claimant to show differential treatment based on a protected ground that has the effect of causing harm to them, whether through stereotyping, prejudice, disadvantage, oppression, or the like. As for all other *Charter* rights, this should be a contextual analysis that considers the claimant's harms in broader social and political context. And, as for all other *Charter* rights, unconstitutional effects of a law should be sufficient to establish a breach, rather than requiring an unconstitutional purpose as the Court

of Appeal seems to do. It should then be up to the government to justify its objectives, which would include establishing the relevance of the *DTPR* and its objectives in this case.

I am sure there are many more questions that arise in relation to this case, and I am looking forward to discussing these during the roundtable.

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July 8, 2009

More Questions about the Decision to Reinstate the Cap on Damages for Soft Tissue Injuries

By: Jonnette Watson Hamilton

Case Commented On: *Morrow v Zhang*, 2009 ABCA 215, overturning 2008 ABQB 98

In her post critiquing the Alberta Court of Appeal decision in *Morrow v Zhang*, Some Questions about the Decision to Reinstate the Cap on Damages for Soft Tissue Injuries, Professor Jennifer Koshan asks, "Did the Court actually apply the new approach to section 15 of the *Charter*?" I would like to focus on that question and raise a few additional and related matters. I agree with Professor Koshan that the Court of Appeal seems to apply the old test from *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 in its section 15(1) analysis in *Morrow v Zhang*. However, they do so without a focus on human dignity, which seems to result in the application of the *Law* test in a very formalistic way, rather than substantively. Does it matter? I think that the use of the original *Law* test, complete with a focus on human dignity, could have rather easily resulted in an affirmation of the trial judge's decision. Alternatively, and perhaps more importantly, I think that an application of the test in *R v Kapp*, 2008 SCC 41, could also have resulted in an affirmation of the trial judge's decision had that application really focused on stereotyping.

As Professor Koshan notes in her post, the Court of Appeal begins its analysis of "substantive discrimination" (at para 86) by referencing *Law* (and *Law* alone) and then proceeds to apply each of the four contextual factors from *Law*. But can a court deal with *Law*'s four contextual factors without referring to human dignity? Consider what these factors contextualize. In *Law*, Iacobucci J. noted (at para 62) that these are "factors which may be referred to by a s. 15(1) claimant in order to demonstrate that legislation has the effect of demeaning his or her dignity . . ." (emphasis added). That was their purpose in the analytical framework. It is true that in *Kapp*, the Supreme Court stated (at para 24) that the factors cited in *Law* "should not be read literally as if they were legislative dispositions, but as a way of focussing on the central concern of s. 15 identified in *Andrews* – combating discrimination, defined in terms of perpetuating disadvantage and stereotyping." Paraphrasing Iacobucci' J.'s statement then, the idea seems to be that a court could use *Law*'s four contextual factors in order to demonstrate that that challenged legislation has the effect of perpetuating disadvantage or stereotyping.

Does the Court of Appeal adapt the four contextual factors from *Law* to these reformulated ends? There are two aspects of their judgment that might be an attempt to do this. The first is that *Law*'s first contextual factor – the presence of pre-existing disadvantage, vulnerability, stereotyping or prejudice against the person or group in question – has become merely "pre-existing disadvantage or stereotyping" (in the heading to para 87 and at para 88). This suggests a narrower understanding of discrimination. The second is that the four contextual factors from *Law* have become five factors in their analysis of "substantive discrimination." After *Law*'s first contextual factor, the Court of Appeal adds (at paras 96-103) "perpetuation of the stereotype." This might seem to acknowledge the need for more of a focus on one of the two types of

discrimination recognized by *Kapp*. The Court of Appeal does not state why it added this as an additional factor to its analysis. In the circumstances of this case, it seems to be added because the court grudgingly agreed with the trial judge that what they called (at para 87) "minor injury victims" are subjected to stereotyping and prejudice. (I characterize it as grudging because the best light the Court of Appeal seems to be able to put on this finding (at para 92) is that they "cannot say that his finding in this regard was incorrect.") They disagreed, however, with the trial judge's assessment that the *Minor Injury Regulation* (MIR) reinforced this perception by implying that sufferers of soft tissue injuries are less worthy and deserving of compensation. Perhaps the fifth factor was created merely to differentiate between the Court of Appeal's partial agreement and partial disagreement with the trial judge on *Law*'s first contextual factor. However, adding "perpetuation of the stereotype" as something to be proven by the claimant appears to either duplicate considerations usually brought up under *Law*'s second contextual factor of "correspondence between the ground claimed and the needs, capacities and circumstances of the claimants" or create an additional burden on the claimant.

The balance of the Court's application of the *Law* test does not, however, seem to have been adapted to meet the new approach from *Kapp*. For example, the Court of Appeal includes *Law*'s third contextual factor – whether the law ameliorated the position of another disadvantaged group – as part of its section 15(1) analysis. It does so despite the fact that *Kapp* indicated this factor goes to whether the purpose of the legislation is remedial within the meaning of section 15(2), not section 15(1). It is true that the Supreme Court in *Kapp* did go on to add parenthetically (at para 23) that the third *Law* factor might be relevant to the question of whether the effect of the law or program was to perpetuate disadvantage, but the Court of Appeal does not use it that way. They discuss (at para 127) whether the distinction was designed to improve the situation of a more disadvantaged group. This consideration no longer belongs in a section 15(1) analysis, according to *Kapp*.

As another example (at paras 134 and 148), although the Court of Appeal is quite critical of the way that section 1 justifications have slipped into the section 15(1) rights violation analysis, and particularly the analysis of the second and fourth contextual factors in *Law*, the Court's use of these two factors from *Law* perpetuates this problem. Its analysis of the correspondence between the ground claimed and the needs, capacities and circumstances of the claimants – *Law*'s second contextual factor – is all about rising insurance premiums and the purpose of the legal reforms (at paras 107 – 111 especially). There is nothing in *Kapp* that states that the purpose of the legislation is relevant to a section 15(1) analysis (as opposed to a section 15(2) analysis) or that the focus should be on intent and not impact.

I also want to consider what difference it might have made had the Court of Appeal either used the *Law* test as it was formulated or, more importantly, had they used the approach set out in *Kapp*.

Although I am not a big fan of the focus on human dignity in the *Law* test because it is subjective and difficult to apply, in the *Morrow v Zhang* case a consideration of the human dignity of the claimants does make clear the discriminatory impact of the MIR. Alberta insurers and the public were concerned about the rising cost of motor vehicle insurance premiums (at para 1). Increases in bodily injury costs on automobile insurance premiums were blamed on increasing awards for non-pecuniary damages, a significant proportion of which appeared to be minor soft tissue injuries (at para 12) The insurance law reforms, including the MIR, reduced automobile insurance premiums by singling out those who suffered from particular types of minor injuries – soft tissue injuries or whiplash – and capping their damages for pain and suffering at $4,000. Not

everyone suffering a minor injury in a motor vehicle accident had their non-pecuniary damages capped, but doing so would have reduced insurance premiums for all of us. Not everyone suffering an injury in a motor vehicle accident had their pain and suffering damages capped, but doing that would have also reduced insurance premiums for all of us. By singling out only those suffering minor soft tissue injuries in motor vehicle accidents, only this one group of people paid for reduced insurance premiums for all of us. What kind of message does that send to those suffering minor soft tissue injuries in motor vehicle accidents when their government makes them, and them alone, bear the cost of reducing insurance premiums?

What might the result have been had the *Kapp* approach – the approach mandated and used by the Supreme Court of Canada – been used? Once it is found that the law creates a distinction based on an enumerated or analogous ground, the *Kapp* approach asks (at para 17) whether "the distinction creates a disadvantage by perpetuating prejudice or stereotyping?" The focus on perpetuating prejudice or stereotyping seems to narrow the concept of discrimination, but in this particular case, with stereotyping the type of discrimination at issue, that narrowing is of less concern.

Why were those suffering minor soft tissue injuries in motor vehicle accidents singled out? The trial judge found (2008 ABQB 98 at para 205) that they "are often viewed as malingerers who exaggerate their injuries or their effects in an effort to gain financially" and (at para 219) that they are stereotyped as "malingerers and fraudsters or that their pain is not real." Unlike other minor injuries caused by motor vehicle accidents which can be seen on an x-ray or other image, those suffering minor soft tissue injuries suffered from "invisible disabilities" (at para 209). Thus, the trial judge concluded (at para 255) that "discrimination results from the apparent message that Minor Injury victims' pain is worth less or is not 'real'."

The Court of Appeal, as already noted, did not disagree with the trial judge that soft tissue injury claimants were subjected to stereotyping enough to overturn him on this finding of fact. They did not discuss the stereotyping in much detail, merely noting (at para 88) that the trial judge found that these claimants "are often viewed as malingerers who exaggerate their injuries or the effects of those injuries in an effort to gain financially." Otherwise the talk was all about "the" stereotype. And because the Court of Appeal held (at para 102) that a different regulation (the DTPR) recognized that these soft tissue injuries were "real," the impugned MIR was "the antithesis of the perpetuation of the stereotypical soft-tissue victim who fakes or malingers his or her injury." In summary, the Court of Appeal seems to be saying that the stereotype is that the claimants are faking their injuries, but a regulation related to the challenged legislation acknowledges their injuries are real, and therefore the legislation not only does not perpetuate the stereotype but it fights against it and cannot be discriminatory.

However, in their consideration of *Law*'s fourth contextual factor – the nature and scope of the interest affected – the Court of Appeal found (at para 133) that "the nature of the interest affected here is not of 'fundamental' societal or constitutional importance." The fourth contextual factor (according to *Law* at para 74) recognizes that the more severe and localized the consequences of the distinction drawn by the law are on the claimants, the more likely it is that the distinction is discriminatory. The consequences of saying that only those suffering minor soft tissue injuries in motor vehicle accidents will have their non-pecuniary damages capped is certainly localized. But the Court of Appeal held the consequences were not severe because they were not of fundamental societal or constitutional importance.

Why weren't they that important? The Court of Appeal gave two types of reasons. First, the Court said that this was not a case where the claimants were deprived of all types of compensation; they still could get damages for loss of income, cost of care and other pecuniary damages. With full costs of care covered, it is apparently alright to "moderate" non-pecuniary damages which are the law's mechanism for acknowledging the injured person's lost ability to enjoy activities important to them such as lifting a child (at para 131). They hold (at para 137) that the trial judge erred in concluding that damages for pain and suffering are of such fundamental societal significance that to interfere with them is indicative of discrimination. Why it is acceptable to cap damages for some people who can no longer lift their children up but not others is not stated. The use of one or more comparator groups here might have been helpful.

The second reason proffered was that there is a constitutionally valid cap on all non-pecuniary damages and because other partial caps in other provinces have been found constitutional. For the "other partial caps are constitutional" point, the court relied upon *Hernandez v Palmer* (1992), 15 C.C.L.I. (2d) 187 and *Hartling v Nova Scotia (Attorney General)*, 2009 NSSC 2. However, the cap challenged in *Hernandez v Palmer* was one that precluded all claims for all types of damages (pecuniary and non-pecuniary) where the nature of the injuries were not serious enough to pass the threshold, and in *Hartling* the statutory cap applied to all minor injuries and was not restricted solely to soft tissue injuries. Just because some caps on some types of damages have been found constitutional, does that really mean that no cap can raise an issue of fundamental societal or constitutional importance?

The Court does not consider whether the stereotyping suffered by those with soft tissue injuries might be at work in concluding that the nature of the interest affected by the cap was just not that important. Had they taken *Kapp*'s focus on stereotyping more seriously, the result might have been different. Is the only stereotype at work a stereotype that these injuries are not "real" and the person claiming to suffer them is therefore faking? Doesn't the stereotype of faking and malingering go towards exaggeration of injuries as well as pretending to have an injury? Isn't that sort of stereotype what allows people to trivialize soft tissue injuries?

Both the stereotype that soft tissue injuries are "not real" and that they are "exaggerated" can be seen in the excerpt from *Alberta Hansard* of April 7, 2004, where MLA Masyk stated, in the context of a debate concerning Bill 204 Insurance *(Accident Insurance Benefits Amendment Act, 2003)* (quoted in the trial judgment, 2008 ABQB 98 at para 206):

> Mr. Speaker, it's noted at some point that when somebody gets in an accident, they open the glove box and there is already an inflatable collar. We have to discourage these things. This law suit based system for compensating auto injuries allows claimants to seek payment for uneconomic damages such as pain and suffering. So the rule of thumb is for lawyers and the claimant to calculate these losses at two or three times the claimant's economic losses. Economic losses are things like lost wages and medical expenses. Since pain and suffering awards are measured as a multiple of medical and wage losses, there's a powerful incentive to inflate one's claim of economic damages and pursue legal action. This should give all members a better idea of why insurance premiums have been going through the roof of late.

The first sentence relies on the "faking" stereotype. The second last sentence relies on the exaggeration stereotype. Is it possible that the Court of Appeal itself applied such stereotypes in finding (at para 137) that damages for pain and suffering are not of such fundamental societal or constitutional significance that they cannot be capped for one particular, easily singled out group of persons injured in motor vehicle accidents?

It therefore seems to me that the claimants in this case could have won under the *Law* test (as they did in the Court of Queen's Bench) and they could have won under the approach set out in *Kapp*, but they could not win under a *Law*-lite test that jettisons human dignity and considers all of the factors normally included in a section 1 analysis.

December 17, 2009

Supreme Court Denies Equality Claimants Leave to Appeal Insurance Cap

By: Jennifer Koshan

Case Commented On: *Morrow v Zhang*, 2009 ABCA 215; leave to appeal dismissed by SCC on December 17, 2009

The Supreme Court has denied Peari Morrow and Brea Pederson leave to appeal the Alberta Court of Appeal ruling that upheld the province's cap on non-pecuniary damages for soft tissue injuries incurred in motor vehicle accidents. Previous posts on ABlawg critiqued the Court of Appeal decision for (1) failing to apply the new approach to equality rights set down in *R v Kapp*, 2008 SCC 41, (2) improperly applying the old approach to equality rights from *Law v Canada, Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, (3) giving insufficient weight to evidence of stereotyping in relation to victims of minor tissue injuries, and (4) giving too much weight to the purpose of the law at the expense of its effects on those victims (see Some Questions about the Decision to Reinstate the Cap on Damages for Soft Tissue Injuries and More Questions about the Decision to Reinstate the Cap on Damages for Soft Tissue Injuries).

Leave to appeal was dismissed by Chief Justice Beverly McLachlin, Justice Rosalie Abella, and Justice Marshall Rothstein, with costs to the respondent drivers and the province of Alberta. As usual, no reasons were given for the leave decision.

The Supreme Court has missed out on an important opportunity to clarify the application of the test for discrimination under section 15(1) of the *Charter*. Lower courts are struggling with how to approach equality rights claims, and Supreme Court decisions since *Kapp* have failed to provide adequate guidance (see *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9; *A.C. v Manitoba (Director of Child and Family Services)*, 2009 SCC 30; *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37).

The decision to deny leave to appeal is surprising in light of the composition of the panel. Chief Justice McLachlin and Justice Abella took markedly different approaches in their majority and dissenting judgments, respectively, in the *Hutterian Brethren* case. While that case focused on freedom of religion rather than equality, it still gives some indication of their orientation towards issues such as stereotyping and accommodation. I will not speculate on why leave was denied in *Morrow v Zhang*, but it is interesting to see the two judges in agreement here.

Supreme Court Denies Equality Claimants Leave to Appeal Insurance Cap

Comments:

Jennifer Koshan says:

December 21, 2009 at 10:21 am

> An ABlawg reader noted the significance of the third member of the panel on the leave decision – Mr. Justice Marshall Rothstein. Justice Rothstein was, of course, the author of the Supreme Court's decision in Ermineskin Indian Band and Nation v. Canada, 2009 SCC 9, noted in my post above.
>
> Also, Jonnette Watson Hamilton passed along a news item from December 17 reporting that Nova Scotia Premier Darrell Dexter plans to remove the $2,500 cap on damages for motor vehicle accident victims who suffer soft-tissue injuries, even though Nova Scotia's law was upheld by their Court of Appeal following a Charter challenge. See http://www.cbc.ca/canada/nova-scotia/story/2009/12/17/ns-dexter-insurance-payout.html

May 21, 2008

Vriend Ten Years Later

By: Linda McKay-Panos

Case Commented On: *Vriend v Alberta*, [1998] 1 SCR 493

April 2, 2008 marked the 10th anniversary of the release of the SCC decision in *Vriend v Alberta*. This decision was remarkable in many ways. First, there were no less than 17 intervenors by the time the case reached the SCC. Our affiliated agency, the Alberta Civil Liberties Association, was one of those intervenors. The case was significant because of the remedy that was ordered by the SCC and because of the analysis that the SCC undertook in determining that sexual orientation should be included as a protected ground in Alberta's *Individual's Rights Protection Act* ("*IRPA*", now called the *Human Rights, Citizenship and Multiculturalism Act* ("*HRCMA*"), R.S.A. 2000, c. H-14). It is also interesting to examine what has happened in the area of sexual orientation and human rights since this noteworthy case.

The facts of the case are quite straight forward. Delwin Vriend was employed as a teacher in King's College, a private religious college. In response to an inquiry by the president of the college in 1990, Mr. Vriend disclosed that he was gay. Shortly thereafter, Vriend was asked to resign; the sole reason given was his non-compliance with the college's policy on homosexuality. Mr. Vriend then tried to complain to the Alberta Human Rights Commission, arguing that he was discriminated against in the area of employment on the ground of sexual orientation. The Commission advised Vriend that he could not make a complaint under the *IRPA*, as sexual orientation was not included as a protected ground. Vriend then filed a motion in the Alberta Court of Queen's Bench and was successful in obtaining a declaration that the omission of the protection on the basis of sexual orientation in the *IRPA* was an unjustified violation of s. 15(1) of the *Canadian Charter of Rights and Freedoms* ("*Charter*"). Justice Russell granted the declaration and ordered that "sexual orientation" be read into various sections of the *IRPA* as a protected ground.

On appeal to the Alberta Court of Appeal, two justices – McClung J.A. and O'Leary J.A. — allowed the government's appeal. Hunt J.A. dissented. McClung J.A. held that the omission of "sexual orientation" from the *IRPA* did not amount to "governmental action" as required by s. 32 of the *Charter*. Thus, in his view, the court could not use the *Charter* to force the legislature to enact a provision dealing with a "divisive issue" if it had chosen not to. Both McClung and O'Leary JJ.A. held that *Charter* s. 15(1) was not violated by the *IRPA*, and thus any inequality that existed was because of the state of social affairs and not because of the operation of the *IRPA*. Hunt J.A. disagreed and held that *Charter* s. 15(1) was violated by the failure of the Alberta government to provide protection from discrimination on the basis of sexual orientation. Further, in her judgment, the violation of *Charter* s. 15(1) could not be saved by *Charter* s. 1.

Mr. Vriend then appealed to the SCC. All nine justices sitting on the SCC heard the matter, although Justice Sopinka did not take part in the judgment, as he passed away in November 1997. Justice Major wrote the sole dissenting judgment. The majority held that under-inclusive

legislation could be subjected to *Charter* scrutiny and that the *Charter* did not merely apply to positive actions that encroached on rights or excessive exercise of authority. In addition, the majority held that the omission of sexual orientation from the protected grounds under the *IRPA* created a distinction between gays and lesbians and other disadvantaged groups which were protected under the Act. Further, the omission of sexual orientation had a disproportionate effect on gays and lesbians. The *IRPA* thus denied formal and substantive equality to gays and lesbians. Finally, the omission could not be saved by *Charter* s. 1. The SCC ordered that "sexual orientation" be read in as a ground in several sections of Alberta's *IRPA*.

In addition to being a ground-breaking case for recognizing sexual orientation as a ground for protection from discrimination, the case is also distinctive because the court ordered that words be read in to existing legislation as a *Charter* remedy. After having succeeded in his case eight years after being denied the right to complain, Mr. Vriend never did proceed with his complaint to the Alberta Human Rights Commission.

A great deal has happened since *Vriend* was decided. First, the Alberta Human Rights and Citizenship Commission takes complaints regarding discrimination on the basis of sexual orientation and includes information about this on its website. However, although the Alberta Legislature has had numerous opportunities to amend the *HRCMA*, the words "sexual orientation" have never been added to it. Newcomers reading the legislation have wondered whether there is protection from discrimination on the basis of sexual orientation in Alberta. Presumably, one would have to be aware of the *Vriend* case or consult the Commission's website to find out.

Second, in the ten years since the judgment in *Vriend*, there have been a number of legal developments. Federal and Ontario legislation changed in 1999 after the case of *M v H*, [1999] 2 S.C.R. 3, concluded that it was discriminatory to exclude same-sex couples from benefits programs. In addition, in the following years, several provinces introduced legislation providing for recognition of same-sex relationships. The 2002 *Immigrant and Refugee Protection Act*, S.C. 2001, c. 27, recognized same-sex partners as common-law spouses who can enter Canada if they can establish a conjugal relationship. In 2004, the *Criminal Code of Canada*, R.S.C. 1985, c. C-46, was amended to include "sexual orientation" as a ground for protection from hate crimes (see sections 318 and 319). Also in 2002, Marc Hall was successful in his court application to be allowed to attend the Prom at a Catholic school with his same-sex partner. On July 20, 2005, Canada became the fourth country in the world to enact legislation providing for same-sex marriage, after a 2004 Reference case to the SCC on the issue (see *Reference re Same-Sex Marriage*, 2004 SCC 79). In 2007, the SCC reiterated that same-sex partners are entitled to survivor benefits under the Canada Pension Plan (in the *Hislop* case, 2007 SCC 10). Also in 2007, the Ontario Court of Appeal exercised its *parens patriae* ("parent of the country") jurisdiction to recognize that in some cases, children in same-sex relationships can have more than two legally recognized parents *(A.A. v B.B.*, 2007 ONCA 2).

There remain a number of outstanding legal issues faced by gays and lesbians in Canada. Adoption, vital statistics registration and custody/access of children from same-sex relationships continue to be litigated. Homophobia and Transphobia in schools and in society at large are still issues. In particular, trans-gendered and trans-sexual persons continue to seek legal protection from discrimination and violence.

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February 20, 2009

The End of *Law*: A New Framework for Analyzing Section 15(1) *Charter* Challenges

By: Jennifer Koshan and Jonnette Watson Hamilton

Case Commented On: *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9

After the Supreme Court of Canada handed down its decision in *R v Kapp*, 2008 SCC 41 in June of 2008 there were questions about whether the Court had changed the legal framework for analyzing challenges brought under section 15(1) of the *Charter*. *Kapp* had clearly changed the approach to section 15(2), granting it independent status to protect ameliorative laws, programs and activities. However, on the topic of section 15(1), the Court had sent mixed signals about its intended approach. The message sent by the Court's February 13, 2009 decision in *Ermineskin Indian Band and Nation v Canada* is much clearer; the legal framework for analyzing section 15(1) claims will be very different than it has been for the past decade.

In *Kapp*, the Court left no doubt that *Andrews v Law Society of British Columbia*, [1989] 1 S.C.R. 143, is henceforth to be considered the leading case on section 15(1). Its decision in *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497- the leading decision for the past decade – was relegated to a supporting role. *Andrews*, the Court asserted in *Kapp* (at para 17), "set the template for this Court's commitment to substantive equality." The ascendancy of *Andrews* and its two-part test is clearest in par. 17 in *Kapp*:

> The template in Andrews, as further developed in a series of cases culminating in *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, established in essence a two-part test for showing discrimination under s. 15(1): (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? These were divided, in Law, into three steps, but in our view the test is, in substance, the same.

Note the Court's assertion that the three-step test in *Law* is the same in substance as the two-part test in *Andrews*: *Law* had merely divided *Andrews*' first part into two questions, separating out the distinction drawn from the ground on which it was drawn.

The Court in *Kapp* had little to say about *Andrews*' first step. It did note (at para 22) that *Law* had been criticized for allowing "the formalism of some of the Court's post-*Andrews* jurisprudence to resurface in the form of an artificial comparator analysis focussed on treating likes alike." Aside from this acknowledgement of the criticism, however, the Court said nothing about comparator groups. This left up in the air the issues surrounding comparator groups that had been raised in the academic literature the Court cited. What would be the role of comparator groups henceforth?

The Court in *Kapp* had much more to say about *Andrews*' second step. This step – analyzing whether the distinction based on an enumerated or analogous ground identified in step one

amounts to discrimination – is usually the most difficult part of a section 15(1) analysis. In *Andrews*, according to *Kapp* (at para 18), discrimination was defined by two concepts:

> (1) the perpetuation of prejudice or disadvantage to members of a group on the basis of personal characteristics identified in the enumerated and analogous grounds; and
>
> (2) stereotyping on the basis of these grounds that results in a decision that does not correspond to a claimant's or group's actual circumstances and characteristics.

However, in *Law*, as the Court in *Kapp* acknowledged (at para 19), discrimination had been defined "in terms of the impact of the law or program on the 'human dignity' of members of the claimant group, having regard to four contextual factors: 1) pre-existing disadvantage, if any, of the claimant group; (2) degree of correspondence between the differential treatment and the claimant group's reality; (3) whether the law or program has an ameliorative purpose or effect; and (4) the nature of the interest affected . . ." In *Kapp* (at para 21, emphasis in the original) the Court acknowledged the difficulties created by "the attempt in *Law* to employ human dignity as a legal test." Human dignity, while still "an essential value" underlying section 15 (at para 21), was admitted (at para 22) to be "an abstract and subjective notion" that was "confusing and difficult to apply" and, worse, "an additional burden on equality claimants." That is all the Court had to say about human dignity in *Kapp* however. Its role in future section 15(1) jurisprudence was left unsettled.

The Court in *Kapp* was a little more specific about the four contextual factors set out in *Law* by which impact on human dignity was to be assessed. Those four factors, the Court asserted (at para 23) "are based on and relate to the identification in *Andrews* of perpetuation of disadvantage and stereotyping as the primary indicators of discrimination." *Law*'s factors one and four went to *Andrews*' perpetuation of disadvantage and prejudice, it was said, while *Law*'s second factor dealt with stereotyping. The third factor – the ameliorative purpose or effect of a law or program – was now subsumed in the section 15(2) analysis, but might still have a role in determining whether the effect of the law or program is to perpetuate disadvantage. With this amalgamation in *Kapp* of *Law*'s four contextual factors to *Andrews*' two concepts of discrimination, *Law* appeared to continue to have a role in future analyses under section 15(1).

Indeed, all of the lower courts which dealt with challenges under section 15(1) in the 7 ½ months between the *Kapp* and the *Ermineskin* decisions used the two-part test set out in *Andrews*, as restated in *Kapp*. See *Hartling v Nova Scotia (Attorney General)*, 2009 NSSC 2 at para 17; *C.C.-W. (Litigation guardian of) v Ontario (Health Insurance Plan, General Manager)*, [2009] O.J. No. 140 (SCJ) at para 104; *Withler v Canada (Attorney General)*, 2008 BCCA 539 at para 155; *Confédération des syndicats nationaux v. Québec (Procureur général)*, 2008 QCCS 5076 at paras 326-27; and *Downey v Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2008 NSCA 65. Most also used the concept of human dignity and Law's four contextual factors in the second step. Even though *Withler* (at paras 159-160) and *Hartling* (at para 19) noted that the Supreme Court in *Kapp* had moved away from *Law*'s insistence that discrimination be defined in terms of the impact of the law or program on human dignity, they still applied *Law*'s four contextual factors, as did the court in *Downey*.

In all, the lower court decisions after *Kapp* suggested that, aside from formulating the test as a two-part test, instead of a three-part test, *Kapp* was having little impact on analyzing section 15(1) claims.

The Supreme Court of Canada's February 13, 2009 decision in *Ermineskin Indian Band and Nation v Canada* will change all that. Our colleague Nigel Bankes' recent post "The Crown has neither the power nor the duty to invest Indian monies: The use of legislation to limit trust duties" sets out the facts of *Ermineskin*. Our focus in this comment is on how the Court articulates its approach to section 15(1) in *Ermineskin*, and how it applies that approach (or rather fails to do so in a satisfactory way) to the facts.

The analytical approach to section 15(1) is indeed changed in *Ermineskin*. The Supreme Court did not overrule *Law* in *Kapp*; it did not even say the test set out in *Law* was wrong. But *Law* is gone; there is no reference to it in *Ermineskin*. The only equality cases the Court relies upon in *Ermineskin* are *Andrews* and *R v Turpin*, [1989] 1 S.C.R. 1296.

The phrase "human dignity" is never mentioned in *Ermineskin*. None of the four contextual factors from *Law* are used; rather context is now the larger social, political and legal context of the impugned legislation: *Ermineskin* at para 193, citing *Turpin*. The *Ermineskin* decision is therefore a strong signal to lower courts and tribunals that the *Law* framework for analyzing an equality challenge should no longer be used.

Ermineskin makes it clear that the second part of the test from *Andrews* as re-stated by *Kapp* – the question of whether the distinction creates a disadvantage by perpetuating prejudice or stereotyping – is to be answered by considering "the broader context of a distinction": *Ermineskin* at para 194. That is really all the guidance the Court offers on how a lower court or tribunal should conduct that analysis. This should certainly do away with the tendency towards formalism that *Law*'s more specific four contextual factors approach had engendered. But what will it be replaced with? *Ermineskin* does not have the strong statements of the Court's commitment to substantive equality that *Kapp* had (at paras 14-16). All the Court has to say about substantive equality in *Ermineskin* (at para 194) is that its "statement in *Turpin* signals the importance of addressing the broader context of a distinction in a substantive equality analysis."

This aspect of *Ermineskin* is troubling in at least a couple of respects. First, discrimination seems to have been reduced to a consideration of prejudice and stereotyping. As noted above, the Court began to focus on these particular harms of discrimination in *Kapp*, tracing this understanding of discrimination back to *Andrews*. While the *Law* decision was rightly criticized, one thing it did do relatively well was to set out a broader range of harms flowing from discrimination – not just prejudice and stereotyping, but also vulnerability, powerlessness, oppression, stigmatization, marginalization, devaluation, and disadvantage more broadly (*Law* at paras 29, 42, 44, 47, 53, as cited in Women's Legal Education and Action Fund, Intervener Factum in *Newfoundland (Treasury Board) v NAPE* at para 17 (available here)).

Second, by failing to provide sufficient doctrinal guidance, the Court has made it likely that lower courts will fixate on the words "prejudice and stereotyping" as a complete statement of the harms that substantive equality prohibits. It will be up to counsel for equality rights litigants to educate lower courts on a more fulsome definition of substantive equality. This is not a new hurdle – but it is frustrating that the Court decided to revisit its approach to section 15(1) of the *Charter* in cases where there were no interveners expert in equality rights – something it was also criticized for doing in *Law*.

What of the first part of the *Andrews* test as restated by *Kapp*, the question of whether the law creates a distinction based on an enumerated or an analogous ground? The Court said very little about this part of the test in *Kapp*, but it says even less in *Ermineskin*. In the latter case, the Court

merely states (at para 188) that the first part of the test requires a determination of whether the law creates a distinction based on an enumerated or analogous ground. There is no elaboration.

The lack of direction, given the acknowledged criticism about comparator groups in *Kapp*, is disappointing. Even more concerning, however, is the way the Court applies the first part of the test from *Andrews*, as restated by *Kapp*, to the facts in *Ermineskin*. According to the Court (at para 185) the appellants had argued that, as Indians, they had been deprived by the *Indian Act* of the rights available to non-Indians whose property is held in trust by the Crown. The Court acknowledges (at paras 189 and 201) that the first requirement of the test is satisfied because the impugned legislation "creates a distinction between Indians and non-Indians because the legislation only applies to Indians." It might seem as though the Court "refined" the comparator group from non-Indians whose property is held in trust by the Crown to non-Indians, period. However, in para. 195, the Court does contrast "the management of Indian moneys" with "other trust relationships where risk and financial returns are generally the only considerations, and where there is little concern with the trustee having complete control and discretion. . .". The use of a comparator group that did not have to satisfy the Crown that management and investment of its funds was in its best interests might have affected the Court's determination in para. 201 that the "distinction between Indians and non-Indians . . . is not discriminatory." Even taking the narrow definition of discrimination – disadvantage created by prejudice and stereotyping – this paternalistic approach to management of First Nations' money should surely meet the definition.

At one time, comparators were said to be relevant at each stage of the analysis: *Hodge v Canada (Minister of Human Resources Development)*, 2004 SCC 65, [2004] 3 S.C.R. 357. Instead of using comparator groups in its analysis of whether the distinction drawn between those groups and the appellants created disadvantage, however, the Court in *Ermineskin* seems to focus on two other comparisons. The first is a comparison between the Crown investing the bands' oil and gas royalties in a diversified portfolio and the Crown paying interest on the amounts: see paras. 191 and 196. The second is a comparison between bands who invest Indian moneys themselves and those who do not: see paras 200-201. Is the latter a relevant comparator group? For what purpose is the comparison drawn? As noted by Nigel Bankes, the Court in its section 15(1) analysis failed to focus on "the question of whether the Crown was in breach of a *duty to transfer* capital monies to the band for them to invest" (at p. 8, emphasis added). Had the Court focused on this question, the relevant comparator might have been beneficiaries who are not obliged to convince the Crown that they have a financial management plan before a transfer will be made. Arguably, the failure to identify and apply an appropriate comparator contributes to the Court's finding that there was no discrimination here.

The Samson Nation argued that three possible comparator groups were relevant: (a) all other trust beneficiaries who are not Indians or Bands of Indians; (b) all others for whom the federal Crown acts as statutory fiduciary or trustee; and (c) all other beneficiaries of a federally-regulated fund managed by a fiduciary or trustee (Factum of the Samson Appellants in *Ermineskin* at para 280). They further argued that members of these comparator groups had the right to have their moneys invested or earn a maximum rate of return, without an undue risk of loss. By failing to give attention to the claimant's choice of comparators, the Court is also distancing itself from previous case law, where the claimant's framing of the comparator was to be the starting point for the comparator analysis (see *Law* at para 58).

We've gone on at some length about comparators because the Court does not use them the way it has said a court should. This emphasis troubles us as we don't wish to reify this part of the section 15(1) analysis. Although we believe that appropriate attention to comparators would have resulted in a finding of discrimination in this case, we don't mean to assert that this will always be the case. There will be other cases where other factors are better at bringing out the disadvantage. Here, however, it seems clear that extra obligations are being imposed on Indian beneficiaries that are not being imposed on others, and this should lead to a finding of discrimination (in spite of the Court's rhetoric about "Aboriginal self determination and autonomy" at para 195).

A related problem is that there is no mention of grounds in *Ermineskin*, whether enumerated or analogous. A grounds based approach to section 15(1) is one of the few constants in the jurisprudence from *Andrews* to *Law* to *Kapp*. Although a number of problems have been noted with the concept of grounds, grounds do provide "the necessary history and context of discrimination", and focusing on why something counts as a ground is a reminder of why discrimination is not allowed: see Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experience" (2001) 13 Canadian Journal of Women and the Law 37 at 41. The parties in *Ermineskin* characterized the grounds at issue as "race, national or ethnic origin" (Factum of the Samson Appellants, para 279). By failing to acknowledge that these grounds were the basis of the differential treatment in *Ermineskin*, the Court glosses over the "social, political and legal context" of the claim that *Turpin* requires attention to (again).

There was quite a bit of positive "buzz" around the Supreme Court's return to *Andrews* in *Kapp*. *Andrews*, however, was fairly confusing about what a substantive equality analysis would look like. It would be a contextual analysis, but what else it would be was not clear. We must also recall that there were controversies in the application of *Andrews*, and its approach to equality rights was restated even before *Law* (see the 1995 trilogy *Miron v Trudel*, [1995] 2 S.C.R. 418; *Egan v Canada*, [1995] 2 S.C.R. 513, *Thibaudeau v Canada*, [1995] 2 S.C.R. 627). It might feel good to be optimistic about the new direction in analyzing section 15(1) challenges now that *Andrews* is back. But there is little in *Ermineskin*'s analysis of the section 15(1) challenge in that case to make us feel hopeful.

March 8, 2009

Evidence of Amelioration: What Does *Kapp* Require of Governments Under s.15(2) of the *Charter*? What Will Courts Permit?

By: Jennifer Koshan

Case Commented On: *Cunningham v Alberta (Aboriginal Affairs and Northern Development)*, 2009 ABCA 53

Jonnette Watson Hamilton and I recently commented on the implications of the Supreme Court of Canada's decision in *R v Kapp*, 2008 SCC 41 for the proper approach to equality rights under s.15(1) of the *Charter* (see The End of *Law*: A New Framework for Analyzing Section 15(1) *Charter* Challenges). We also noted that *Kapp* was more clear in terms of the approach to be taken under s.15(2) of the *Charter*, giving that section "independent status to protect ameliorative laws, programs and activities." A recent Alberta case deals with a potential new battleground under s.15(2): government attempts to introduce new evidence to establish the ameliorative purpose of their laws on appeal. If a government is successful in this respect, and the court accepts the ameliorative purpose of the law or program in question, this will effectively serve to bar a claim under s.15(1).

Only a few years ago in *Lovelace v Ontario*, 2000 SCC 37, the Supreme Court held that s.15(2) should be used as an interpretive aid in relation to s.15(1). Following the earlier case of *Law v Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497, claims of discrimination under s.15(1) of the *Charter* would be assessed contextually with a focus on the claimant's human dignity. Part of the context would include consideration of whether the challenged law or program was put in place for or targeted at the amelioration of disadvantage of another group. If so, that factor tended to weigh against a finding of discrimination. The Court rejected the approach of the Ontario Court of Appeal in *Lovelace*, which held that s.15(2) could act as a shield to a claim of discrimination where the challenged law or program was ameliorative. According to Justice Frank Iacobucci, writing for the Supreme Court in *Lovelace*:

> In summary, at this stage of the jurisprudence, I see s. 15(2) as confirmatory of s. 15(1) and, in that respect, claimants arguing equality claims in the future should first be directed to s. 15(1) since that subsection can embrace ameliorative programs of the kind that are contemplated by s. 15(2). By doing that one can ensure that the program is subject to the full scrutiny of the discrimination analysis, as well as the possibility of a s. 1 review. However, as already stated, we may well wish to reconsider this matter at a future time in the context of another case (at para 108).

The future arrived in *Kapp*, where the Supreme Court decided that it was time to reconsider its approach to s.15(2). At a general level, the Court had this to say about the relationship between s.15(1) and s.15(2):

> Sections 15(1) and 15(2) work together to promote the vision of substantive equality that underlies s. 15 as a whole. Section 15(1) is aimed at preventing discriminatory

> distinctions that impact adversely on members of groups identified by the grounds enumerated in s. 15 and analogous grounds. This is one way of combatting discrimination. However, governments may also wish to combat discrimination by developing programs aimed at helping disadvantaged groups improve their situation. Through s. 15(2), the *Charter* preserves the right of governments to implement such programs, without fear of challenge under s. 15(1) (at para 16 per Chief Justice Beverly McLachlin and Justice Rosalie Abella for the majority).

So far this does not sound much different from *Lovelace*. The Court went on, however, to adopt what it saw as a third approach to s.15(2). Rather than using the interpretive aid approach from *Lovelace*, or the exception / exemption approach it rejected in that case, the Court applied what might be called the "independent force" approach. Under that approach,

> once the s. 15 claimant has shown a distinction made on an enumerated or analogous ground, it is open to the government to show that the impugned law, program or activity is ameliorative and, thus, constitutional. This approach has the advantage of avoiding the symbolic problem of finding a program discriminatory before "saving" it as ameliorative, while also giving independent force to a provision that has been written as distinct and separate from s. 15(1). Should the government fail to demonstrate that its program falls under s. 15(2), the program must then receive full scrutiny under s. 15(1) to determine whether its impact is discriminatory (at para 40).

Put another way,

> A program does not violate the s. 15 equality guarantee if the government can demonstrate that: (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds (at para 41).

This new test necessitated some elaboration by the Court. First, it held that the focus should be on the ameliorative purpose rather than effects of the law or program in question. At the same time, courts should ensure that the alleged ameliorative purpose is genuine and, invoking language normally used in division of powers cases, not "colourable" (at para 54). Further, the Court noted that "in examining purpose, courts may … find it necessary to consider not only statements made by the drafters of the program but also whether the legislature chose means rationally related to that ameliorative purpose, in the sense that it appears at least plausible that the program may indeed advance the stated goal of combatting disadvantage" (at para 48). However, the program's purpose need not be its exclusive objective. Second, "amelioration" was defined as precluding from s.15(2) protection laws that restrict or punish behaviour. To meet the definition, the court again suggested that there would need to be some evidence of a law's "plausible or predictable ameliorative effect" in order not to "render suspect the state's ameliorative purpose" (at para 54). Third, "disadvantage" was taken to mean "vulnerability, prejudice and negative social characterization… of a specific and identifiable disadvantaged group" as opposed to a group that receives benefits under "broad societal legislation." However, "not all members of the group need to be disadvantaged, as long as the group as a whole has experienced discrimination" (at para 55).

How did all of this play out in the case under consideration in this post?

Cunningham concerns a claim by a number of individuals who in 2001 were removed from the membership list of the Peavine Métis Settlement by the Registrar of Métis Settlements at the direction of the Former Peavine Council. Section 90 of the *Métis Settlements Act*, R.S.A. 2000, c. M-14 ("*MSA*"), provides that a Métis settlement member who voluntarily registered as an "Indian" under the *Indian Act*, R.S.C. 1985, c. I-5 after November 1, 1990 must be removed from the Métis settlement membership list by the Registrar on request by the settlement council. A subsequently elected Peavine Council sought to have these individuals reinstated, but the Registrar refused to do so on the basis that s. 75 of the *MSA* prohibits an adult Métis person who holds Indian status from obtaining membership in a Métis settlement. The individuals concerned then initiated a *Charter* claim seeking a declaration that that the relevant sections of the *MSA* violated their rights under sections 2(d), 7 and 15(1) of the *Charter*, and an order requiring the Registrar to reinstate them to the Peavine membership list (see *Peavine Métis Settlement v. Alberta (Minister of Aboriginal Affairs and Northern*, 2007 ABQB 517 at paras 1 to 4 ("*Peavine Métis Settlement*")).

The practical consequence of being removed from the Peavine membership list was that the *Charter* applicants "lost their formal ability to participate in their Métis community and [were] disqualified from voting in elections of the Peavine Council" (*Peavine Métis Settlement* at para 34). A further effect is that former members lost their right to reside on or occupy Métis land unless they are part of the immediate family of a settlement member, a teacher or health care worker, or an employee of the settlement.

At trial, Madam Justice D.L. Shelley of the Alberta Court of Queen's Bench rejected the applicants' claims that their freedom of association had been infringed contrary to s. 2(d) of the *Charter*, and that their right to liberty had been deprived contrary to the principles of fundamental justice under s. 7 of the *Charter*. Further, she found that there was no violation of equality rights under s. 15(1) of the *Charter*, applying the governing test at that time from *Law v Canada*. As compared to Métis who had not registered as Indians under the *Indian Act* and who met the other criteria for settlement membership, the applicants were differentially treated in that they lost the benefits of settlement membership. This was found to be differential treatment based on the analogous ground of registration as an Indian under the *Indian Act*, a ground "that is closely akin to the concepts of nationality and citizenship" (at para 167, citing *McIvor v. Canada (Registrar, Indian and Northern Affairs)*, 2007 BCSC 827). However, this differential treatment on a protected ground was not found to be discriminatory, as it did not violate the essential human dignity of the applicants. Because the applicants had voluntarily chosen to register as Indians, and did so to obtain some of the benefits that were available under the *Indian Act*, their loss of benefits as Métis was not found to violate their human dignity. Key to Justice Shelley's decision on s.15(1) was her characterization of the legislation in question as ameliorative:

> the *MSA* represents a partnered initiative between the Government of Alberta and Alberta Métis designed, as stated in the recital to the Act, to recognize that the "Métis should continue to have a land base to provide for the preservation and enhancement of Métis culture and identity and to enable the Métis to attain self-governance under the laws of Alberta." The Act recognizes that the Government of Alberta and the Alberta Federation of Métis Settlement Associations entered into The Alberta-Métis Settlements Accord on July 1, 1989, which was intended to allow the Métis "to secure a land base for future generations, to gain local autonomy in their own affairs, and to achieve economic self-sufficiency" (at para 183).

The *Charter* applicants appealed this decision to the Alberta Court of Appeal. On appeal, the Alberta government applied to introduce new evidence to support the ameliorative purpose of the relevant legislation in light of the *Kapp* decision. More specifically, the Crown sought to introduce: (1) an affidavit summarizing the legal structure of rights and privileges under the *Métis Settlement Act*, the *Métis Settlements Accord Implementation Act*, and the *Peavine Métis Settlement Budget By-law* #118/07 2007/2008; (2) information from a web-site as to the benefits available to settlement members and registered Indians; (3) assertions of fact as to the purposes of the *Métis Settlement Act* and an assertion that the "membership provisions [of the Act] are the result of extensive consultation and agreement between the Government of Alberta and the Métis people" (see *Cunningham v. Alberta (Aboriginal Affairs and Northern Development)*, 2009 ABCA 53 at para 3).

Cunningham et al ("the appellants") raised a number of concerns regarding the timing of the Crown's application. More substantively, the appellants argued that the evidence should not be introduced because:

> (1) the material existed before the hearing below; (2) the topic of an "independent force" to s. 15(2) of the *Charter* could have been fully litigated at the hearing below; (3) the topic of ameliorative purpose was in issue below regardless of any enhancement of its relevance arising under *Kapp*; (4) the specific legislation under attack is not supportable by reference to any ameliorative purpose that the overall statutory structure may be said to have arising from the proposed new evidence; and (5) the evidence would not be expected to have affected the outcome below (at para 7).

Justice Jack Watson of the Alberta Court of Appeal held that it was up to the appeal panel to decide whether to permit the Crown to introduce new evidence and to raise new arguments based on that evidence. It was also up to the appeal panel to decide if any harm or unfairness would result from the admission of new evidence. However, Justice Watson permitted the Crown to include the proposed evidence with its materials on the appeal, noting that "the material is not bulky" (at para 9). The Crown was ordered to file a supplementary memorandum of its argument on the new material, and the appellants were permitted to file a reply memorandum to address the Crown's argument and new evidence motion.

It will be interesting to see how the appeal panel decides to treat this proposed evidence. As noted, the ameliorative purpose of the challenged law or program has been an important factor to the determination of discrimination since *Law*. The Alberta government did lead evidence of the ameliorative purpose of the *MSA* and related legislation at trial. However, the government's apparent reaction to *Kapp* was an attempt to buttress the evidentiary foundation for establishing the ameliorative purpose of the laws, the plausibility of their ameliorative effects, and the disadvantage of the targeted group. This strategy supports the doctrinal significance of the *Kapp* case for s. 15(2) of the *Charter*. If only the government can prove the ameliorative purpose of the law for a disadvantaged group, the appellants will not have a viable s. 15(1) argument (or so the government will argue). As noted by Rob Moyse (LLB expected 2010) at a roundtable our faculty held on *Kapp* shortly after its release, a contextual factor has thus been elevated to a bar to a finding of discrimination. That this should be so even where the persons excluded from the ameliorative law are themselves disadvantaged is an issue that *Kapp* left open. The question of

how to deal with ameliorative legislation that is discriminatorily underinclusive under s. 15(2) is currently being addressed in another case involving Aboriginal claimants, *Micmac Nation of Gespeg v Canada*, 2007 FC 1036 (CanLII), currently before the Federal Court of Appeal.

The Appellants will likely also be making new arguments on appeal, namely that the *Law* test and its focus on human dignity are no longer the governing approach to discrimination under s. 15(1) of the *Charter*. Provided the Appellants can get to the discrimination part of the s. 15(1) test, that is.

July 13, 2009

Another Take on Equality Rights by the Court of Appeal

By: Jennifer Koshan

Case Commented On: *Cunningham v Alberta (Aboriginal Affairs and Northern Development)*, 2009 ABCA 239

In my recent post on *Morrow v Zhang*, 2009 ABCA 215, Some Questions about the Decision to Reinstate the Cap on Damages for Soft Tissue Injuries, I noted that this case was the first opportunity for the Court of Appeal to apply section 15 of the *Charter* (the equality rights provision) since the Supreme Court of Canada's landmark decision in *R v Kapp*, 2008 SCC 41. Only a couple of weeks later, a differently constituted Court of Appeal panel decided another section 15 case, and the analysis and outcome of the two cases are quite different. While I have a few quibbles with the Court's decision in *Cunningham v Alberta (Aboriginal Affairs and Northern Development)*, I believe it is a much better example of how section 15 of the *Charter* should be applied than is *Morrow v Zhang*.

I also wrote a post, "Evidence of amelioration: What does Kapp require of governments under s.15(2) of the Charter? What will courts permit?" on an earlier decision in *Cunningham* which dealt with a government application to introduce new evidence on appeal (*Cunningham v Alberta (Aboriginal Affairs and Northern Development)*, 2009 ABCA 53). As noted there, the case deals with a claim by a number of individuals who were removed from the membership list of the Peavine Métis Settlement in 2001 by the Registrar of Métis Settlements as requested by a former Peavine Council. Under section 90 of the *Métis Settlements Act*, R.S.A. 2000, c. M-14 (*MSA*), a Métis settlement member who voluntarily registered as an "Indian" under the *Indian Act*, R.S.C. 1985, c. I-5 after November 1, 1990 must be removed from the Métis settlement membership list by the Registrar when requested by the settlement council. The Registrar refused to reinstate these individuals on an application by a subsequently elected Peavine Council because section 75 of the *MSA* prohibits an adult Métis person who holds Indian status from obtaining membership in a Métis settlement. The individuals in question initiated a *Charter* action for a declaration that the relevant sections of the *MSA* violated their rights under sections 2(d), 7 and 15 of the *Charter*, and for an order requiring the Registrar to reinstate them to the Peavine membership list.

At trial, the applicants' claims based on freedom of association (section 2(d) of the *Charter*) and liberty (section 7 of the *Charter*) were rejected by Madam Justice D.L. Shelley of the Alberta Court of Queen's Bench (*Peavine Métis Settlement v Alberta (Minister of Aboriginal Affairs and Northern*, 2007 ABQB 517). More relevant to this post, she also found that there was no violation of equality rights under section 15 of the *Charter*, applying the test from *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 which governed at that time. Justice Shelley found that as compared to Métis individuals who had not registered as Indians under the *Indian Act* and who met the other criteria for settlement membership, the applicants were differentially treated because they lost the benefits of settlement membership. Such benefits included the ability to participate in the Métis community, the right to vote in Peavine Council

elections, and the right to reside on or occupy Métis land. This differential treatment was said to be based on the analogous ground of registration as an Indian under the *Indian Act*, a ground "that is closely akin to the concepts of nationality and citizenship" (at para 167, citing *McIvor v Canada (Registrar, Indian and Northern Affairs)*, 2007 BCSC 827). Thus Justice Shelley found that the first two steps of the *Law* test had been met.

However, she went on to find that this differential treatment on a protected ground did not pass the third stage of the *Law* test, which required a finding of discrimination based on a violation of the essential human dignity of the claimants. Applying the first contextual factor from *Law*, Justice Shelley found that the claimants were not subject to "any stereotyping or unique disadvantage" as compared to the comparator group, "other than exclusion from the benefits offered by settlement membership" (at para 180). Under the third contextual factor from *Law*, Justice Shelley characterized the *MSA* as ameliorative:

> the *MSA* represents a partnered initiative between the Government of Alberta and Alberta Métis … which was intended to allow the Métis "to secure a land base for future generations, to gain local autonomy in their own affairs, and to achieve economic self-sufficiency" (at para 183, citing The Alberta-Métis Settlements Accord of 1989).

In terms of the second contextual factor from *Law*, whether there is a correspondence between the ground on which the claim is based and the actual needs, capacities, and circumstances of the claimants, Justice Shelley held (at para 204) that "the ameliorative purpose or effect of the legislation is supported rather than undermined by the impugned provisions" in light of the fact that the *MSA* permitted Métis Councils to adopt policies overriding the loss of Métis status upon registration as an Indian. Lastly, she focused on the fact that the applicants had voluntarily chosen to register as Indians in order to obtain some of the benefits available under the *Indian Act*. This was seen to be relevant to the fourth contextual factor from *Law*. While "the loss of their right to formally participate in the Métis community with which they have been associated on a long- term basis, if not for their whole life, is undoubtedly a severe consequence suffered by the individual Applicants", … "by registering as Indians under the *Indian Act*, they have chosen to acquire other rights and benefits" (at para 205). Overall, the application of the *Law* test was seen to mandate the finding that the *MSA* "[does] not affect the human dignity of the individual Applicants and, therefore, [is] not discriminatory" (at para 206).

The claimants appealed this decision to the Alberta Court of Appeal, where the government applied to introduce new evidence to support the ameliorative purpose of the relevant legislation in light of the *Kapp* decision. *Kapp* had come down after the trial judgment, and gave new and independent weight to section 15(2) of the *Charter*, the affirmative action provision. Justice Jack Watson of the Alberta Court of Appeal held that the appeal panel should decide whether the Crown was permitted to introduce new evidence and raise new arguments based on that evidence, and to decide if any harm or unfairness would result from the admission of new evidence (*Cunningham v Alberta (Aboriginal Affairs and Northern Development)*, 2009 ABCA 53).

As it turns out, the question of new evidence was not determinative on appeal, as the claimants did not in the end object to the consideration of the evidence put forward by the government (at para 18). What was more important was the proper application of section 15 of the *Charter* in light of all the evidence.

Justice Keith Ritter (with Justices Peter Costigan and Elizabeth McFadyen concurring), began the section 15 analysis by referencing the *Kapp* decision. He interpreted the case to mean that "if the state can meet the requirements of s.15(2), then a s.15(1) claim will fail" (at para 19, citing *Kapp* at paras 37-39). Accordingly, the Court said that it would consider section 15(2) before section 15(1) (at para. 17).

This is not quite right. The Supreme Court held in *Kapp* that section 15 analysis should begin with a consideration of whether there has been differential treatment based on a protected ground, the first step towards proving a claim under section 15(1). If that step is met, then a court should turn its focus to section 15(2), where the burden shifts to the government to prove that the impugned law or government program has an ameliorative purpose that targets a disadvantaged group. If the government can meet its burden under section 15(2), the section 15(1) claim will fail. If not, the burden returns to the claimant(s) to prove that there has been discrimination contrary to section 15(1) (see *Kapp* at paras 40-41).

While it may seem overly formalistic to insist that courts sequentially follow the Supreme Court's stages of analysis from *Kapp*, the Court of Appeal's failure to proceed through these steps in the right order causes confusion in *Cunningham*. At para 20, under its section 15(2) analysis, the Court finds as follows:

> The chambers judge identified the appellants as being denied the benefits of settlement membership on the basis of their registration as Indians under the *Indian Act*, and correctly found that to be a personal characteristic analogous to an enumerated ground…. Because the impugned provisions target the appellants, and those similarly situated, the second part of the s. 15(2) test is met.

In spite of its earlier statement that it would consider section 15(2) first, the Court effectively looks at the first step of section 15(1) in this passage, and supports the trial judge's decision that there was differential treatment (the denial of the benefit of settlement membership) on the basis of a protected ground (Indian status). This is actually a positive thing, as it is difficult to see how the section 15(2) analysis could proceed without an initial determination of the nature of the discrimination being claimed under section 15(1). However, to go on to say that because there is differential treatment on a protected ground, the law targets a disadvantaged group for the purposes of section 15(2) is surely incorrect. The whole gist of section 15(2) is to protect programs that are targeted at disadvantaged groups <u>other than the claimants</u>. In *Kapp*, for example, at issue was a fishing program that gave west coast Aboriginal fishers a one day lead over fishers who were not included in the program. The excluded fishers claimed discrimination, and the Supreme Court held that even though there was differential treatment against this group based on a protected ground, the program was designed to ameliorate the disadvantage of another group (i.e. the Aboriginal fishers) and could not therefore be seen as discriminatory. In *Cunningham*, in addressing whether the law targeted a disadvantaged group, the Court should first have looked at who the impugned provisions were designed to benefit, not who was being disadvantaged by the exclusion from those benefits. This is not to say that if a disadvantaged group is wrongly excluded from an ameliorative program they will be unable to successfully mount a discrimination claim. It may be that the targeted group was too narrowly framed by the government when it designed its law or program. This was a key issue left open by *Kapp*, and the Court of Appeal does go on to consider that question in *Cunningham*. But the starting point for section 15(2) should be the determination of which disadvantaged group(s) the law or program was intended to ameliorate (and for what reasons), not who it excludes.

(As an aside, two members of the Supreme Court of Canada make a similar error in *A.C. v Manitoba, (Director of Child and Family Services)*, 2009 SCC 30, released the same day as *Cunningham*. In that case, Chief Justice Beverley McLachlin and Justice Marshall Rothstein find that legislation which limits decisions that minors can make about their medical treatment is ameliorative, and therefore not discriminatory (at para 152). This finding is said to be based on the law's protection of minors as a vulnerable group, but this is the very group to which the claimant A.C. belonged. If ameliorative purpose can be used this way, it means that laws cannot be seen as discriminatory if they are seen to be imposed for the claimant group's own good. This extends the notion of ameliorative purpose even further than it was taken in *Kapp*, and deserves a fuller consideration than the three paragraphs that McLachlin, C.J. and Rothstein, J. gave it.)

In *Cunningham*, the Court of Appeal quickly recovers from its misstep under section 15(2) by considering whether the challenged law rationally advances its intended ameliorative purpose. At this point the Court shifts to an assessment of the *MSA*'s overall ameliorative purpose, which it finds to be "the enhancement and preservation of Métis culture and identity", as well as to "enable a degree of self-governance" and "to preserve a Métis land base" (at para 24). The problem for the government was that the exclusion of the claimants (and others in their situation) detracted from rather than advanced this purpose. Their exclusion is seen by the Court to be arbitrary rather than rationally connected to the purpose of the *MSA*, as they "potentially [exclude] Métis settlement members like the appellants, who, for a long time, have identified with and lived the Métis culture" (at para 28).

Importantly, the Court does not accept the government's argument that because the overall purpose of the *MSA* was ameliorative, this should bar the section 15 claim. The Court draws an analogy to the case of *Vriend v Alberta*, [1998] 1 S.C.R. 493, where the exclusion of sexual orientation as a protected ground under Alberta's human rights legislation was found to be discriminatory. Surely, the Court suggests, we would not say that *Vriend* is now bad law in light of *Kapp* simply because a government could prove that human rights legislation has an overall ameliorative purpose (at para 23). We would still find the exclusion of a particular group that required human rights protection – i.e. of another disadvantaged group – to be discriminatory. This is the same analogy that my colleague Jonnette Watson Hamilton uses in a case comment she is writing on *Kapp*, where she raises *Vriend* as a cautionary tale of how *Kapp* might be misinterpreted. In order to avoid overturning years of section 15 case law dealing with the discriminatory exclusion of particular groups from benefit conferring legislation, *Kapp* must leave space to find that this sort of exclusion cannot be justified under section 15(2). I think the Court of Appeal got this aspect of its judgment right.

So far I have not made any comparisons between *Cunningham* and *Morrow v Zhang*, which I promised I would do in the introduction to this post. That is because section 15(2) was not raised by the government as a bar to the section 15(1) claim of soft tissue injury victims in *Morrow v Zhang*. It is in respect of the Court of Appeal's section 15(1) reasons that *Cunningham* and *Morrow v Zhang* provide such an interesting contrast.

In my post on *Morrow v Zhang*, I suggest that while it seemed to acknowledge the import of *Kapp* and its impact on *Law*, the Court of Appeal went on to apply the *Law* test. In her post on *Morrow v. Zhang*, "More Questions about the Decision to Reinstate the Cap on Damages for Soft Tissue Injuries," Jonnette Watson Hamilton argues that the Court of Appeal applies more of a "*Law*-lite" approach by applying *Law*'s four contextual factors without an overarching focus on human dignity. She also argues that although it added "perpetuation of stereotype" as a new factor, the Court did not take the stereotyping of soft tissue injury victims seriously.

In *Cunningham*, the Court begins its section 15(1) analysis by noting that the only issue of contention (having disposed of the section 15(2) argument) was whether the differential treatment on a protected ground was discriminatory (at para 34). The Court describes how the question of discrimination would have been analyzed under *Law*, with its focus on human dignity assessed via four contextual factors. It then states that *Kapp* "clarified" *Law*, and that "a proper analysis of whether differential treatment is discriminatory involves determining whether the distinction drawn creates a disadvantage by perpetuating prejudice or stereotyping" (at para 34, citing *Kapp* at para 24). In other words, "[d]iscrimination can be found through two avenues: decisions or laws that perpetuate the prejudice or disadvantage of a claimant, and decisions or laws that are based on inaccurate stereotypes" (at para 35, citing *Kapp* at para 18).

This approach was confirmed in *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9. In our post on *Ermineskin*, "The End of Law: A New Framework for Analyzing Section 15(1) Charter Challenges," Professor Watson Hamilton and I argue this is too narrow a test of discrimination, and that a broader range of harms – including vulnerability, powerlessness, oppression, stigmatization, marginalization, and devaluation – should be recognized (as they were, somewhat ironically, in the much criticized *Law* case). However, the Court in *Cunningham* does articulate the test properly according to the Supreme Court's recent pronouncements on section 15.

The Court then turns to the application of the test. Looking first at the perpetuation of prejudice or disadvantage, the Court notes that three of the contextual factors from *Law* continue to be relevant to this analysis: the nature and scope of the interest affected (*Law*'s factor 4), whether the appellants suffered pre-existing disadvantage, stereotyping, prejudice, or vulnerability (*Law*'s factor 1) and whether the law has an ameliorative purpose or effect (*Law*'s factor 3) (at paras 36-37, citing *Kapp* at para 23). Having already dealt with ameliorative purpose under section 15(2), the Court focuses on the other two factors.

In terms of the nature and scope of the interest affected, the Court agrees with the trial judge's holding that the deprivation of settlement membership has severe consequences for the claimants and others. However, the Court disagrees with her finding that because the claimants chose to become registered as Indians, this somehow mitigated the seriousness of the consequences (at para 39).

This is an important finding. Choice was used to the detriment of many equality rights claimants under *Law* (see for example *Nova Scotia (Attorney General) v Walsh*, 2002 SCC 83 and *Gosselin v Quebec (Attorney General)*, 2002 SCC 84) and may rely on certain preconceptions about individual autonomy that do not comport with reality (see Diana Majury, "Women are Themselves to Blame: Choice as a Justification for Unequal Treatment" in Margaret Denike, Fay Faraday & Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006) at 209). Particularly in the context of Aboriginal equality rights claimants, decisions about, for example, whether to reside on or off reserve or whether to acquire Indian status are made in the context of a complex history of colonialism and discrimination against women that cannot be easily equated to a simple matter of "choice" (see *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at paras 62 and 84).

It is difficult to say that the Court's dismissal of choice-based reasoning in *Cunningham* is a direct result of its application of a revised test for discrimination. But it may be that the retreat from human dignity as the focus of section 15(1) does play a role in minimizing the role of

choice in the discrimination analysis (see Majury, *supra* at 219-220). Law's statement of the purpose of section 15(1) did include references to "human dignity and freedom" (at paras 48, 51 (emphasis added)) and also the notion that the equality guarantee in section 15(1) "is concerned with the realization of personal autonomy and self-determination" (at para 53). Personal autonomy and self-determination are not the same as "choice," but those who understand freedom as negative liberty do tend to conflate these ideas.

Moving on to the consideration of pre-existing disadvantage, stereotyping, prejudice, or vulnerability, the Court notes that proof of a "unique pre-existing disadvantage" is required to support a finding of discrimination; an absence of relative disadvantage will be seen as neutral (at para 41, citing *Nova Scotia (Workers' Compensation Board) v Martin*, 2003 SCC 54 at paras 86-88). The Court finds that the claimants' loss of settlement benefits, including the entitlement to participate in settlement governance, meets this test (at para 41, relying upon *Lovelace v Ontario*, 2000 SCC 37 at para 70). While it seems the Court is correct about the claimants' disadvantage being unique relative to other Métis persons, this flows from the impugned provisions themselves, and so it is more difficult to see this particular disadvantage as being "pre-existing". However, I think there was other evidence upon which a finding of unique pre-existing disadvantage could have been made. The Court refers earlier to the affidavit of one of the claimants, Ralph David Cunningham, whose mother "lost her Indian status by marrying his Métis father, but subsequently regained it in 1985", entitling Ralph to regain status as well (at para 5). This story, said to be "typical" of the claimants, points to a common history faced by the descendents of women who lost their Indian status when they "married out". It supports a finding of unique pre-existing disadvantage, as only persons in this category would have faced the myriad complexities associated with deciding whether to seek reinstatement as Indians (of which the consequences of the *MSA* are only one aspect).

This point is not critical in any event, as discrimination can be evidenced by proof of pre-existing disadvantage, stereotyping, *or* prejudice (and the perpetuation of one of these harms – see *Kapp* at paras 18 and 24). In addition to disadvantage, the Court finds that there was stereotyping at play in the case, based on the fact that the claimants "share the undesirable trait of being status Indians and are consequently seen by some as being "less Métis"" (at para 43). The *MSA* is seen to perpetuate this stereotype "by terminating the appellants' settlement memberships [and thus] encouraging a wrongful presumption that because the appellants registered as Indians, they are not interested in participating in their community and identifying as Métis" (at para 43). The Court also links stereotyping to *Law*'s 2nd contextual factor, whether the impugned law corresponds to the actual needs, capacities and circumstances of the claimant. If the law is based on stereotypical assumptions about the claimants' needs rather than on their actual situation, this will support a finding of discrimination (at para 46). Here, the Court finds that "the impugned provisions fail to account for the appellants' needs and circumstances in terms of belonging to a settlement and self-identifying as Métis" (at para 48). This is so even though the claimants "chose" to register as Indians and thus became eligible for certain benefits under the *Indian Act* that were not available to them under the *MSA* (e.g. health benefits).

Cunningham provides a nice contrast with *Morrow v Zhang* in its treatment of stereotyping. As noted in our ABlawg posts on *Morrow v Zhang*, the Court of Appeal found that the cap on general damages for soft tissue injury victims did not perpetuate the stereotype that such victims are less worthy and deserving of compensation because they were eligible for other benefits under the package of insurance forms of which the cap was a part. The Court failed to grapple with the implications of a particular category of accident victims being singled out for this sort of treatment (see Jonnette Watson Hamilton's post on *Morrow v Zhang* at p. 3 and my post at p. 4).

In contrast, the fact that the claimants in *Cunningham* were eligible for benefits under the *Indian Act* did not detract from the findings of stereotyping and disadvantage, and the singling out of Métis persons with Indian status was seen as stereotypical.

There are a couple of places in *Cunningham* where, like in *Morrow v. Zhang*, the Court returns to the language of human dignity and other aspects of the *Law* test. For example, at para 50 the Court states that "the underlying question [of discrimination] always relates to the claimant's human dignity", and at para 52 it reverts to the idea of a three step test for section 15(1) (following *Law*). However, the question of two steps or three steps is not significant (as opposed to the content of those steps), and the Court does not use human dignity in the problematic ways identified in *Kapp*. Overall, the Court's analysis in *Cunningham* does seem to be in keeping with the overall purpose of section 15 equality rights, which is "the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration" (*Andrews v Law Society of British Columbia*, [1989] 1 S.C.R. 143 at para 34).

On reflection, it may be that it is not so much a question of what test was applied by the Court in *Morrow v Zhang* versus *Cunningham*. In both cases the Court looks at the contextual factors from *Law*, albeit in different ways. And I still have concerns with the focus on stereotyping, prejudice and disadvantage as the sole markers of discrimination. However, given that both cases could have been resolved on the basis of stereotyping, what seems most significant in the end is the Court's ability to actually see the stereotyping at play in each case. Justices Ritter, Costigan and McFadyen could see such stereotyping in *Cunningham* (although Justice Shelley could not), while Justices Rowbotham, O'Brien and McFadyen could not see such stereotyping in *Morrow v Zhang* (although Justice Wittman could). This may ultimately have more to do with the nature of the inequalities at issue in each case, or the individual judges' ability to truly understand those inequalities, rather than the test the Court applied.

After finding a violation of section 15 in *Cunningham*, the Court declined to consider the alleged violations of section 2(d) and 7 of the *Charter*. Further, it held that the government could not justify the equality rights breach under section 1 of the *Charter*. I will not undertake a full review of the Court's section 1 reasons here, but suffice it to say that in spite of being permitted to introduce fresh evidence on appeal, the government still failed to prove that the purported objectives of the *MSA* were the specific objectives it had when it passed the legislation (at paras 62-64). Further, the Court held that the objectives, even if pressing and substantial, were not achieved via rational or minimally impairing means (at paras 66-70). Lastly, section 25 of the *Charter*, which was raised by an intervener, was found to be inapplicable given the lack of an evidentiary basis for analyzing this section (which provides that *Charter* rights and freedoms "shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada"). This is unfortunate, as the case does

raise important questions about the interaction between Métis rights of control over membership provided under the *MSA*, and individual membership rights. In the end, the impugned sections of the *MSA* were declared unconstitutional and severed from the *MSA*, and the Registrar was directed to restore the claimants' names to the Peavine Métis Settlement's membership list (at para 84).

March 15, 2010

Leave to Appeal Granted by the SCC in Métis Status Case

By: Jennifer Koshan

Case Commented On: *Cunningham v Alberta (Aboriginal Affairs and Northern Development)*, 2009 ABCA 53, leave to appeal granted March 11, 2010

On March 11, 2010, the Supreme Court of Canada (Justices McLachlin, Abella and Rothstein) granted leave to appeal to the Alberta government in *Her Majesty the Queen in Right of Alberta (Minister of Aboriginal Affairs and Northern Development) and the Registrar et al. v Barbara Cunningham et al*. Dealing with the relationship between Métis and Indian status under the *Métis Settlements Act*, the case may take on even greater significance in light of Bill C-3, the *Gender Equity in Indian Registration Act*, introduced in the House of Commons on March 12, 2010.

The Supreme Court's summary of the *Cunningham* case is as follows:

> *Charter of Rights and Freedoms*, s. 15 – Constitutional law – Right to equality – Aboriginal law – Métis – Respondents' membership in the Peavine Métis Settlement terminated pursuant to s. 90 of the *Métis Settlements Act*, R.S.A. 2000, c. M-14 after they voluntarily registered as Indians under the *Indian Act*, R.S.C. 1985, c. I-5 – Section 75 of the MSA prohibits individuals with Indian status from obtaining Métis settlement membership – Whether the Court of Appeal applied the correct interpretation and application of *R v Kapp* with respect to s.15(2) *Charter* analysis, particularly, on the relationship between the ameliorative purpose of a given scheme and impugned provisions -Whether this appeal addresses issues fundamental to the role of a government wishing to establish an ameliorative program designed to assist a vulnerable or disadvantaged social group – Whether this appeal addresses issues fundamental to the preservation of Métis culture, which is recognized as a distinct aboriginal culture under s.35 of the *Constitution Act, 1982* – Whether this appeal raises issues regarding the right of self-determination and self-definition of all identifiable cultures and minorities within Canada -Whether this appeal addresses issues relevant to persons with Indian status and federal legislation – Whether this appeal raises issues pertaining to the correct approach with respect to s.15(1) *Charter* analysis.

At the Court of Appeal, the focus was on section 15 of the *Charter*, and in particular the application of the new approach to ameliorative laws and programs under section 15(2) set out by the Supreme Court in *R v Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 (see my post on the Court of Appeal decision in *Cunningham* here). Section 15 is sure to be a focus at the Supreme Court as well, as the case concerns a factual context not considered in *Kapp* – that of an under-inclusive law and an internal conflict within a community. The Supreme Court's summary suggests that it may also hear arguments under section 35 of the *Constitution Act, 1982* in relation to the protection of Métis culture and self-determination. Not mentioned in the Court's summary is section 25 of the *Charter*, which was raised by an intervener, the Elizabeth Métis Settlement, at the Court of Appeal. Section 25 provides that *Charter* rights and freedoms "shall

not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada". The Court of Appeal did not consider section 25, finding that it lacked an evidentiary basis for analyzing this section of the *Charter*. This may also undermine the consideration of section 25 by the Supreme Court. The Supreme Court has not yet rendered a majority opinion on the proper interpretation of section 25 (although see the concurring judgment of Bastarache, J. in *Kapp* for one possible approach to section 25).

The *Cunningham* case was the subject of the recent Kawaskimhon Aboriginal moot that took place in Ottawa over the first weekend in March. The team from the University of Calgary represented the Cunninghams. U of C third year student Orlagh O'Kelly reports that the teams at her table reached consensus at the moot, aiming to balance the need for self-government and community harmony with individual rights. It was agreed that section 75 of the *Métis Settlements Act*, which prohibits individuals with Indian status from obtaining Métis settlement membership, should be repealed. This is where Bill C-3 is relevant, as it will amend the *Indian Act* by providing Indian status to another generation of persons whose female ancestors "married out" (i.e. married non-Aboriginal men) following the direction of the B.C. Court of Appeal in *McIvor v Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153. The Globe and Mail reported last week that this amendment might add up to 45,000 people to the Indian Register.

At the Kawaskimhon moot, section 78 of the *Métis Settlements Act* was thought to provide sufficiently clear criteria for establishing membership in Métis settlements regardless of the Indian status of the applicant (although it was also decided that there should be more emphasis on community based decision making in section 78). Section 78 currently provides that an applicant for membership in a Métis settlement must satisfy the settlement council that he or she:

> (a) is a person of Canadian aboriginal ancestry who identifies with Métis history and culture,
> (b) has or will have suitable living accommodation in the settlement area, and
> (c) is committed to living in the settlement area and preserving a peaceful community.

The teams also agreed to amend section 90 of the Act (which provides for loss of Métis status in particular circumstances, including registration as an Indian), such that only if a member of a Métis settlement defaulted on one of the grounds on which they were granted membership could they be excluded. Decisions on exclusion would also be community based, and would include a healing circle, with the decision to be based upon the Métis or indigenous law within the community.

This is not doing justice to the full tenor of discussions at the moot, but it is interesting that, following a process of consensus building between parties and interveners with diverse interests, the students were able to agree on this outcome. Applications to intervene in the Supreme

Court's leave to appeal hearing in *Cunningham* by the East Prairie Métis Settlement, the Métis Settlements General Council, and the Elizabeth Métis Settlement were dismissed, but without prejudice to the right of these groups to apply for leave to intervene in the appeal itself. It is to be hoped that the Supreme Court will hear from a full range of interveners in *Cunningham* so that a full range of perspectives on the issues raised in this case can be heard.

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December 16, 2010

Interpreting Section 15(2) of the *Charter*: LEAF's Intervention in *Alberta (Minister of Aboriginal Affairs and Northern Development) v Cunningham*

By: Jonnette Watson Hamilton

Cases Commented On: *Her Majesty the Queen in Right of Alberta (Minister of Aboriginal Affairs and Northern Development), et al. v Barbara Cunningham, et al.* (Alberta) (Civil) (By Leave) Case number 33340; on appeal from *Cunningham v Alberta (Aboriginal Affairs and Northern Development)*, 2009 ABCA 239

The Supreme Court of Canada is scheduled to hear the appeal of the Alberta government in *Alberta (Minister of Aboriginal Affairs and Northern Development) v Cunningham* on Thursday, December 16, 2010. *Cunningham* will be the first case in which the Supreme Court considers the application of section 15(2) of the Charter since that Court gave independent meaning to section 15(2) in *R v Kapp,* 2008 SCC 41 and the first case in which the Court must consider the possible application of section 15(2) when the challenge is on the basis of under-inclusiveness. This comment is based on my experience serving on the Women's Legal Education and Action Fund (LEAF) case subcommittee in *Cunningham*, the factum filed by LEAF, and, to a much lesser extent and only to offer a contrast, the facta of the Appellants and the Attorney General of Ontario.

The facts of the *Cunningham* case have been summarized by my colleague, Jennifer Koshan, in her post on the Alberta Court of Appeal decision in *Cunningham*, Another Take on Equality Rights by the Court of Appeal.

The *Cunningham* appeal has attracted a large number of interveners. The Attorneys General of Ontario, Quebec and Saskatchewan intervened as of right, and leave to intervene was granted to the Métis Settlements of East Prairie, Elizabeth and Gift Lake, the Métis Settlements General Council, the Métis National Council, the Métis Nation of Alberta, the Native Women's Association of Canada, Aboriginal Legal Services of Toronto Inc., the Canadian Association for Community Living, and LEAF. The facta of the last nine interveners listed are limited to 10 pages in length. Of those nine interveners, each of LEAF, the Native Women's Association of Canada, the Métis Nation of Alberta and the Métis Settlements General Council were granted permission to present oral arguments not exceeding 10 minutes at the hearing of the appeal, with the others being restricted to 5 minute oral arguments. (For a recent critical comment on limits on written and oral arguments such as these, see Sanda Rodgers, "Getting Heard: Leave to Appeal, Interveners and Procedural Barriers to Social Justice in the Supreme Court of Canada", in Sanda Rodgers and Sheila McIntyre, eds., *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (LexisNexis, 2010) 1.)

Although there are a number of issues in *Cunningham* – including the infringement of sections 2(d) and 7 of the *Charter* — LEAF's intervention before the Supreme Court is limited to the interpretation of section 15 of the *Charter*:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In *R v Kapp,* the Supreme Court held that ameliorative laws, programs and activities are shielded from scrutiny under section 15(1) of the *Charter* if the government proves: (1) the scheme has an ameliorative or remedial purpose; and (2) the scheme targets a disadvantaged group identified by the enumerated or analogous grounds (*Kapp* at para 41). However, *Kapp* involved a classic claim of "reverse discrimination" that challenged the very existence of a program which ensured a 24-hour reserved fishery for three Aboriginal bands.

LEAF's position is that there are two threshold issues that must be addressed before *Kapp*'s section 15(2) test can be applied. The first is the issue of whether the targeted law, program or activity is ameliorative within the meaning of section 15(2). Many of the interveners address this crucial issue in the context of the facts in *Cunningham*, i.e., the question of whether general legislation that addresses the historic status of Métis peoples, not as a disadvantaged group, but as Aboriginal peoples can be ameliorative within the meaning of section 15(2). LEAF is not making submissions on this important first threshold issue, given the limited number of pages and minutes they have to present their arguments.

The second threshold issue looks at the nature of the challenge. In its factum, LEAF argues that the test set out in *Kapp* is not appropriate for all types of challenges to ameliorative programs. LEAF contends that the Supreme Court based its section 15(2) analysis in *Kapp* on the principle that a deferential approach to the ameliorative program in that case advanced the goal of substantive equality. Deference is reflected in the Court's focus on the government's purposes. *Kapp* held that, as long as the purpose is genuine (at para 46), measured by whether the "means [are] rationally related to that ameliorative purpose" (at para 48), then the effects of the ameliorative scheme need not be scrutinized. That is the critical difference between section 15(2) and section 15(1). In contrast to the deferential focus on the government's purpose under section 15(2), an evaluation of the challenged law's effects is required under section 15(1).

LEAF's argument is that section 15(2) – assuming the *Métis Settlements Act,* R.S.A. 2000, c. M-14 is ameliorative for the sake of argument – is not applicable in cases such as *Cunningham* where the claim is one of under-inclusiveness. In *Cunningham*, the claimants were not challenging the existence of the *Métis Settlements Act*, or the fact that Act targeted Métis. Instead, the claimants challenged only the restrictive definition of who is a Métis under that Act, a definition that excluded those who became status Indians after November 1, 1990, the date the *Métis Settlements Act* came into effect. LEAF's main point is that when the government's legislative scheme, program or activity is challenged solely on the basis that it is under-inclusive in its targeting, the definition of the target group is not immune from scrutiny under section 15(1) and that scrutiny requires careful assessment of effects. In delineating the disadvantaged group targeted by the ameliorative law, program or activity, regard must be had to the effects of the government's delineation in order to achieve substantive equality.

Without regard to the effects of the law challenged in *Cunningham*, the intersection of discrimination on the basis of sex and Indian status might not be seen and cannot be appreciated. The *Indian Act*, R.S.C. 1985, c. I-5, as amended, has a long history of sex discrimination embedded in its status provisions, whereby Indian women who "married out" lost their status: see *McIvor v Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153, leave to appeal to the Supreme Court of Canada denied, [2009] S.C.C.A. No. 234. Bill C-31 partially remedied that discrimination, but many of the people eligible for status under Bill C-31 were not registered by November 1, 1990. As a result, they were not "grandfathered" in under the *Métis Settlements Act*. And because McIvor found that Bill C-31 was itself discriminatory on the ground of sex, there will be yet more people, newly eligible for Indian status, who will also not be "grandfathered" in. (Bill C-3, the *Gender Equity in Indian Registration Act*, is the government's answer to the discrimination identified in *McIvor*, but critics say that it too is discriminatory because it does not ensure that women and their descendants will be treated the same as men and their descendants for the purposes of determining Indian status.) If attention is only paid to the government's purpose in enacting the *Métis Settlements Act*, then the discriminatory effects of the delineation of who is and who is not Métis under the *Métis Settlements Act* would be missed.

Without regard to the effects of the law challenged in Cunningham, it is also easier to say that some Métis "chose" to acquire Indian status after Bill C-31 came into effect, as the trial judge did in this case: *Peavine Métis Settlement v Alberta (Minister of Aboriginal Affairs and Northern*, 2007 ABQB 517. An approach that avoids examining the effects of an ameliorative law, program or activity can also fail to appreciate constraints on choice. Choice, liberty and autonomy are not meaningful in situations of inequality: see Diana Majury, "Women are Themselves to Blame", in Fay Faraday, Margaret Denike and M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) 219.

In its factum, the appellant, the government of Alberta, abandoned its claim that if the ameliorative scheme as a whole meets the *Kapp* section 15(2) test – if the government proves (1) the scheme has an ameliorative or remedial purpose; and (2) the scheme targets a disadvantaged group identified by the enumerated or analogous grounds – then the challenged provisions do not violate section 15. Instead, the government now argues that in addition to meeting the two-part section 15(2) test set out in *Kapp*, the government must also prove a connection between the challenged provisions and the ameliorative scheme as a whole such that the challenged provisions "are supportive of or rationally connected to the ameliorative scheme" (at para 28). However, as those familiar with the *Oakes* test for section 1 of the *Charter* know, to require only a rational connection between the exclusion of the claimants and the ameliorative purpose of the legislation, program or activity is to set the bar too low. All delineations of the targeted disadvantaged group will to some extent be rationally connected to the ameliorative purpose. If the purpose is, for example, as expressed in the preamble to the *Métis Settlements Act*, to recognize "the Metis should continue to have a land base to provide for the preservation and enhancement of Metis culture and identity and to enable the Metis to attain self governance under the laws of Alberta," then the definition of Métis is rationally connected to that purpose. Whether the claimants are part of the disadvantaged group targeted by the legislation, program or activity or whether they are part of a different disadvantaged group requires assessment of the effects of the lines drawn by the government to exclude the claimants. The lines drawn should not be drawn in such a way that the consequences are discriminatory on the ground of the targeting or any other enumerated or analogous ground.

Like LEAF, the Attorney General of Ontario has intervened exclusively on the section 15 issue and, specifically, on the proper interpretation of section 15(2) when the challenge to their exclusion from an ameliorative law, program or activity that benefits some members of a disadvantaged group is brought by other members of that disadvantaged group. The Attorney General of Ontario argues there are two types of challenges not contemplated by Kapp, which did not involve a challenge by a disadvantaged group. One is a challenge brought by a different disadvantaged group than the one the ameliorative law, program or activity was designed to benefit – what some term a "competing claim." For such challenges, the Attorney General for Ontario argues, the deferential *Kapp* test for the application of section 15(2) should apply.

The second type – the type seen in *Cunningham* – is said to be a challenge to their exclusion that is brought by some members of the disadvantaged group that benefits from the ameliorative law, program or activity. In those instances, the Attorney General for Ontario argues (at paras 4 and 22 of its Factum) that the court should consider whether there is a rational connection between the eligibility criteria and the ameliorative program's purpose and design. Consideration of who the program was designed to benefit and the nature of the program are relevant, it is claimed, in this new section 15(2) analysis.

There are at least two big problems with these arguments. First, the issue of whether the challenge is being brought by a disadvantaged group that is different from the targeted disadvantaged group or whether it is being brought by some members of the targeted disadvantaged group is usually the heart of the case. Were the non-status Indians and the Métis who challenged the Casino Rama project in *Lovelace v Ontario*, 2000 SCC 37, [2000] 1 S.C.R. 950 members of the disadvantaged group targeted by the project or were they part of a different group?

Second, in setting out its proposed test for challenges by members of the same disadvantaged group, the Attorney General of Ontario changes the deferential section 15(2) *Kapp* test by refocusing the inquiry on the eligibility criteria and their relationship to the ameliorative law, program or activity's purpose and design. The proper question, argues the Attorney General for Ontario, is whether those eligibility criteria and the scheme's purpose and design are "rationally connected." The rational connection test in *Kapp* (at para 48) was "whether the legislature chose means rationally related to that ameliorative purpose, in the sense that it appears at least plausible that the program may indeed advance the stated goal of combatting disadvantage." The new rational connection test proposed by the Attorney General for Ontario is almost as deferential to the government because it can be satisfied if the government establishes "a reasonable basis for their identification of the group" (Factum of the Attorney General for Ontario, para 37).

How does the Attorney General for Ontario justify so much deference and so much focus on the government's purposes? A test that is easy to meet is required because "otherwise governments cannot draft the very ameliorative programs s. 15(2) encourages them to draft in order to further substantive equality in Canada" (Factum of the Attorney General for Ontario, para 37). The message appears to be that even if the eligibility criteria are discriminatory in their effects, any ameliorative program is better than none.

There is no doubt that targeted ameliorative laws, programs and activities need to be selective. However, they cannot be discriminatory. If the decision as to whether the delineation of who is to benefit from those targeted schemes is scrutinized under section 15(2) with a focus on the government's purpose, then formal equality is the likely result. It is only when the effects of exclusion are scrutinized under section 15(1) analysis that an assessment can be made as to whether or not the goal of substantive equality is met.

August 10, 2009

Security Trumps Freedom of Religion for Hutterite Drivers

By: Jennifer Koshan

Case Commented On: *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37

The Supreme Court of Canada's long awaited decision on whether Hutterites can be forced to have their photographs taken to obtain a driver's licence was released on July 24, 2009. Reversing the judgments of the Alberta Court of Queen's Bench and the Alberta Court of Appeal, a majority of the Supreme Court finds that the violation of freedom of religion caused by the photo requirement is justifiable under section 1 of the *Canadian Charter of Rights and Freedoms*. This comment will argue that the majority's decision, especially its failure to find a duty to accommodate on the part of the government, sets the protection of *Charter* rights back several years.

Facts

Since 1974 all drivers of motor vehicles in Alberta have been required to hold valid licences bearing their photograph. Until May 2003, the Registrar of Motor Vehicles could grant exemptions from this requirement by issuing licences without photos (Condition Code G licences) to persons who objected to having their photograph taken on religious grounds. In 2003 this exemption was removed via the *Operator Licensing and Vehicle Control Regulation*, Alta. Reg. 137/2003, made under the *Traffic Safety Act*, R.S.A. 2000, c.T-6. According to the government, the universal photo requirement was adopted to minimize identity theft arising from the use of driver's licences. To carry out this objective, all photos taken for driver's licences were placed in a facial recognition bank.

Hutterites, including the members of the Wilson Colony in southern Alberta, believe that it is contrary to the Second Commandment to have their photo willingly taken. The Second Commandment states "You shall not make for yourself an idol, or any likeness of what is in heaven above or on the earth beneath or in the water under the earth" (Exodus 20:4, cited at para 29). Prior to 2003, some members of the Wilson Colony held Condition Code G licences. Following 2003, they proposed that they be issued licences without photos, marked "Not to be used for identification purposes." The government did not accept this proposal, and suggested two alternatives: (1) licences would display a photo but be carried in a sealed envelope indicating they were the property of Alberta, or (2) licences would be photo-less, but digital photos of Hutterite drivers would be placed in the facial recognition bank. The government's proposals were said to be aimed at "minimiz[ing] the impact of the universal photo requirement on religious beliefs by removing the need for Colony members to have any direct contact with the photos" (at para 12), but members of the Wilson Colony rejected the proposals on the basis that the act of taking the photos was itself a violation of the Second Commandment.

Lower Court Decisions

In light of this impasse, the Wilson Colony challenged the photo requirement as contrary to the guarantee of freedom of religion under section 2(a) of the *Charter*. At trial, Justice Sal LoVecchio found in the Colony's favour, holding that the government had not adequately accommodated their religious beliefs. In his view, the Hutterites' proposal would sufficiently meet the government's objective of preventing identity theft, as anyone seeking to impersonate the licence holder would be "significantly limited" in their use of the licence if it were marked "Not to be used for identification purposes" (2006 ABQB 338 at para 28).

A majority of the Alberta Court of Appeal (per Justices Carole Conrad and Clifton O'Brien) agreed with Justice LoVecchio that there had not been reasonable accommodation and that the claimants' rights were not minimally impaired (2007 ABCA 160). Justice Frans Slatter disagreed, finding in dissent that any accommodation beyond what the government had proposed would amount to undue hardship on the government.

Analysis

In my view, one of the most significant and troubling aspects of the Supreme Court decision is the Court's treatment of reasonable accommodation. For a majority of the Court, Chief Justice Beverley McLachlin holds that when a legislative act of government is at issue, there is no duty to accommodate minority rights and freedoms. The dissenting justices (Abella, LeBel and Fish, J.J.) do not explicitly challenge this aspect of the majority's ruling, which runs counter to the lower courts' focus on reasonable accommodation and previous case law of the Supreme Court. Before turning to this issue, I will examine the Court's reasons under section 2(a) of the *Charter* and its overall approach under section 1 of the *Charter*.

Section 2(a) Freedom of Religion

In order to establish a violation of freedom of religion under section 2(a) of the *Charter*, a claimant must prove a sincere belief in a particular tenet or practice connected to religion, and that the law or government action in question interferes with this belief or practice in a way that is more than trivial or insubstantial (at para 32, citing *Syndicat Northcrest v Amselem*, 2004 SCC 47). In this case, the government of Alberta conceded that the members of the Wilson Colony sincerely hold the belief that the photo requirement violates the Second Commandment (at para 33). The second requirement, which the majority explains is meant to exclude "interference that does not threaten actual religious beliefs or conduct" from the ambit of section 2(a) (at para 32), was not conceded by the government. However, "the courts below seem to have proceeded on the assumption that this requirement was met" (at para 34), and so the majority assumes a violation of section 2(a) of the *Charter*.

As a result of this assumption, there is very little discussion in the majority's reasons under section 2(a) about the nature of the religious beliefs at issue and the seriousness of their violation. Some of this discussion comes later, but I was left thinking that the majority's limited analysis of freedom of religion caused its section 1 analysis to occur in a vacuum. The Court has been critical of this tendency in other cases (see for example *Schacter v Canada*, [1992] 2 S.C.R. 679). A more robust analysis of section 2(a) may well have made a difference under section 1, as it seems to do for the dissenting justices.

Section 1 Justification

Once a claimant has proved (or a government has conceded) a violation of a *Charter* right or freedom, the burden shifts to the government to establish that the violation is "a reasonable limit" that can be "demonstrably justified in a free and democratic society" under section 1 of the *Charter*. This analysis takes place via the *Oakes* test, which requires that the government prove a pressing and substantial objective, and the proportionality of the means through which the objective is achieved (*R v Oakes*, [1986] 1 S.C.R. 103). At the same time, it must be recalled that *Oakes* stands for more than this test. In a less-cited but still crucial aspect of *Oakes*, the Supreme Court set out some of the values and principles underlying a free and democratic society: "respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society" (at para 64). These values and principles are both the source of the rights and freedoms protected under the *Charter*, "and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified" (ibid.).

However, rather than beginning with these core values, the majority commences its section 1 analysis with a statement of deference: "leeway must be accorded to governments in determining whether limits on rights in public programs that regulate social and commercial interactions are justified under s.1 of the *Charter*" (at para 35). This is a very broad statement of the situations in which deference to government might be appropriate. In previous cases, deference was said to be owed in situations where, for example, the government was protecting vulnerable groups (e.g. with limits on pornography (*R v Butler*, [1992] 1 S.C.R. 452)), or mediating between the competing interests of different groups (e.g. those owed pay equity and others needing educational and health services in a time of fiscal crisis (*Newfoundland (Treasury Board) v N.A.P.E.*, 2004 SCC 66)). Now, however, we are told that deference is owed for "public programs that regulate social and commercial interactions." But doesn't this include virtually everything that a government does? In *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 S.C.R. 199, McLachlin J. (as she then was) warned of the dangers of overly attenuating the government's burden of proof under section 1, but that now seems a distant memory (except in the reasons of Justice Abella, where she quotes liberally from McLachlin's reasons in *RJR-MacDonald* and does not once use the word deference).

Another general comment about the majority's approach under section 1 is its explicit reliance on utilitarian, cost / benefit reasoning. For example the spectre of the floodgates is raised as follows:

> Much of the regulation of a modern state could be claimed by various individuals to have a more than trivial impact on a sincerely held religious belief. Giving effect to each of their religious claims could seriously undermine the universality of many regulatory programs, including the attempt to reduce abuse of driver's licences at issue here, to the overall detriment of the community (at para 36).

Chief Justice McLachlin thus indicates early on that this case is all about majority interests trumping minority rights. There is more utilitarian reasoning at para 69, where the majority states that under section 1, "the court's ultimate perspective is societal". And at para 77, the majority explicitly talks in terms of costs and benefits.

While societal interests have always been a key consideration under section 1 of the *Charter*, such interests were to be weighed against the rights and freedoms in question in the overall context of the values underlying a free and democratic society. There is no reference to the *Oakes* values in the majority reasons. Instead, the universality of regulatory programs seems to have become an overarching value that outweighs the practice of fundamental religious beliefs.

One final general point of interest under section 1 is made by the majority of the Supreme Court at para 40. At the Alberta Court of Appeal, Justice Conrad "expressed concern" about the lack of democratic debate surrounding Alberta's discontinuance of the religious-based exemption from the photo requirement, which was effected by a regulation. However, the Supreme Court notes that regulations are clearly prescribed by law, and thus stand to be defended by the government under section 1. The Court does not consider whether the level of democratic debate around a particular measure should be a factor going to whether the government is entitled to some deference under section 1. Arguably, this would be an important addition to the other contextual factors enumerated by the Court in cases such as *Thomson Newspapers Co. v Canada (Attorney General)*, [1998] 1 S.C.R. 877 at paras 90 to 91 (those factors include the vulnerability of the group the government is protecting, the group's "own subjective fears and apprehension of harm", the difficulty of scientifically measuring a particular harm, the effectiveness of a remedy, and the nature of the activity in question). If a government can show that a particular measure was the subject of wide and meaningful public consultation, perhaps courts should show the government some deference in defending that measure under the *Charter*. But the corollary would also be true, such that if a government failed to engage in democratic debate over a measure that adversely impacts upon a disadvantaged group, then the government would not be entitled to deference under the *Charter*.

The *Oakes* Test

As noted earlier, the first part of the *Oakes* test requires that the government prove the measure which infringes a *Charter* right or freedom was enacted for a pressing and substantial reason. In this case, the majority articulates the objective in very broad terms when it finds that the government's photo requirement is aimed at "maintaining the integrity of the driver's licensing system in a way that minimizes the risk of identity theft" (at para 42). Cast in such terms, the majority then has little difficulty finding the objective to be a pressing and substantial one. The government's other goal, "harmonization of international and interprovincial standards for photo identification" is seen as "a factor relevant to" the overall goal even though "other provinces have not yet moved to this requirement" (at para 43). Moreover, the fact that the photo requirement was enacted pursuant to legislation that focuses on traffic safety is not seen as problematic. The majority agrees with Slatter J.A. that "[t]he Province was entitled to pass regulations dealing not only with the primary matter of highway safety, but with collateral problems associated with the licensing system. It was therefore entitled to adopt a regulation requiring photos of all drivers to be held in a digital photo bank, thereby minimizing the risk of identity theft to the extent possible" (at para 45).

Overall, then, the prevention of identity theft – essentially an objective related to security – is found to be pressing and substantial. The dissent does not disagree with this conclusion (see Abella J. at para 140).

The second part of the *Oakes* test requires that the means be proportional to the objective, and involves three considerations: rational connection, minimal impairment, and overall proportionality of effects.

The rational connection step is explained by the majority as requiring "a causal connection between the infringement and the benefit sought on the basis of reason or logic" (at para 48, citing *RJR- MacDonald* at para 153). Justice Abella contends that this step is "the seemingly easiest hurdle in the *Oakes* analysis" (at para 141), and both the majority and dissent find that the requirement is met here. The majority holds that the government put forward sufficient evidence to show that the universal photo requirement is "more effective in preventing identity theft than a system that grants exemptions to people who object to photos being taken on religious grounds" (at para 49; see also the dissent at para 142). The language used here is interesting and supports the characterization of the objective as security related. More specifically, the government's concerns about allowing exemptions are framed in terms of "fraudulent criminals", "wrongdoers" and "risk." This language calls to mind Wendy Brown's argument that tolerance for religious minorities (and other "others") – even though it is an insufficient response to difference — easily turns to intolerance in the context of risk and security (see *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton University Press, 2006).

The minimal impairment step of *Oakes* has been the stage where governments have failed most often in past cases. In the *Hutterian Brethren* case, however, the majority sets out some principles for this step that will make it easier for governments to cross this hurdle, particularly where legislative measures are being defended.

Under the minimal impairment step, the majority reiterates the need for deference in respect of "complex social issues" (at para 53), but states that "deference is not blind or absolute" (at para 55). It notes that "[t]he court should not accept an unrealistically exacting or precise formulation of the government's objective which would effectively immunize the law from scrutiny at the minimal impairment stage", and that "[t]he test … is whether there is an alternative, less drastic means of achieving the objective in a real and substantial manner" (at para 55).

Applying these principles to the case at hand, the majority finds that the regulation imposing the universal photo requirement is part of a "complex regulatory scheme … aimed at an emerging and challenging problem" (at para 56). However, there is no explanation of what makes this a "complex" regulatory scheme or a "challenging" problem. All government action could be called complex and challenging at some level, and the majority's failure to explain – or to make the government explain – is problematic.

The majority holds that the claimants' alternative of a photo-less licence that would not be used for identification purposes "would *significantly* compromise the government's objective and is therefore not appropriate for consideration at the minimal impairment stage" (at para 60, emphasis in original). The fact that 700,000 Albertans do not hold licences and pose an even greater risk for identity theft than drivers with photo-less licences – an argument accepted by the dissenting justices — is said to be irrelevant, as this is seen to frame the objective of the regulation too broadly (i.e. to eliminate all identity theft) rather than looking at the true objective (to maintain the integrity of the driver's licensing system so as to minimize identity theft *associated with that system*" (at para 63, emphasis in original)). But is the requirement for photos in relation to approximately 250 Hutterite drivers really something that will achieve that objective "in a real and substantial manner" (see Justice Abella at para 158)?

The majority seems to acknowledge the challenges for freedom of religion presented by universal rules such as the photo requirement (at para 61), but says that the impact of such laws should be considered at the final proportionality stage. This is interesting, as the final stage has not been determinative in past cases (something that the majority recognizes at para 75). And is

it in keeping with previous jurisprudence? There are many past cases where the Supreme Court looked at the impact of a law as part of the minimal impairment analysis. For example in *Keegstra*, the criminal nature of the hate speech laws and the potential for imprisonment were seen to be relevant under the minimal impairment step (*R v Keegstra*, [1990] 3 S.C.R. 697). More recently, in *Multani* the impact of a school board's zero tolerance weapons policy on a Sikh's freedom to wear a kirpan was analyzed under the minimal impairment stage as well, under the rubric of reasonable accommodation (*Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6).

However, in *Hutterian Brethren* the majority rules that this is not a case where reasonable accommodation should be considered. Its first reason for this conclusion is that reasonable accommodation is a concept taken from human rights law rather than the *Charter* (at para 66). Second, although *Multani* was decided under the *Charter* and a reasonable accommodation analysis was done under the minimal impairment step in that case, the majority finds a reason to distinguish *Multani*. It draws a distinction between *laws* (i.e. legislation and regulations), which will be found of no force or effect under section 52 of the *Constitution Act, 1982* if they violate the *Charter*, and *government action or administrative practice*, which will be remedied under section 24 of the *Charter* if they are found unconstitutional (at para 67, emphasis added). Reasonable accommodation, which "envisions a dynamic process whereby the parties … adjust the terms of their relationship" (at para 68), is said to apply to the latter type of case (of which *Multani* is an example) and not to the former. In respect of the former, the majority says the following:

> A very different kind of relationship exists between a legislature and the people subject to its laws. By their very nature, laws of general application are not tailored to the unique needs of individual claimants. *The legislature has no capacity or legal obligation to engage in such an individualized determination, and in many cases would have no advance notice of a law's potential to infringe Charter rights. It cannot be expected to tailor a law to every possible future contingency, or every sincerely held religious belief* (at para 69, emphasis added).

This reasoning is very disconcerting. In previous cases the Court has said that human rights legislation and the Charter should be interpreted consistently (see e.g. *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 S.C.R. 3 at para 48 ("*Meiorin*")), so it is unclear why the Court is taking a different approach here. Furthermore, the distinction between legislation and government / administrative action has the potential to be exploited by governments. One of the Court's strongest statements on reasonable accommodation occurred in *Meiorin*, where a government policy setting out minimum physical fitness requirements for forest firefighters was challenged by a woman who was fired after she could not meet one of the requirements. The Court (per McLachlin, J. as she then was) used this case as an opportunity to erase the distinction between direct discrimination (where discrimination is evident on the face of the law or policy) and adverse effects discrimination (where the law or policy is neutral but has a negative impact on a disadvantaged group). The government was found to be under a duty to justify the physical fitness requirement generally and to accommodate women in the position of Ms. Meiorin to the point of undue hardship. In a case released at the same time also involving the B.C. government, the Court used the same analysis in respect of a blanket refusal of drivers' licences for persons with a particular visual disability (see *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 ("*Grismer*")). While these were human rights cases, they could also have been brought under the *Charter* given that the government of B.C.'s actions were under challenge. According to the

Court's reasoning in *Hutterian Brethren*, the cases would still have been subject to a reasonable accommodation analysis under the *Charter*, as they involved government actions other than legislation. But if the government had set out the physical fitness requirements or licence restrictions in regulations rather than policies, *Hutterian Brethren* now means that it could avoid its duty to accommodate in each case. Governments wanting to escape a reasonable accommodation analysis under section 1 of the *Charter* could similarly choose to enact particular requirements or restrictions under legislation rather than policy.

The majority's reasoning also runs counter to lower court decisions which effectively use reasonable accommodation analysis in the context of legislation. For example, drug users have been exempted from universal criminal prohibitions against possession of drugs where they use marijuana for medical purposes (see e.g. *R v Parker* (2000), 49 O.R. (3d) 481 (C.A.)) or where they use narcotics in a safe injection site (see e.g. *PHS Community Services Society v Attorney General of Canada*, 2008 BCSC 661). Accommodation in relation to a mandatory firearm prohibition under the *Criminal Code*, which was found to have an adverse impact on an Aboriginal person who made his living as a trapper, has also been granted (see *R v Chief*, [1990] 1 W.W.R. 193 (Y.T.C.A.)). While accommodation in these cases was realized at the remedies stage via forms of constitutional exemption, nevertheless the cases can be seen as instances where governments are held to a duty to accommodate persons who are adversely impacted by their laws.

The majority insists that accommodation involves "individualized determinations" (at para 69). This is often true, as in *Grismer* (where the blanket restriction on licences was struck down in favour of assessments for individual drivers with the disability in question.). However, there are other cases, such as *Hutterian Brethren*, where individuals are part of a recognized group that requires accommodation. The reasonable accommodation analysis should apply equally in these sorts of situations. Further, to state that legislatures "have no advance notice of a law's potential to infringe *Charter* rights" is to let governments off the hook in a major way. After more than 25 years of the *Charter* and a longer period in which they have been bound by human rights obligations, governments can no longer claim that they are unaware of the impact that laws might reasonably have on groups protected by these documents (for an argument to this effect that is now over 15 years old, see David Lepofsky, "The Duty to Accommodate: A Purposive Approach" (1993), 1 *Can. Lab. L.J.* 1 at pp. 8-9, cited in *Meiorin* at para 29).

Perhaps the holding that reasonable accommodation is not part of the minimal impairment analysis for legislative breaches of the *Charter* is not as serious as I fear it may be. A court must consider whether there are *reasonable alternatives* that are less impairing of the claimant's rights and freedoms under section 1 in any event, and it could be said that the "reasonable alternatives" step fulfills largely the same function as the "reasonable accommodation" step. However, it seems perverse to suggest that legislatures have no duty to accommodate disadvantaged groups in this day and age, as well as contrary to trends in the case law.

It is interesting that the dissenting justices do not challenge the majority on this aspect of its ruling – in fact, they have nothing to say about reasonable accommodation, although they do find that the government did not meet the minimal impairment step. According to Justice Abella,

> It is not difficult for the state to argue that only the measure it has chosen will *maximize* the attainment of the objective and that all other alternatives are substandard or less effective. And there is no doubt that the wider the use of the photographs, the greater the minimization of the risk. But at the minimal impairment stage, we do not assess whether

> the infringing measure fulfills the government's objective more perfectly than any other, but whether the means chosen impair the right no more than necessary to achieve the objective (at para 147, emphasis in original).

This test the dissent found the government could not meet. Justice Abella notes that

> all of the alternatives presented by the government involve the taking of a photograph. This is the very act that offends the religious beliefs of the Wilson Colony members. The requirement therefore completely extinguishes the right, and is, accordingly, analogous to the complete ban in *RJR-MacDonald*. It is therefore difficult to conclude that it minimally impairs the Hutterites' religious rights (at para 148).

Moving to the final proportionality stage, the majority claims that this is the only step to focus on the effects rather than the purpose of the law (at para 76). As I argue above, I think this is analytically wrong, as the minimal impairment step has previously considered the effects of the law as well. Both Justices Abella and LeBel, writing in dissent, also disagree with the majority's "watertight compartments" approach under section 1 (at para 134 per Abella J.; see also LeBel at para 191).

There is much talk of risk in this part of the majority's judgment. For example, "[t]hough it is difficult to quantify in exact terms how much risk of fraud would result from permitted exemptions, it is clear that the internal integrity of the system would be compromised." According to the majority, this differs from previous freedom of religion cases, "where this Court … found that the potential risk was too speculative" (at para 81). All a government enacting social legislation must show is that "reason and the evidence suggest [its measures will] be beneficial." There is no requirement "to show that the law will in fact produce the forecast benefits" (at para 85). Once again, we see significant deference to the government in the majority's finding that the photo requirement has sufficient salutary effects. Justice Abella, in contrast, sees the advantages as speculative (at para 154) and not up to the "rigorous" demands of section 1 (at para 173).

The salutary effects must then be weighed against the deleterious effects of the photo requirement on freedom of religion. Freedom of religion is constructed by the majority as an aspect of liberty – i.e. it is seen to protect "the right of choice on matters of religion" (at para 88). It is thus cast as essentially individualistic, in spite of the majority's attempts to link freedom of religion to culture and community (at para 89).

Consistent with its reasons on reasonable accommodation, the majority draws a distinction between direct state compulsion in relation to religious beliefs and practices, and compulsion that is indirect. In the words of the majority:

> Cases of direct compulsion are straightforward. However, it may be more difficult to measure the seriousness of a limit on freedom of religion where the limit arises not from a direct assault on the right to choose, but as the result of incidental and unintended effects of the law. In many such cases, the limit does not preclude choice as to religious belief or practice, but it does make it more costly (at para 93).

The overall effect of the majority's reasons is to re-create the distinction between direct and adverse effects discrimination that it erased in *Meiorin*. It is striking that Justice McLachlin is the author of both judgments. The import of the distinction in *Hutterian Brethren* seems to be that

cases of direct compulsion will generally be seen as serious (at paras 91-93), while cases of "incidental effects" may not be. The question in the latter type of case is whether the cost on freedom of religion "in terms of money, tradition or inconvenience" still leaves "the adherent with a meaningful choice concerning the religious practice at issue" (at para 95).

Applying that question to the case at hand, the majority holds that "the cost of not being able to drive on the highway … does not rise to the level of depriving the Hutterian claimants of a meaningful choice as to their religious practice, or adversely impacting on other *Charter* values" (at para 96). Shockingly, the claimants are told that they should "[arrange] alternative means of highway transport … [so as not to] end the Colony's rural way of life" (at para 97). Only costs that are "prohibitive" seem to matter (at para 97), and the relevant costs here are seen to be merely those of "money and inconvenience" (at para 102). Further, driving is said by the majority to be "not a right, but a privilege" (at para 98). The Hutterites' reasons for needing to drive are given no attention whatsoever by the majority.

This can be contrasted with Abella J.'s reasons, where she notes that the Wilson and other colonies "attempt to be self-sufficient, and members of the community operate motor vehicles in order to fulfill their responsibilities to the community." More specifically, they drive motor vehicles in order "to obtain medical services each week for the 48 children and 8 diabetics on the Colony, for community firefighting by volunteer firefighters, and in commercial activity to sustain their community" (at para 118). Their reasons for driving are not just monetary and convenience-based, but are "religious and democratic" (at para 175). Moreover, Justice Abella disagrees with the majority's reliance on licenses as "privileges", noting that benefits must be equally scrutinized under *Charter* (at para 171; see also LeBel J. at para 201).

In conclusion, the majority believes the law has "an important social goal… that should [not] lightly be sacrificed" (at para 101). Weighed against effects which are seen to be only monetary matters of convenience, the law's violation of freedom of religion can easily be justified under section 1 of the *Charter* (at paras 102-103).

Section 15

In light of its finding that there was a justifiable violation of section 2(a) of the *Charter*, the majority goes on to consider the claimants' alternative argument, that the photo requirement is contrary to equality rights as guaranteed under section 15 of the *Charter*. The majority reiterates the test from *R v Kapp*, 2008 SCC 41, whereby discrimination is to be assessed in terms of whether it amounts to a disadvantage perpetuated by prejudice or stereotyping (at para 106). The regulation here is found to create a distinction on the enumerated ground of religion, however this distinction is seen to arise not from any demeaning stereotype, but from a "neutral and rationally defensible policy choice" (at para 108). In its very brief reasons finding no discrimination, then, the majority seems to be importing section 1 considerations into section 15 of the Charter all over again. This is something that its reasons in *Kapp* said were to be avoided.

Conclusion

The majority decision in this case is a major disappointment and arguably sets *Charter* jurisprudence back many years. In particular, the majority's easing of the burden on governments in the case of their legislative actions is a major setback for disadvantaged groups under the *Charter*. The dissenting reasons are much truer to the spirit of the *Charter* and to previous case law, some of it decided by Justice McLachlin before she was Chief Justice. The one positive note here is that Justice Abella finally seems to be finding her voice on *Charter* issues as a member of the Supreme Court.

January 13, 2010

A Vote for *R v Kapp* as the Leading Equality Case of the Past Decade

By: Jonnette Watson Hamilton

Case Commented On: *R v Kapp*, 2008 SCC 41

R v Kapp, 2008 SCC 41 is my nominee for the most significant case of the Aughts decade in the equality rights area. *Kapp* was destined to be a landmark case, if only because it involved the first direct challenge on the enumerated ground of race under the *Charter*'s equality guarantee that was heard by the Supreme Court of Canada. However, because the Court used *Kapp* as a vehicle to substantially and substantively revise its approach to section 15 claims, the decision is even more significant.

First, the Court restated the approach courts are to take to claims under section 15(1) of the Charter, synthesizing the approach in *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 to the framework in *Andrews v.Law Society of British Columbia*, [1989] 1 S.C.R. 143, and leaving little or nothing of the former. The renewed role of *Andrews* and the new two-part test for equality claims is clearest in this passage from *Kapp* (at para 17):

> The template in *Andrews*, as further developed in a series of cases culminating in *Law*…, established in essence a two-part test for showing discrimination under s. 15(1): (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

The Court noted (at para 21) that *Law*'s attempts to use human dignity as a legal test had created several problems. Human dignity, acknowledged (at para 22) to be an abstract and subjective notion that was often confusing and difficult to apply, had moreover proven to be an additional burden on equality claimants. Despite these negative comments, however, the Court did not specifically ban human dignity from future equality analyses; nor did it overrule *Law*. The Court also conceded that *Law* had been criticized for the formalism of its artificial comparator analysis focused on treating likes alike. Unfortunately, the Court said nothing more about comparator groups in *Kapp*, creating uncertainty about their role in the analysis.

Second, the Court gave independent significance to section 15(2) of the *Charter* in *Kapp*, exploiting an opening left by *Lovelace v Ontario*, [2001] 1 S.C.R. 950, which had confined it to an interpretative aiding role. The burden of adducing evidence of the purpose of ameliorative laws and programs has been shifted to government under the new section 15(2) approach. *Kapp*'s new approach to section 15(2) – its new role and test for application – may prove to be a turning point in equality jurisprudence, although the failure of the new approach to accommodate claims of under-inclusiveness must be remedied.

The Alberta connection is not just the obvious one of applying – or not applying – the new framework from *Kapp* to cases of claims under section 15 of the *Charter*. Two subsequent decisions of the Alberta Court of Appeal, *Morrow v Zhang*, 2009 ABCA 215, and *Cunningham v Alberta (Aboriginal Affairs and Northern Development)*, 2009 ABCA 239 are examples of that type of connection. But, in addition, it was in a case out of Alberta that the Supreme Court first applied the new analytical framework from *Kapp* to a section 15(1) claim.

Ermineskin Indian Band and Nation v Canada, 2009 SCC 9, largely dealt with the federal government's treatment of oil and gas royalties under the *Indian Act*, R.S.C. 1985, c.I-5. However, the bands also challenged several sections of the Act that provided for the management of "Indian moneys," and to the extent those sections stopped the Crown from investing or transferring the royalties, the bands argued they violated section 15. The framework used by the Court to analyze this claim was the two-part test from *Kapp*. There is no reference to *Law* in *Ermineskin* at all. The phrase "human dignity" does not appear. Context was said to be the larger social, political and legal context of the impugned legislation, borrowing from *R v Turpin*, [1989] 1 S.C.R. 1296. The *Ermineskin* decision therefore provides a strong signal that *Kapp* is now the leading decision in the equality rights area.

May 25, 2010

Differential Treatment of Equality Law post-*Kapp*

By: Jennifer Koshan

Case Commented On: *Woodward v Council of the Fort McMurray No. 468 First Nation*, 2010 FC 337

There have been several posts on ABlawg concerning the Supreme Court's most significant equality rights decision of late, *R v Kapp*, 2008 SCC 41. Jonnette Watson Hamilton nominated *Kapp* as the leading equality rights case of the 2000s. She and I have also written on the application of *Kapp* (or lack thereof) in cases such as *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9; *Morrow v Zhang*, 2009 ABCA 215 (see also here); and *Cunningham v Alberta (Aboriginal Affairs and Northern Development)*, 2009 ABCA 239. We are hosting a continuing legal education session on *Litigating Equality Claims Post-Kapp* on June 15, 2010, and hope to have a good turnout of equality rights litigators, judges and NGOs to discuss the implications of *Kapp* (note: the last date to register is June 1, 2010). The need for this session is real because, even two years post-*Kapp*, some lower courts continue to ignore the ruling in that case. The latest example is a decision of Justice James O'Reilly of the Federal Court in a case involving voting rights of non-resident members of the Fort McMurray First Nation in *Woodward v Council of the Fort McMurray No.468 First Nation*.

The applicants in the *Woodward* case were members of the Fort McMurray First Nation (FMFN) who resided off reserve in the village of Anzac. Under the FMFN's Customary Election Regulations (1993), voting in elections for the band's chief and council was restricted to members of the band who were eighteen years of age or older and were "residents" of FMFN (section 2.7). A "resident" was defined as someone "who maintains a place of residence on one [sic] the band's reserves for at least six months of the year" (section 2.8, cited at para 3).

After determining that the Regulations (but not a related decision of the FMFN) were subject to judicial review, Justice O'Reilly assessed whether the Regulations were part of the FMFN's customs. This issue was relevant to whether the Regulations were shielded by section 25 of the *Charter*. Section 25 provides that "[t]he guarantee in this *Charter* of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada…" If the FMFN's Customary Election Regulations reflected a customary norm of the FMFN, they might be protected under section 25 of the *Charter* "as other rights or freedoms" and be shielded from challenge by individual band members under section 15 of the *Charter* (at para 26).

Justice O'Reilly found that the evidence called by the parties of experts and elders did not support the FMFN's argument that it was customary that only residents participated in selecting a chief. The historic practice was that "members of local bands would choose a leader by consensus" and "there was no custom of distinguishing between residents and non-residents" (at para 21). In particular, the evidence that band members only lived on reserve lands as of the

1950s was particularly persuasive. Section 25 therefore did not apply, and it was open to individual band members to challenge the Regulations under section 15 of the *Charter*.

Section 25 of the *Charter* has not received much judicial scrutiny, particularly at the Supreme Court level. However, in a concurring judgment in *Kapp*, Justice Michel Bastarache decided the case on the basis that the Aboriginal fishing licence that was alleged to be discriminatory by non aboriginal commercial fishers was protected from challenge under section 25 (*Kapp* at paras 117 to 121). Justice O'Reilly does not refer to Justice Bastarache's judgment in *Kapp*, nor to the majority's reasons (where it declined to apply section 25, but suggested in *obiter* that "only rights of a constitutional character are likely to benefit" from the section (at para 63), and questioned whether section 25 should create an "absolute bar" to *Charter* claims in any event (at para 64)).

The FMFN's second argument concerning the customary nature of its elections related to the application of the *Charter* itself. Because the Regulations were said to be based on custom rather than delegated authority under the *Indian Act*, R.S.C. 1985, c. I-5, the FMFN argued that it did not qualify as "government" under section 32 of the *Charter* with respect to the Regulations. Section 32 of the *Charter* has been interpreted to provide that the *Charter* only applies to government actors or non-government actors implementing government policy (see *Eldridge v British Columbia (Attorney General)*, [1997] 3 S.C.R. 624).

Justice O'Reilly also rejected this argument, relying on a number of other Federal Court decisions where the *Charter* had been found to apply to band regulations or policies even if those rules were based on custom. In *Thompson v Leq'à:mel First Nation Council*, 2007 FC 707, the Court held that "a band council elected under Band Regulations still exercises its powers of governance under the *Indian Act* and therefore if admission to, or the right to vote for, that council is discriminatory within the meaning of subsection 15(1) of the *Charter* such discriminatory results arise under an act of Parliament" (at para 8). Similarly, in *Clifton v Hartley Bay Indian Band*, 2005 FC 1030, the Court held that "whether the Village Council is acting according to custom or the *Indian Act*, its decisions are ultimately made pursuant to its authority under the *Indian Act* and are therefore subject to the *Charter*" (para 45). Justice O'Reilly also referred to *Scrimbitt v Sakimay Indian Band Council*, [2000] 1 F.C. 513 (T.D.) in support of his decision.

These cases raise interesting and important issues about the strength and priority of customary law for First Nations. However, these issues are beyond the scope of this comment, given my interest in focusing on the Court's treatment of section 15 of the *Charter*.

Justice O'Reilly began his consideration of section 15 by citing *Corbière v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, where the Supreme Court found that the *Indian Act* requirement that voters in band elections be resident on reserve violated section 15 and could not be justified under section 1 of the *Charter*. FMFN attempted to distinguish *Corbière* on the basis that since that decision, "off-reserve members are now allowed to vote on many things, just not for the chief and council of the band" (at para 32). FMFN also argued that its members "have the option of moving onto the reserve," and that the evidence of over-crowding in *Corbière* was not present in this case (at para 32).

Justice O'Reilly's response to this submission was as follows:

> I cannot agree with the FMFN's position. I see no reason to depart from the analysis of Justice Strayer in *Thompson*, above, where he concluded that:
>
> > • limiting the right to vote based on residence makes a distinction that denies equal protection or equal benefit of the law;
> > • that distinction is based on grounds analogous to those set out in s. 15 because it involves characteristics that the government has no legitimate interest in expecting the person to change (citing *Corbière*);
> > • a distinction based on residence on the reserve is discriminatory because it implies that off-reserve members are lesser members of the band, infringes their dignity by denying them a full opportunity to participate in the band's affairs, and restricts their ability to maintain a connection with the band;
> > • the fact that a person may choose voluntarily to live off the reserve is irrelevant (*Woodward* at para 33, emphasis added).

The *Thompson* case relied on by Justice O'Reilly was decided before *Kapp*, and applied the then-governing test for section 15 of the *Charter* from *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497. The *Law* case defined discrimination as a breach of the claimant's essential human dignity, which was to be determined by assessing a range of contextual factors, including (1) pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the claimant; (2) the correspondence between the ground(s) on which the claim is based and the actual need, capacity, or circumstances of the claimant; (3) the ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society; and (4) the nature and scope of the interest affected by the impugned law (*Law* at paras 62-75).

The focus on human dignity in *Law* was critiqued as being "abstract and subjective", "confusing and difficult to apply", "formalistic", and "an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be" (*Kapp* at para 22, citing a range of secondary literature (emphasis in original)). In none of the Supreme Court decisions involving section 15 of the *Charter* since *Kapp* has human dignity been the focus (see *Ermineskin*, *supra* at para 188; *A.C. v Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181 (at paras.111, 150); *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567 (at para. 106)). Instead, discrimination is now to be defined in terms of whether differential treatment of the claimant based on a protected ground results in disadvantage based on prejudice and stereotyping (*Kapp* at para 24). Human dignity should no longer be seen as the touchstone for discrimination after *Kapp*.

Justice O'Reilly thus applied the wrong test for discrimination by relying on another Federal Court case that was decided during the reign of the human dignity approach to discrimination – an approach that has since been discredited. His lack of attention to current case law under section 15, section 25, and as I will note below, section 1 of the *Charter* is troubling. However, does it make a difference to the outcome of the case?

At first blush, the answer appears to be no. Although human dignity and its associated contextual factors were recognized as potentially creating an additional burden on equality claimants in *Kapp*, that burden was found to be met in this case, and a violation of section 15 of the *Charter* was seen to be established, as noted in the above passage.

However, Justice O'Reilly went on to find that the Regulations were justifiable under section 1 of the *Charter* in spite of their violation of section 15. This was based on the considerations stipulated in *R v Oakes*, [1986] 1 S.C.R. 103 (although that case is not cited). Nor are the Supreme Court's more recent section 1 reasons in *Hutterian Brethren of Wilson Colony* referenced. The only case that Justice O'Reilly referred to under section 1 was *Thompson*, *supra*, where Justice Strayer held that the voting restrictions in that case could not be justified under section 1.

In *Thompson*, the voting restrictions failed at the first stage of the *Oakes* test – they were seen to have no pressing and substantial objective. Justice Strayer stated as follows:

> While no doubt it is important to the Leq'á:mel Band to identify the area traditionally occupied by it and 23 other Stó-lo First Nations enjoying historic language ties, nowhere is it explained why a present band member not living in that area should not be allowed to vote in the band election governing the three Leq'á:mel reserves that make up only a small part of the CTST [Canadian Traditional Stó:lo Territory]. Similarly, no rational connection is shown between the right to vote and the obligation to live somewhere in the CTST. To the extent that there might be some logic, in respect to purely local matters, to require that voters be resident on the reserve, this regulation does not require that. It only requires that the voter live in any one of dozens of communities, or in rural areas, scattered throughout the CTST (at para 24).

Justice O'Reilly distinguished the section 1 reasons in *Thompson*. He found that the Customary Election Regulations fulfilled a pressing and substantial objective, that of providing local government to FMFN residents. More specifically, the residency requirement was said to properly "ensure that those most affected by the band's governance have the most say in choosing their representatives" (at para 35). Second, he found a rational connection between the residency requirement and the objective of the Regulations, "given that most of the band's activities relate to the administration of the reserves for the benefit of the people residing there" (at para 36). The Customary Election Regulations were seen to differ from the voting restrictions at issue in *Thompson*, as the rules in latter case covered a large geographic area and were not aimed at ensuring local governance in the interests of local residents.

Further, Justice O'Reilly found that there was minimal impairment of the claimants' section 15 rights, as they were not completely excluded from voting in band elections (as were the claimants in *Corbière*). Justice O'Reilly noted that following *Corbière*, non-resident FMFN members are entitled to vote on several issues, including reserve lands, membership of the band, and amalgamations. They are also entitled to sit on the FMFN Elder Committee and advise the chief and council on matters affecting the band (at para 37). It was also seen as relevant that "the FMFN has very limited resources" (at para 38), and that if non-resident members were entitled to vote for chief and council, they would make up a majority of voters. Lastly, there was "almost no evidence … as to the effect of the residency requirement" on the claimants (at para 39), making it difficult to conclude that the deleterious effects of denying them voting rights outweighed the salutary effects of restricting voting to resident members of the FMFN.

Would a focus on discrimination as disadvantage based on prejudice and stereotyping have resulted in a more favourable outcome for the claimants under section 1 of the *Charter*? Under section 15, one of the reasons Justice O'Reilly gave for holding that the Regulations were

discriminatory was that they "implie[d] that off-reserve members are lesser members of the band" (at para 33). The implication that off-reserve members are lesser members of the band sounds like the harm of stereotyping. Would actually calling the harm "stereotyping" have made a difference? It may have countered Justice O'Reilly's claim that there was a lack of evidence as to the effect of the residency requirement on the claimants, as surely stereotyping can be seen as such an effect. However, Justice O'Reilly's section 1 reasons suggest that the stereotyping was not so bad, as the claimants were not considered lesser members of the band for all intents and purposes, and could still play some role in influencing band governance. His reasons suggest that there may be varying degrees or effects of stereotyping, some of which are more serious and difficult to justify than others. This reading of the case implies that the post-*Kapp* focus on prejudice and stereotyping rather than human dignity may not have made a difference in the outcome of this case.

Jonnette Watson Hamilton and I noted in our post on *Ermineskin* that the focus on discrimination as defined by prejudice and stereotyping is too narrow, and that a broader range of harms flowing from discrimination should be considered, including vulnerability, powerlessness, oppression, stigmatization, marginalization, devaluation, and disadvantage. Even if those broader harms had been considered part of the definition of discrimination in this case, however, the lack of evidence of more specific effects of the Regulations on the claimants (beyond some stereotyping) would likely have made it difficult to find that these other harms had occurred in a way that was unjustifiable. Overall, then, this case could be seen as one where the evidence was insufficient to make out a claim of discrimination that was strong enough to survive section 1 scrutiny, regardless of the test for section 15 that was applied. While I do not take issue with that result, I do think it is important that courts get to their conclusions by applying the correct legal tests.

September 29, 2010

Access to Justice and Representation by Agents

By: Jennifer Koshan

Case Commented On: *R v Frick*, 2010 ABPC 280

Cutbacks to legal aid are a harsh reality in Alberta and the rest of Canada. As noted on the website of Legal Aid Alberta (LAA), "as of April 6, 2010, LAA's eligibility guidelines for full representation by a lawyer have decreased by 30%". This is due in part to the fact that in this province at present, legal aid funding is highly dependent upon Alberta Law Foundation revenue, and this revenue has been adversely affected by the economic downturn. It is also due to government cuts to Legal Aid. Legal Aid has developed a bandaid of sorts through Legal Services Centres, which "provide clients access to legal information, referral and brief services (in family, criminal, civil and immigration matters) with legal advice in immigration and non-family civil matters." However, these centres exist only in Calgary and Edmonton, deal only with certain legal matters at present, and perhaps most importantly, do not provide full legal representation. Attempts by lawyers such as Dugald Christie and the Canadian Bar Association to bring constitutional claims asserting rights to representation by paid legal counsel in certain circumstances have not been successful. In such a climate, it is not surprising that other actors – such as agents – have stepped into the fray to provide legal services. A recent Alberta Provincial Court case, *R v Frick*, shows that there are legislative and constitutional limits to the role that agents can play in filling the gaps in legal aid.

The Facts

Bradley Frick was charged with offences related to impaired driving. He sought the assistance of Student Legal Services of Edmonton (SLS), a student run legal clinic at the University of Alberta law school. Associate Chief Judge J.K. Wheatley had glowing things to say about SLS: "Student Legal Services has been appearing before this court for approximately forty years. The organization provides an exemplary service to both accused persons and to the court" (at para 9). While SLS agreed to appear as agent for Frick and set a trial date for his matter, it withdrew from his case because of the accused's failure to maintain contact with his caseworker. Frick was referred by Duty Counsel to Nadia Kelm, an agent who agreed to represent him for a fee that is not disclosed in the case. We can assume that her fees were likely less than the $5000 – $7500 that Frick was quoted by two different law firms as the cost of representing him. According to the Court, Kelm had been working as a professional legal agent since 1997, with a "significant portion" of her work devoted to impaired driving offences (at para 13). But the Crown objected that Kelm was not legally permitted to appear on behalf of Frick.

The Law

Sections 800 and 802 of the *Criminal Code*, RSC 1985, c. C-46, generally allow for the appearance of agents in summary conviction criminal matters. However, s. 802.1 of the *Code* restricts agents to appearing in matters where the accused "is liable to" imprisonment that does

not exceed 6 months, unless the agent is authorized to appear "under a program approved by the lieutenant governor in council of the province." Under s. 255 of the *Criminal Code*, the maximum penalty for impaired driving offences prosecuted by way of summary conviction is 18 months imprisonment.

Alberta Order in Council 334/2003 provides that the agents approved to provide legal services for defendants whose matters fall within s. 802.1 of the Criminal Code are: articling students, and law students / court workers with Student Legal Services, Student Legal Assistance (University of Calgary's student run legal clinic), Calgary Legal Guidance, and the Criminal Court Worker Program. Agents in the position of Kelm are not included amongst the approved programs.

The Issues

The accused, represented by K. Wakefield, Q.C. at this hearing, raised several issues with respect to the governing legal provisions. First, he argued that s. 802.1 of the *Criminal Code* was *ultra vires* the federal government, or that Parliament had improperly delegated the approval of agents to the provinces. Second, he argued that as a matter of statutory interpretation Kelm should not be precluded from appearing as his agent. Third, he argued that s. 802.1 violated his rights under ss. 7, 10 and 15 of the *Canadian Charter of Rights and Freedoms*.

The Decision

Wheatley A.C.J. commenced his reasons with a critique of the current state of legal services in Alberta:

> For an accused without the means to pay for a lawyer, the current situation in Alberta is troublesome. … [M]any people who would have previously qualified for legal representation through Legal Aid are forced to look elsewhere for assistance. In the past, accused persons … who were not eligible for Legal Aid could often find assistance from Student Legal Services. … However, Student Legal Services has recently had to close its doors, albeit temporarily, due to the increased number of people utilizing its services and the fact that its human resources are stretched beyond their capacity. … It is clear that for those who cannot afford a lawyer, finding effective legal assistance is becoming increasingly difficult. However, despite growing concerns in this province about access to justice and concerns expressed by judges across the country about unregulated professional agents, the Province of Alberta has declined to regulate agents in any meaningful way. This is regrettable (paras 19-21).

In spite of these concerns, Judge Wheatley dismissed all of the accused's legal arguments as unfounded.

First, s. 802.1 of the *Criminal Code* was found to be *intra vires* the federal government. Judge Wheatley characterized s. 802.1 as relating to criminal procedure, a matter properly classified under the federal government's criminal law powers under s. 91(27) of the *Constitution Act 1867*. The accused had argued that s. 802.1 should be characterized as relating to the administration of justice, a power belonging to the provinces under s. 92(14) of the *Constitution Act 1867*. Judge Wheatley cited the case of *R v Lemonides* (1997), 151 DLR (4th) 546 at para 27, where the Ontario Court of Justice noted the "delicate balance between federal and provincial powers" when determining the "dividing line between criminal procedure and the regulation of

the practice of the legal profession". Judge Wheatley followed the reasoning in *Lemonides*, where the Court held that deciding which categories of persons may appear on behalf of accused persons, and in what capacity, was a matter of criminal procedure that fell on the federal government's side of the line. Judge Wheatley contrasted this power with that of determining the qualifications of people falling within the different categories of those entitled to appear under s.802.1, which falls on the province's side of the line under s. 92(14) of the *Constitution Act 1867*.

The Court also rejected the alternative argument that the federal government had improperly delegated its powers to determine who could appear as agents under s. 802.1 of the *Code* to the province. In support, the Court cited *R v Furtney*, [1991] 3 SCR 89, where the Supreme Court held that it is open to the federal government to incorporate provincial legislation by reference and to create limits in its own legislation to accommodate provincial laws, provided that the provincial law is *intra vires*. Applying that reasoning to the facts of the case before him, Judge Wheatley held that "Parliament is not attempting to govern the qualifications of those appearing, that power correctly remains with the province. Instead, Parliament is indicating that, as a matter of procedure, these are more serious matters and demand that the province turn its attention to who is qualified to appear on these particular offences." (at para 27).

The accused's second main argument, based on statutory interpretation, was also dismissed. There were two aspects to this argument. First, it was argued that the *Provincial Offences Procedure Act*, RSA 2000, c. P-34 and the *Alberta Rules of Court*, Alta. Reg. 390/1968 should be interpreted so as to constitute an "authorized program" under s. 802.1 of the *Criminal Code*. This argument was quickly dismissed. Although both the *Provincial Offences Procedure Act* and the *Alberta Rules of Court* allow agents to appear relatively broadly in matters covered by each piece of legislation, Judge Wheatley held (at paras 31-33) that the provincial legislation applied to provincial matters only, and not to *Criminal Code* offences such as those faced by the accused. Furthermore, if the provincial provisions did apply, they would be in conflict with s.802.1 of the *Code*, and the latter would prevail under the paramountcy doctrine.

The second statutory interpretation argument focused on the wording of s.802.1 of the *Criminal Code*. That section provides as follows:

> … a defendant may not appear or examine or cross examine witnesses by agent if he or she is liable, on summary conviction, to imprisonment for a term of more than six months, unless the defendant is a corporation or the agent is authorized to do so under a program approved by the lieutenant governor in council of the province.

The Crown had said that it would not be seeking a custodial sentence if the accused was convicted. The accused argued that he was therefore not "liable to" imprisonment for more than 6 months. Here again there was case authority contrary to his position. In *R v Robinson*, [1951] SCR 522, the Supreme Court held that "liable" meant the maximum sentence that could be imposed. Although this case was decided in a different context, Judge Wheatley found that it was applicable to the case at hand, and that Kelm was not entitled to appear on behalf of the accused as he was "liable to" a maximum sentence of 18 months under s. 255 of the *Criminal Code* (at paras 38-40).

The third set of arguments focused on whether the inability of Kelm to appear on behalf of the accused violated his rights under the *Charter*, particularly his rights under s.10(b), s.7 and s.15(1). Section 10(b) guarantees the right "to retain and instruct counsel without delay and to be

informed of that right." The accused argued that "counsel" should be interpreted to include agents, relying on a Federal Court of Appeal decision, *Olavarria v Canada* (1973) 41 DLR (3d) 472. Judge Wheatley distinguished *Olavarria* on the basis that it dealt with the meaning of "counsel" under immigration regulations. He held that a contextual approach to interpretation should be taken, and noted that the accused had not put forward any cases where "counsel" was interpreted to include "agent" under the *Charter*. Further, "counsel" is defined under the *Criminal Code* to mean "barrister or solicitor." The right to counsel in criminal matters was thus seen to be restricted to the right to a lawyer (at paras 44-47).

Under section 7 of the *Charter*, the accused argued that s. 802.1 of the *Criminal Code*, as interpreted by the Court, violated his "right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Judge Wheatley held that this argument depended on a finding that "representation by an agent is a principle of fundamental justice" (at para 48), and found that no such principle existed. A principle of fundamental justice is one "about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a management standard against which to measure deprivations of life, liberty or security of the person" (*R v Malmo Levine*, 2003 SCC 74, [2003] 3 SCR 571 at para 113). Judge Wheatley found that the accused had not met the onus of proving that representation by an agent met this test. In particular, "the case law before the court does not support the suggestion that there is a consensus in society that representation by agents is vital to our notion of justice. Instead, the cases before the court overwhelmingly reflect a concern about the negative impact that unregulated agents may have on an accused" (at para 52, citing *R v Kubinski*, 2006 ABPC 172; *R v Romanowicz*, 178 DLR (4th) 466; and *R v Wolkins*, 2005 NSCA 2).

Moreover, representation by agent (or counsel for that matter) was not seen to be required in order for the accused to receive a fair trial, another aspect of s.7 of the *Charter*. Judge Wheatley focused here on the obligation of courts to ensure that an accused person receives a fair trial, regardless of whether he or she is represented by counsel, an agent, or is self-represented. He stated that it was only in the "exceptional circumstances" where a trial judge could not ensure trial fairness that a court should order state-funded counsel (at para 59, citing *R v Rowbotham* (1988), 41 CCC (3d) 1, [1988] OJ No. 271 (C.A.) and *R v Rain*, 1998 ABCA 315, (1998), 130 CCC (3d) 167). According to Judge Wheatley, "the presumption must be that a trial judge will do everything in the scope of his or her authority to ensure that the accused person receives a fair trial", and there was no evidence to suggest that the trial judge in this case could not fulfill this duty (at para 60).

The final argument was based on the accused's equality rights under s. 15(1) of the *Charter*. The Aboriginal Court Worker Program, which is recognized under Alberta Order in Council 334/2003 as an authorized program allowing agents to appear for accused persons under s. 802.1 of the *Criminal Code*, was said to discriminate against non-Aboriginal accused persons. Judge Wheatley followed the governing case of *R v Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, and held that this Program did draw a distinction between Aboriginal and non-Aboriginal accused persons in terms of the availability of agents. Again following *Kapp*, this distinction was said to be based upon the enumerated ground of race (at para 70). However, the Aboriginal Court Worker Program was seen to meet the requirements of s. 15(2) of the *Charter*, which protects affirmative action programs. Judge Wheatley found the Program's objective was to ameliorate the conditions of a disadvantaged group, namely Aboriginal persons, who are over-represented in, inequitably treated by, and lacking in equal access to the criminal justice system (at para 71). Based on

Kapp, the finding of an ameliorative program meant that there was no discrimination under s. 15(1) of the *Charter* in the lesser availability of agents to non-Aboriginal accused persons such as Frick.

Overall, none of the accused's *Charter* arguments were found to have merit, there were no *Charter* violations established, and the Court found it unnecessary to consider s. 1 of the *Charter*, the reasonable limits provision.

Commentary

I think Judge Wheatley came to the correct decision on the federalism and statutory interpretation aspects of the case in light of the governing precedents, although he omits reference to relevant case law that would have buttressed his decision.

On the division of powers issue, the accused had argued that the Court should follow *Law Society (British Columbia) v Mangat* (1997), 149 DLR (4th) 736 (B.C.S.C.), where provisions authorizing the appearance of agents under the *Immigration Act*, RSC 1976-77, c. 52 were at issue. The B.C. Supreme Court found (at para 62) that those provisions of the *Immigration Act* were *ultra vires* the federal government "insofar as they authorize the practice of law." Judge Wheatley stated that he did not find the decision persuasive, and distinguished it on the basis that it dealt with the *Immigration Act* rather than the *Criminal Code* (at para 26). He did not refer to the fact that *Mangat* was eventually heard by the Supreme Court of Canada, where the Court held that both the federal government (under the *Immigration Act*) and the provincial government (under the *Legal Profession Act*) had overlapping powers to regulate the appearance and qualification of agents in immigration matters, which should operate concurrently unless there was a conflict (in which case the federal provisions would be paramount). The Supreme Court ruling in *Mangat* would have supported Judge Wheatley's decision had it been cited. Although it dealt with a different context — immigration rather than criminal matters – those contexts are analogous when it comes to the respective powers of the federal and provincial governments to regulate who may appear on behalf of the parties.

Judge Wheatley's ruling on s.7 of the *Charter* also omits reference to a key ruling under this section, and in this case the omission may have been to the detriment of the accused. In *New Brunswick (Minister of Health and Community Services) v G.(J.)*, [1999] 3 S.C.R. 46, the Supreme Court held that a fair trial may, in some circumstances, require representation by state funded counsel. If the state seeks to violate a person's life, liberty or security of the person via criminal or civil proceedings (e.g. child welfare proceedings), then the right to a fair trial is engaged. A fair trial may require representation by state funded counsel, depending upon the seriousness of the interests at stake, the complexity of the proceedings, and the capacity of the party asserting s. 7 rights.

If these circumstances – a serious interest, complex proceedings, and the inability of the party to self-represent – are present, it seems wholly inadequate for a person whose s.7 rights are at issue to have to rely on the trial judge to protect their right to a fair trial, as implied in Judge Wheatley's ruling. It may be that Judge Wheatley meant to recognize this point when he stated that there are "exceptional circumstances" when "a trial judge cannot ensure trial fairness" (at para 59). And it may be that the accused in this case did not prove that these "exceptional circumstances" existed in his case. But it is difficult to see how serious interest, complex proceedings, and the inability of the party to self-represent would be exceptional – in fact, these circumstances are the norm in criminal proceedings as well as child welfare matters (see the

concurring reasons of Justices L'Heureux-Dubé, Gonthier and McLachlin in *G.(J.)* at para 125 in support of this point, although the majority in *G.(J.)* thought that such cases would be "rare" (at para 102)).

The implications of this argument are far-reaching, as it would support the right to state funded counsel in a much broader range of circumstances than those currently recognized in the case law (see e.g. *Rowbotham* and *Rain*, above). It would not, however, be as broad a right as the Supreme Court rejected in *British Columbia (Attorney General) v Christie*, [2007] 1 S.C.R. 873, 2007 SCC 21. In that case, the Court held that the rule of law does not support a broad right to counsel in all court or tribunal proceedings where legal rights and obligations are at stake. Nor is this broad right what the accused was actually claiming in *Frick*. We must recall that what the accused was seeking here was the right to *representation* in order to have a fair trial, and given that legal aid was unavailable, he was seeking representation by an agent. My point is that if the state's failure to fund legal counsel can amount to a violation of the principles of fundamental justice in some circumstances, then the state's prohibition on representation by an agent should also be seen as a potential violation of those principles.

If the prohibition on representation by agents was found to violate s. 7, the government would still have an opportunity to justify the prohibition as a reasonable limit under s. 1 of the *Charter*. This is where the governments' objectives in limiting the services provided by agents become relevant, along with the means they used to achieve those objectives (see *R v Oakes*, [1986] 1 S.C.R. 103). The federal government has a reasonable interest in ensuring that serious criminal matters are handled by those who are qualified to do so, and the provinces have a reasonable interest in setting out and enforcing those qualifications. The problem is that there is an entire category of persons who is excluded from representing accused persons in serious criminal matters, namely agents who do not fall within one of the exceptions in Alberta Order in Council (334/2003). This exclusion is arguably overbroad to the extent that it is not tied to some measure of competence or certification. But because agents are unregulated in Alberta, there are no such measures. This is in contrast to the situation in some other provinces, such as Ontario, where the province has regulated legal agents such as paralegals since 2007 (see *Frick* at para 21).

The issue of representation by agents in Alberta is being studied currently by a joint Steering Committee on Access to Justice, which has the mandate to review the Alternate Delivery of Legal Services. The Steering Committee has membership from the Law Society of Alberta, Alberta Justice, the Alberta Courts, Canadian Bar Association (Alberta branch) and Legal Aid Alberta. According to the Steering Committee's website, "[c]itizen protection, the unclear definition of the practice of law and the lack of information on the delivery of legal services were among several issues identified in [the] first phase" of the project. The second phase of the project, now underway, is "explor[ing] the issues identified thorough a survey of the public and lawyers on the alternate delivery of legal services." Further, "the task force will begin preparing an "industry profile" of non-lawyers already providing legal services." This is important work towards the regulation of agents in this province. More fundamentally though, the *Frick* case raises questions about access to justice that go beyond the issue of whether accused persons should be entitled to appear by agent in certain circumstances. How should we, as a profession

and as a society, ensure adequate funding for legal aid? If priorities must be made in terms of how the available funding is allocated, what kinds of matters should have priority? And if legal aid funding is not available, how can we best ensure that accused persons and others receive a fair trial or hearing?

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Access to Justice and Representation by Agents

Comments:

Jonnette Watson Hamilton says:

September 29, 2010 at 6:34 pm

> Thanks for this comment, Jennifer, on a very interesting case. I want to highlight one point in Judge Wheatley's decision that you did not comment on – a point admittedly not relevant to the access to justice issues at the heart of the case but nevertheless problematic. I am referring to the fact that Judge Wheatley follows R. v. Kapp, 2008 SCC 41 in holding that the Aboriginal Court Worker Program drew a distinction between Aboriginal and non-Aboriginal accused persons that was based upon the ground of race (at para. 70). Neither Frick nor Kapp discuss whether or not categorizing their respective challenged programs as a race-based is justified. In my opinion, it is not.
>
> When the Supreme Court has looked how Aboriginal peoples have suffered from discriminatory treatment, the Court has not characterized the distinctions drawn as race-based nor the treatment as racism. For example, in Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010 at para. 53, Chief Justice Lamer characterized the source of disruption of the occupation and use of traditional lands as colonization, not racism. The basis of Aboriginal rights is not race. It is stated concisely in R. v. Van der Peet, [1996] 2 S.C.R. 507 to be "because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status."
>
> Labelling the distinction drawn as race-based in Kapp and Frick leaves the Aboriginal organizations holding communal fishing licences and the Aboriginal accused represented by the Aboriginal Court Worker Program in the same position vis-à-vis the state as racialized and ethnic minority groups. The characterization is also problematic because it does not seem to allow for self-definition of the membership of Aboriginal groups.
>
> The Court appears very reticent to recognize race and racism when Aboriginal peoples have been treated unjustly. Why then is race put forward as the ground of discrimination, without discussion, when the claim is that Aboriginal peoples have unfairly benefited?

Jennifer Koshan says:

September 30, 2010 at 10:47 pm

> Thanks for your comment, Jonnette. I agree with your critique of the holding in Kapp that these sorts of distinctions are race based, as there was no analysis of grounds in Kapp. The Court simply assumed without any references to case law or literature that exclusions

of non-Aboriginal persons from particular programs was race based. Earlier Supreme Court cases involving discrimination against Aboriginal persons have framed the grounds in terms of Aboriginal status, although those were cases where the distinctions were between different groups of Aboriginal persons rather than Aboriginal and non-Aboriginal persons (see e.g. Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203). Interestingly, there have also been no s.15 cases where the Supreme Court has dealt with claims of discrimination against racialized or ethnic minority groups.

I suppose the Alberta Provincial Court cannot be faulted for following the Supreme Court in its finding of a race based distinction, and it could be argued that the grounds were irrelevant in light of the fact that the Aboriginal Court Worker program was protected under s.15(2). But the question of what properly amounts to a race based distinction is something that the Supreme Court needs to provide guidance on, and that guidance should come from analysis and reflection rather than assumptions.

David Laidlaw says:

November 2, 2010 at 12:20 pm

Slaw has an interesting article on Ontario's call for input on "udbundling legal services" which was defined as:
"provision of limited legal services or limited legal representation. It is the concept of taking a legal matter apart into discrete tasks and having a lawyer or paralegal provide limited legal services or limited legal representation, that is, legal services for part, but not all, of a client's legal matter by agreement with the client. Otherwise, the client is self-represented."

The article is at: http://www.slaw.ca/2010/10/28/ontario-law-society-seeks-input-on-unbundling/#comments

January 18, 2011

The Saskatchewan Court of Appeal's Marriage Commissioners Decision – What are the Implications for Alberta?

By: Jennifer Koshan

Case and Legislation Commented On: *In the Matter of Marriage Commissioners Appointed under the Marriage Act, SS 1995, c M-4.1,* 2011 SKCA 3; *Marriage Act*, RSA 2000, c M-5

The Saskatchewan Court of Appeal ruled last week on the constitutionality of proposed amendments to Saskatchewan's *Marriage Act*, S.S. 1995, c.M-41, which would have allowed marriage commissioners to decline to perform marriage ceremonies that were contrary to their religious beliefs. The Court found that the proposed amendments violated the equality rights of gays and lesbians under section 15 of the *Canadian Charter of Rights and Freedoms*, and that this violation could not be justified under section 1 of the *Charter* because the Saskatchewan government had not minimally impaired the rights of same sex couples in the way it had set out the proposed scheme for religious exemptions.

What are the implications of the decision in Alberta? Surprisingly, the *Marriage Act*, R.S.A. 2000, c. M-5, still defines marriage as "marriage between a man and a woman" (section 1(c); see also the preamble), even though in 2004 the Supreme Court confirmed that the power to determine whether same sex couples have the capacity to marry belongs to the federal government under section 91(26) of the *Constitution Act 1867* (*Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698). While the Alberta government tried to shield the law by using section 33 of the *Charter*, the notwithstanding clause, that clause could not have saved the invalidity of the Act on division of powers grounds, and the relevant section of the *Marriage Act* expired in 2005 in any event. Furthermore, Alberta marriage commissioners have been performing same sex marriages in this province since 2005 in spite of the heteronormative definition in the *Marriage Act*. An attempt to bring in a law similar to that ruled upon in the Saskatchewan case was defeated when Bill 208, the *Protection of Fundamental Freedoms (Marriage) Statutes Amendment Act, 2006*, was blocked by members of Alberta's opposition parties. This Bill would have amended the *Marriage Act* and human rights legislation to protect marriage commissioners who refused to perform same sex marriages on religious or moral grounds. On the face of it then, marriage commissioners in Alberta do not have the sort of opting out protection that was considered in the Saskatchewan case.

Melissa Luhtanen of the Alberta Civil Liberties Research Centre will be providing further analysis of the Saskatchewan case and its implications in Alberta on ABlawg; readers may also be interested in this post on the case by Denise Réaume on the Women's Court of Canada blog.

February 23, 2011

The Saskatchewan Court of Appeal's Marriage Commissioners Decision – The Never-Ending Fight for Human Rights of Same-Sex Couples

By: Melissa Luhtanen

Case and Legislation Commented On: *In the Matter of Marriage Commissioners Appointed under the Marriage Act, SS 1995, c M-4.1*, 2011 SKCA 3; *Marriage Act*, RSA 2000, c M-5

The Saskatchewan Court of Appeal considered two proposed amendments to the *Marriage Act*, S.S. 1995, c. M-4.1. The *Act* legislates on the solemnization of marriage in Saskatchewan. It provides for specific religious officials and marriage commissioners to solemnize marriages. The Lieutenant Governor in Council in Saskatchewan sought the Court's opinion on potentially amending the *Marriage Act* after complaints from marriage commissioners who said that solemnizing same-sex marriages breached their rights under s.2(a) of the *Charter*.

There were two potential amendments suggested, stated as Schedule A and Schedule B:

> Schedule A
>
> 28.1(1) Notwithstanding *The Saskatchewan Human Rights Code*, a marriage commissioner who was appointed on or before November 5, 2004 is not required to solemnize a marriage if:
>
> (a) to do so would be contrary to the marriage commissioner's religious beliefs; and
>
> (b) the marriage commissioner has filed the notice mentioned in subsection (2)
>
> within the period mentioned in that subsection.
>
> (2) A marriage commissioner who wishes to rely on the exemption mentioned in subsection (1) must file a written notice with the director, within three months after the date this section comes into force, stating that the marriage commissioner intends to rely on the exemption.
>
> (3) A marriage commissioner who does not file the notice mentioned in subsection (2) within the required period cannot rely on the exemption mentioned in subsection (1).
>
> Schedule B
>
> 28.1 Notwithstanding *The Saskatchewan Human Rights Code*, a marriage commissioner is not required to solemnize a marriage if to do so would be contrary to the marriage commissioner's religious beliefs.

The idea behind both amendments was to allow marriage commissioners the ability to deny their services to a same-sex couple in situations where same-sex marriage was contrary to the marriage commissioner's religious beliefs.

Schedule A proposed allowing those marriage commissioners who had been appointed before *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698 to opt out based on religious grounds. Schedule B provided a more wide-reaching exemption for all marriage commissioners to opt out when solemnizing a marriage would be contrary to their religious beliefs.

The Saskatchewan Court of Appeal found that both amendments offended the Charter and could not be justified under section 1. For an analysis of how this decision affects Section 15 jurisprudence see Denise Réaume, "Rare Bird Spotted: A Successful Adverse Effects s. 15 Equality Claim" on the Women's Court of Canada blog.

The Court of Appeal addressed both Schedule A and B in the same analysis because it did not agree that limiting the exemption only to those marriage commissioners who had been appointed before 2004 would have any less effect on same-sex couples and thereby make the amendment constitutional. The Court also noted that both options reach further than just same-sex couples, and could be used by marriage commissioners to refuse other kinds of unions such as inter-racial marriages.

In assessing Schedules A and B the court said that both would result in same-sex couples being refused the services of some marriage commissioners. This effect would be particularly difficult in rural areas where there are fewer marriage commissioners available. In addition, a couple might have to experience the refusal of not just one, but two or more marriage commissioners who will not perform a same-sex marriage. This would have a significant impact, not just a minor impact, on same-sex couples and an impact one that would not be experienced by opposite-sex couples. Therefore the Court of Appeal found that both Schedules created a negative distinction based on sexual orientation that was discriminatory and could not be saved by section 1. In making this finding the Court of Appeal noted that there are other ways of accommodating religious beliefs of marriage commissioners, such as couples being referred through the Director of the Marriage Unit to commissioners who are available for the specific date and willing to perform their marriage.

While Alberta has not had a similar case, there has been a great deal of resistance to same-sex marriage in the province. The Alberta government threatened to use the notwithstanding clause to opt out of the Supreme Court of Canada support for a definition of marriage as between "two persons" (*Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698). However, over time the Alberta government gave up on fighting this definition of marriage since marriage falls under federal powers. Despite this, the *Marriage Act*, R.S.A. 2000, c. M-5, which deals with the solemnization of marriage, which is within provincial jurisdiction, still defines marriage as "marriage between a man and a woman". This definition calls into question whether the Act actually technically covers the solemnization of marriage for a same-sex couple. In practice, however, it is being used for the solemnization of the marriages of same-sex couples. The Act's preamble describes the political reasons behind this homophobic definition. It says:

> WHEREAS marriage is an institution the maintenance of which in its purity the public is

deeply interested in;

WHEREAS marriage is the foundation of family and society, without which there would be neither civilization nor progress;

WHEREAS marriage between a man and a woman has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long standing philosophical and religious traditions; and

WHEREAS these principles are fundamental in considering the solemnization of marriage;

The only change that has been made to the *Act* is taking out section 2 which said that it operated *notwithstanding* the *Charter of Rights and Freedoms* and the *Alberta Bill of Rights*. This vague acknowledgement of a change allowing same-sex marriage did not show up in the *Marriage Act* until 2007, almost three years after the Supreme Court of Canada *Reference re Same-sex Marriage* decision. The fact that section 2 is no longer in effect is a reflection of the law which says that using the notwithstanding clause only lasts for five years before it has to be renewed. *The Marriage Act* originally came to be in 2002 and so by 2007 section 2 had expired.

Even in 2005, as the rest of the country celebrated same-sex marriage, Alberta's government continued to threaten the use of the notwithstanding clause to prevent same-sex couples from marrying in Alberta. Two gay men, Keith Purdy and Rick Kennedy, applied at the registry office for a marriage license but were refused. They filed a complaint with the Human Rights Commission that was eventually dropped when the Alberta Government admitted that they had no legal recourse against same-sex marriage. Alberta also reacted to the same-sex marriage decision by introducing Bill 208 the *Protection of Fundamental Freedoms (Marriage) Statutes Amendment Act*, 2006. Bill 208, which proposed certain protections for those who do not believe in same-sex marriage, was defeated.

This history of blocking, denying and resisting marriage for same-sex couples has had a lasting effect on the understanding of the average Albertan regarding the rights of gays and lesbians. Some Albertans still believe it is illegal for same-sex couples to get married in Alberta even though same-sex couples have had this right for over six years.

Federal legislation called the *Civil Marriage Act* S.C. 2005, c.33 states in section 3: "It is recognized that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs." However, marriage commissioners are not officials of religious groups; they are hired by the government to perform civil marriages. The *Civil Marriage Act* states in section 2 that "marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others." What is sad is that six years after gays and lesbians gained this right to legally marry their partners, there is still confusion and debate as to whether same-sex couples are or should be able to fully access this right. The Saskatchewan Court of Appeal case takes another step toward, yet again justifying the human rights of gays and lesbians.

December 8, 2011

The Repeal of the Long Gun Registry: A Violation of the Federal Government's Obligations Concerning Violence Against Women?

By: Jennifer Koshan

Legislation Commented On: Bill C-19, *An Act to amend the Criminal Code and the Firearms Act ("Ending the Long-gun Registry Act")*, 41st Parliament, 1st Session

December 6, 2011 was the National Day of Remembrance for Violence Against Women, which marked the 22nd anniversary of the Montreal Massacre. The Globe and Mail's Jane Taber indicated that "government MPs [were] purposely shut out from officially speaking at and attending an event on Parliament Hill to honour the 14 young women who were shot dead in 1989," because the government is about to repeal the long gun registry (see Bill C-19). The Montreal Massacre was one of the pressure points for the registry, as was the use of firearms in crimes of domestic violence. When the Alberta government challenged the constitutionality of the registry, which was implemented via the *Firearms Act*, SC 1995, ch 39, as an amendment to the *Criminal Code*, the Supreme Court found that it was properly enacted under the federal government's criminal law powers (see *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 SCR 783 at paras 43, 59). The enactment of the law creating the registry was constitutional; but is its repeal unlawful? I think an argument can be made that the federal government's abolishment of the long gun registry is unconstitutional on *Charter* grounds, as well as contrary to international law.

This argument is dependent on the premise that the long gun registry is effective in preventing violence, and evidence of this efficacy would need to be mounted in any court challenge. Here, we might also turn to the *Reference re Firearms Act* case. While acknowledging that its task was not to rule on the efficacy of the law in a reference on division of powers grounds, the Supreme Court stated the following (at para 59):

> We also appreciate the concern of those who oppose this Act on the basis that it may not be effective or it may be too expensive. Criminals will not register their guns, Alberta argued. The only real effect of the law, it is suggested, is to burden law-abiding farmers and hunters with red tape. These concerns were properly directed to and considered by Parliament; they cannot affect the Court's decision. … Furthermore, the federal government points out that it is not only career criminals who are capable of misusing guns. Domestic violence often involves people who have no prior criminal record. Crimes are committed by first-time offenders. Finally, accidents and suicides occur in the homes of law-abiding people, and guns are stolen from their homes. By requiring everyone to register their guns, Parliament seeks to reduce misuse by everyone and curtail the ability of criminals to acquire firearms. Where criminals have acquired guns and used them in the commission of offences, the registration system seeks to make those guns more traceable.

In the debate around Bill C-10, evidence of efficacy of the registry has been put forward by police forces, which support the continued existence of the registry as a useful tool in their efforts to prevent violence (see Rhéal Séguin, History of tragic shootings drives Quebec's gun-registry battle, Globe and Mail, 16 November 2011). See also the brief of the Coalition for Gun Control on Bill C-19, available here along with the briefs of other organizations critiquing Bill C-19.

Assuming evidence of the efficacy of the registry in reducing gun-related violence could be amassed, *Charter* arguments might be made under both sections 7 and 15. These arguments would be to the effect that the repeal of the firearms registry is an arbitrary violation of the right to life and security of the person contrary to the principles of fundamental justice under section 7, and that the maintenance of the registry is required in order to combat violence against women, an aspect of women's equality under section 15 of the *Charter*. The difficulty under both sections would be that arguments that the government has a positive obligation to enact or maintain legislation have not been well received by the courts (see for example *Ferrel v Ontario* (Attorney General) (1998), 42 OR (3d) 97; 168 DLR (4th) 1 (ONCA) and *Gosselin v Québec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429). On the other hand, the Supreme Court's recent decision in Canada (Attorney General) v PHS Community Services Society, 2011 SCC 44 effectively requires the federal government to maintain an exemption for Vancouver's safe injection site (Insite) under the *Controlled Drugs and Substances Act*, SC 1996, c 19 to protect the life and security of the person rights of intravenous drug users, and may help to offset some of the earlier negative case law on positive obligations. The government would likely try to distinguish the Insite case on the basis that it deals with the obligation to grant an exemption from existing legislation to avoid criminal consequences to the *Charter* claimants, rather than the enactment of (or obligation not to repeal) legislation to protect the interests of the claimants. However, with strong evidence of the effectiveness of the firearms registry it might be possible to overcome this distinction, as both cases ultimately involve the government's obligation to protect the claimant group from the harm that would otherwise result from its (in)action. (For further discussion of the Insite decision, see Linda McKay Panos, SCC Wrongly Accused of "Judicial Activism" in Recent Insite Case).

International law could also be brought to bear as an interpretive tool in assessing the government's *Charter* obligations. For example, the recent report of the Inter American Commission of Human Rights in Lenahan, on which I blogged (here), does an excellent job of linking state inaction on violence to violations of women's rights to life, security of the person and equality (see *Jessica Lenahan (Gonzales) et al v United States*, Case 12.626, Report No. 80/11 (Inter-American Commission on Human Rights, 17 August, 2011). In addition to providing an interpretive tool under the *Charter*, principles such as those in *Lenahan* can hold the government to account for a breach of its international legal obligations under instruments such as the *American Declaration on the Rights and Duties of Man* (OAS Res XXX, Int'l Conference of American States, 9th Conference, OEA/Ser.L/V/I.4 Rev XX (2 May 1948)). Under Articles II and VI of the *American Declaration*, which protect the right to life, liberty and security of the person and the right to equality, respectively, states such as Canada have an obligation to act with due diligence to prevent, investigate, and sanction acts of gender-based violence, including those committed by private actors (*Lenahan* at paras 119, 120, 122, 124, 126). This principle is echoed in other international documents, such as the Report of the Special Rapporteur on violence against women on *The Due Diligence Standard as a Tool for the Elimination of Violence against Women*, E/CN.4/2006/61 (20 January 2006), which concludes

that the obligation of states to use due diligence to prevent and respond to violence against women is a rule of customary international law (at para 29). The Special Rapporteur's Report on *The Due Diligence Standard*, as well as the United Nations General Assembly Resolution *Accelerating efforts to eliminate all forms of violence against women: ensuring due diligence in prevention* (A/HRC/14/L.9/Rev 1, 16 June 2010), indicate that the enactment of legislation responding to violence against women is an important component of a state's due diligence obligations. It follows that Canada's repeal of the long gun registry can be seen as a violation of its obligation to act with due diligence to prevent violence against women. The federal government's plan to destroy existing registry records rather than provide them to provincial governments such as Quebec who wish to implement their own registries could also be seen as a violation of the government's due diligence obligation (see Joan Bryden and Jim Bronskill, Privacy czar shoots down Tory rationale for destroying gun records, Globe and Mail, 1 November 2011).

The repeal of the long gun registry is obviously a hot political issue. It should also be seen as a legal issue involving justiciable rights.

An earlier version of this comment was posted on the Women's Court of Canada blog, http://womenscourt.ca/blog/.

The Repeal of the Long Gun Registry: A Violation of the Federal Government's Obligations Concerning Violence Against Women?

Comments:

Annie Voss-Altman says:

December 8, 2011 at 3:09 pm

> I would add that the Court has in general been more receptive to positive obligations arguments that seek to keep existing obligations in place and less receptive to positive obligations arguments that seek to impose new obligations on the government (INSITE vs. Gosselin, among others). As the long gun registry has been in place for many years, the Court might be more willing to entertain a Charter argument to keep the registry than, hypothetically, a Charter argument to add a registry that isn't yet in existence.

Jennifer Koshan says:

May 25, 2012 at 4:59 pm

> The Barbra Schlifer Clinic has filed an application before the Ontario Superior Court to have most of Bill C-19 declared unconstitutional on the basis of its violations of women's security of the person and equality rights. The Clinic is also seeking an injunction to maintain the registry and its data until the case is heard. See an article in the Toronto Star here: http://www.thestar.com/news/canada/politics/article/1185244–toronto-legal-clinic-seeks-to-save-federal-long-gun-registry.
>
> If granted, this injunction would extend to all the provinces; Quebec has already received a temporary injunction but only for that province: http://www.thestar.com/news/canada/politics/article/1161126–judge-extends-injunction-preserving-long-gun-registry-in-quebec-for-now

Jennifer Koshan says:

October 2, 2012 at 1:25 pm

> The federal government's application to strike the Barbra Schlifer Clinic's statement of claim was recently dismissed. See Barbra Schlifer Commemorative Clinic v. HMQ Canada, 2012 ONSC 5271, http://www.canlii.org/en/on/onsc/doc/2012/2012onsc5271/2012onsc5271.html. The Clinic's application for an interlocutory injunction to restrain the destruction of records relating to the registration of non-restricted firearms, and to require the continued collection of data was denied, however.

In contrast, the Quebec government was recently successful in enjoining the federal government from destroying firearms records related to that province. See Québec (Procureur général) c. Canada (Procureur général), 2012 QCCS 1614 (CanLII), http://www.canlii.org/en/qc/qccs/doc/2012/2012qccs1614/2012qccs1614.html

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December 6, 2014

National Day of Remembrance and Action on Violence Against Women and the Failed Challenge to the Repeal of the Long Gun Registry

By: Jennifer Koshan

Case Commented On: *Barbra Schlifer Commemorative Clinic v Canada*, 2014 ONSC 5140 (CanLII)

Yesterday the University of Calgary marked the 25th National Day of Remembrance and Action on Violence Against Women with two events: the annual ceremony held by the Women's Centre, and our own ceremony in the Faculty of Law. Our event involved strong components of both remembrance and action. We recognized the 20th anniversary of the installation of Teresa Posyniak's beautiful and haunting sculpture "Lest We Forget" in the Faculty. The sculpture honours women who were killed by men, including Aboriginal women, sex trade workers and the 14 women of L'Ecole Polytechnique. Teresa was present to share her reflections on creating the sculpture, the progress we have made on issues of violence against women over the last 20 years, and the work we still have to do. In terms of action, we also heard from Michelle Robinson, a Yellowknife Dene woman who spoke powerfully about the ongoing colonial violence experienced by indigenous women and indigenous peoples in Canada, and of the actions that we can and must all take to respond to this violence. Dean Ian Holloway stressed the importance of hosting the sculpture in our faculty as a reminder to reflect on the meaning of justice.

That brings me to the case I wish to comment upon in this post. Three years ago, I marked the National Day of Remembrance with an ABlawg post inquiring into whether the federal government's repeal of the long gun registry was a violation of its obligations concerning violence against women. There has now been litigation on that question, and the applicant Barbra Schlifer Commemorative Clinic was unsuccessful in arguing that the repeal violated sections 7 and 15 of the *Charter* (*Barbra Schlifer Commemorative Clinic v Canada*, 2014 ONSC 5140 (CanLII)).

Justice E.M. Morgan of the Ontario Superior Court of Justice began his judgment by setting out the recent history of firearms regulation in Canada. Before 1995, any restrictions and penalties associated with firearms were found in the *Criminal Code*, RSC 1985, c C-46. The *Firearms Act, 1995*, SC 1995, c. 39, created "a comprehensive licensing and registration scheme for all firearms, including prohibited and restricted weapons as well as non-restricted firearms" (at para 6). It established a new registry and was enforced via measures in the *Criminal Code*, which created offenses for the possession of firearms without meeting licensing and registration requirements. The Supreme Court of Canada upheld the *Firearms Act* as a constitutional exercise of the federal government's criminal law powers in *Reference re Firearms Act (Can)*, [2000] 1 SCR 783, 2000 SCC 31. The Court in that case noted that when the *Firearms Act* was introduced, then Justice Minister Allan Rock cast the objective of the legislation as "the preservation of the safe, civilized and peaceful nature of Canada." He also noted the social problems of "suicide, accidental shootings, and the use of guns in domestic violence, and

detailed some of the shooting tragedies that had spurred public calls for gun control", including the shootings at L'Ecole Polytechnique in 1989 (*Reference re Firearms Act (Can)* at para 20, citing *House of Commons Debates*, vol. 133, No. 154, 1st Sess., 35th Parl., February 16, 1995, at p. 9706).

In 2012, the federal government passed Bill C-19, *An Act to Amend the Criminal Code and the Firearms Act*, SC 2012, c 6 (the Act). The Act repealed the firearms registry and mandated the destruction of all registration records regarding non-restricted firearms. However, the Act retained the existing licensing requirements for firearms, which require all persons who wish to possess or acquire firearms to obtain a license, and continues to require all licensees to pass a firearms safety course and to comply with a number of eligibility requirements. Licensing is subject to background checks on the applicant's criminal record and history of violent behavior, and requires notice of the application to the licensee's current and former intimate partners. The Act also maintains existing offenses and punishments with respect to firearms, except those related to non-registration. The rationale for the amendments was articulated by then Minister of Public Safety, Vic Toews, as follows:

> In essence, Bill C-19 retains licensing requirements for all gun owners, while doing away with the need for honest, law-abiding citizens to register their non-restricted rifles or shotguns, a requirement that is unfair and ineffective…
>
> The bill before us today is about making sure that we invest in initiatives that work. It is about making sure we continue to protect the safety and security of Canadians without punishing people unnecessarily because of where they live or how they make a living.
>
> Hon. Vic Toews, *House of Commons Debates*, No. 37 (October 26, 2011, at p. 2535 (cited in 2014 ONSC 5140 at para 9).

The Applicant's first argument was that the Act violated section 7's guarantee of the right to life, liberty and security of the person, in that it "decreased Canadians' personal security and increased the risk of death by firearms" (at para 16). Justice Morgan noted that proof of a violation of section 7 requires a deprivation of life, liberty or security of the person that is supported by the evidence. If such a deprivation can be established, the applicant must show that it was contrary to the principles of fundamental justice. There were three difficulties with the section 7 argument for the Applicant.

First, the Court identified a "state action problem". It is well established that laws which impose or fail to reduce the risk of serious bodily or psychological harm engage the right to security of the person (see *Canada (Attorney General) v Bedford*, 2013 SCC 72 (CanLII), [2013] 3 SCR 1101 and *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 (CanLII), [2011] 3 SCR 134, cited at para 19). This is true even where the underlying risk of harm is caused by non-state actors. For example, the harms of prostitution may be directly caused by third parties, but the former criminal prohibitions related to prostitution amounted to state action that "actively countered" the risk reduction measures that prostitutes could take (at para 27, citing *Bedford* at paras 66-67). In contrast, the absence of state action responding to the risk of serious bodily or psychological harm has not traditionally be seen to engage section 7 (see e.g. *Gosselin v Quebec (Attorney General)*, 2002 SCC 84 (CanLII), [2002] 4 SCR 429, at para 81 per McLachlin CJ for the majority).

That is how Justice Morgan characterized this case – the repeal of the long gun registry was seen as an absence of state action. According to the Court, "[t]he upshot of the Applicant's position is that the state is obliged to maximize life, liberty, and security of the person, and not just to refrain from depriving persons of those rights" – an obligation that the courts have "consistently rejected" (at paras 32-33). Unless there is a constitutional entitlement to the state action that is being sought – for example in the case of underinclusive legislation that excludes farm workers from the protections of freedom of association afforded to other workers (see paras 35-36 and here) – there is no positive obligation on the government to protect security of the person.

The second problem with the section 7 argument, according to the Court, was a "baseline problem." Although the constitution is a "living tree" and the rights that it protects may expand and evolve over time, "this does not support the far more extreme claim that existing distributions should be taken as the baseline from which to decide whether there has been partisanship or neutrality" (at para 40, quoting Cass Sunstein, *The Partial Constitution* (Cambridge, MA: Harvard U Press, 1993) at pp. 129-130). The Applicant's argument was seen to frame the 1995 *Firearms Act* as a neutral baseline, departure from which was a "partisan deviation" (at para 41). The Court noted that a similar argument had failed in *Ferrel v Ontario (Attorney General)* (1998), 42 OR (3d) 97 (Ont CA), an unsuccessful challenge to the repeal of employment equity legislation in Ontario.

The third difficulty with the section 7 argument was the Court's finding of a lack of evidentiary basis for the claim. In short, it found that there was no causal link between the repeal of the registry and any increased risk of harm. There was no clear evidence that the registry had reduced the risk of violence generally or in the context of domestic violence. Rather, statistics showed that "there has been a long term, gradual decline in gun violence in Canada, including in domestic settings, regardless of the existence of the *Firearms Act*" (at para 52). Furthermore, there was no evidence of an increase in gun related violence after the repeal of the registry took effect in 2012. There was a significant drop in seizures of firearms in 2012, but it was difficult to say how many of those firearms were long-guns no longer covered by the registry as opposed to weapons that had been restricted all along.

Although these three problem areas resulted in a finding that there was no violation of security of the person, Justice Morgan went on to state that any such violation would have been in conformity with the principles of fundamental justice in any event. The Applicant had argued that the repeal of the registry was arbitrary, as it was "absolutely unrelated to the general public safety objective of the *Firearms Act*" (at para 68). Justice Morgan disagreed, noting that the objective behind the repeal was "to eliminate the portions of the *Firearms Act* which were determined by Parliament to be ineffective in achieving that goal" (at para 72). Nor were the effects of the repeal grossly disproportionate – the evidence indicated that any negative effects were "minimal or non-existent" (at para 73). Overall, Parliament was found to have made a policy choice that "was not flawed in any way which would implicate the fundamental justice requirement of section 7" (at para 79).

I had predicted that *Ferrel* and the other "state action" cases may be a stumbling block for litigation challenging the repeal of the firearms registry, but had hoped that the strong precedent in *PHS Community Services Society* might provide a rebuttal. *PHS* effectively required the federal government to maintain an exemption for Vancouver's safe injection site (Insite) under the *Controlled Drugs and Substances Act*, SC 1996, c 19. However, *PHS* was based on a very strong evidentiary record of the harms that failing to grant the exemption would create, similar to the strong evidentiary record in *Bedford* of the harms of the prostitution laws. The evidence in

the *Barbra Schlifer* case (at least the rendition of the evidence provided in the decision – see an alternate view here) did not establish the same sort of causal link, even if the repeal could be characterized as state action.

The other argument put forward by the Applicant was that the Act violated equality rights under section 15 of the *Charter*, as it put women "at greater risk of injury and death by firearms, especially in situations of domestic or intimate partner violence" (at para 80). The Court relied on the current incarnation of the test for discrimination set out in *R v Kapp*, 2008 SCC 41 (CanLII), [2008] 2 SCR 483, as modified by *Quebec (Attorney General) v A*, 2013 SCC 5 (CanLII), [2013] 1 SCR 61 at para 323: "the claimant's burden … 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." The Court also relied on *Withler v Canada (Attorney General)*, 2011 SCC 12 (CanLII), [2011] 1 SCR 396 for the point that section 15 requires a contextual analysis of the various interests the government was trying to balance. In this case, that meant that "one cannot examine the Act in isolation, but rather one must keep in mind the social circumstances in which it is enacted as well as the broader criminal justice and law enforcement policy environment" (at para 89).

On the question of whether there was a distinction, the Court noted that although one of the goals of the 1995 *Firearms Act* was to protect women against domestic violence, the Act was aimed more broadly at public safety. Similarly, the 2012 Act was said to be aimed at public safety, as it did away with the allegedly inefficient registry in an overall context of mandatory minimum sentences and tougher approaches to bail for firearms offences (see the *Tackling Violet Crime Act*, SC 2008, c. 6 and the *Safe Streets and Communities Act*, SC 2012, c. 1). The Act therefore had no discriminatory intent, and the case was characterized as one of adverse effects discrimination (at paras 93-94).

The difficulty with the adverse effects argument was similar to that for section 7 – the evidentiary record was found to fall short in establishing an increase in the risk of gun related violence post-repeal, either generally or in the case of women specifically. According to the Court, the evidence showed that the number of men killed by firearms has long "dwarfed" the number of women, and men are also more likely to die from accidents and suicides committed with firearms than women are (para 101). There was also no evidence that women faced an increased risk of domestic violence by firearms in the short period post-repeal – there was only "conjecture" (at para 102). This aligned with the evidence of an expert, Wendy Cukier, that many of the firearms used in incidents of violence against women were not registered, so the Court saw the registry as ineffectual in preventing those sorts of crimes in any event (para 104). Even though there had been positive changes in the statistics between 1995 and 2012, i.e. "a decrease in domestic altercations leading to death by firearm during the period in which the registry was in force" (at para 95), the Court indicated that this could have been the result of the government's "tough on crime" reforms, and was probative only of a correlation but not a causal link between the registry and any reduction in gun violence.

This aspect of the case is in line with the findings that Jonnette Watson Hamilton and I made in our recent review of adverse effects discrimination cases – many such claims are subjected to evidentiary and causation standards that are very difficult to meet. For example, even if men are victimized by gun violence at higher rates than women, women are subjected to domestic violence at higher rates, and an overall adverse impact on the rates of women subjected to gun violence in that context should be sufficient to establish an adverse distinction created by the law. Domestic violence is gender-based violence, which has been characterized as a form of

discrimination against women at the international level (see e.g. General recommendation 19 of the Committee on the Elimination of Discrimination against Women), and any state action which adversely affects rates of domestic violence should be seen in that light. However, Justice Morgan found there was "no reliable evidence that the Act has caused and/or perpetuated, or that it will cause and/or perpetuate, a distinction based on gender" (at para 109).

On the question of whether there was discrimination, Justice Morgan returned to the point that the analysis should be contextual and should consider the broader legislative context of the reforms. Here, although the government had repealed the registry and related offences, it had maintained the licensing scheme and enacted mandatory minimum sentences and tougher bail provisions for some gun related offences. According to the Court, the overall scheme is "designed to ameliorate the circumstances of women who may be subject to intimate partner violence" (at para 114), and "neither stereotypes women nor increases any disadvantage or risks which they already suffer; rather, it seeks a balance between criminal law sanctions, regulatory restrictions, and facilitation of police work that is geared toward violence reduction" (at para 115). To the extent that policy considerations were at play, these were for the government to decide upon, not the court. The Act therefore did not engage in gender discrimination.

The Court's discrimination analysis is arguably problematic for incorporating section 1 considerations into section 15. This is a broader difficulty in section 15 jurisprudence that Jonnette Watson Hamilton and I have also critiqued (see here). Assessment of the proper balance between the rights engaged by the impugned law and the overall legislative scheme should await the reasonable limits analysis under section 1 of the *Charter*, where the burden is on the government to uphold its actions as demonstrably justified. Under section 15, it should be sufficient to prove discrimination by showing that a law perpetuates historic disadvantage against a protected group.

Although it was not necessary for the Court to do so, it went on to find that any violations of section 7 and 15 could have been saved under section 1 of the *Charter*. Justice Morgan also sided with the government at this stage. I take particular issue with two aspects of the section 1 analysis. First, the Court reviewed the objective of the Act in terms of the government's overall approach to firearms regulation, rather than looking specifically at the rationale behind the repeal of the registry (see e.g. *M v H*, [1999] 2 SCR 3 at para 82). If the Court had focused on that more narrow objective, it may have been more difficult for the government to prove that it was pressing and substantial, especially based on an "efficiency" rationale. Second, under the minimal impairment stage, the Court indicated that the registry scheme was only justifiable as criminal legislation, and had to be eliminated once removed from the criminal law regime (at para 129). However, in *Reference re Firearms Act (Can),* the Supreme Court left open the possibility that the national concern branch of the federal government's powers over peace, order and good government might be a basis for finding the registry constitutionally valid. The suggestion that there were no alternatives open to the government beyond a criminal registry does not comport with that decision.

The constitutional challenge in *Barbra Schlifer Commemorative Clinic v. Canada* was thus dismissed, and I am advised that the Applicant will not be filing an appeal. The decision is a disappointing one for advocates of gun control, but it must be noted that the Coalition for Gun Control – which includes survivors and family members of victims of the Montreal Massacre – remains active. The Coalition intervened in a constitutional challenge mounted by the Quebec

government to recover the gun registry data for that province that Bill 19 required to be destroyed. The case was heard by the Supreme Court in October, and while it deals with the federalism aspects of the Act rather than *Charter* issues, the Court's decision will hopefully shed further light on an area that is difficult both doctrinally and in social policy terms.

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January 12, 2012

Non-Biological Father from Separated Same-Sex Couple Declared a Legal Parent

By: Melissa Luhtanen

Case Commented On: *D.W.H. v D.J.R.*, 2011 ABQB 608

Background

Mr. H. and Mr. R. lived together as partners and planned to have a baby through a surrogate mother. Mr. R's sperm was used to conceive the baby, S, with Ms. D as the surrogate mother. Ms. D lived with the two fathers and Mr. R when the baby was first born. After that, the baby lived with the two male partners and visited the surrogate mother once or twice a week. The couple separated when S was 3 years old and Mr. H. applied for access. Madame Justice Eidsvik in *D.W.H. v D.J.R.*, 2009 ABQB 438 found that the child had a mother (who was the surrogate), but no father who could be recognized in law (see my previous post "Gay fathers not seen as a parental unit under the Family Law Act"). Mr. H was given access until November 2007 when, based on a parenting assessment, contact was discontinued. Mr. H.'s relationship with S has since almost completely ceased. Mr. H. applied for guardianship but his application was opposed.

Mr. H. made a claim for advance or interim costs but was refused (see here). In the present application, Mr. H. makes a section 15 *Charter of Rights and Freedoms* challenge to the validity of relevant sections of the *Family Law Act SA* 2003, c F-4.5 ("*FLA*"), and *Vital Statistics Act* RSA 2000 c V-4 ("*VSA*"). S is presently 8 years old. Mr. R. successfully applied to become the child's guardian in November 2010. Ms. D. is the sole legal parent.

Present Application

Mr. H. sought an Order declaring that sections 8, 12 and 13 of the *FLA* violated his *Charter* rights. He argued for a ruling that a gay man, who intended to be a parent when he and his male partner planned for a baby, would be recognized as a parent when the baby was born. In addition Mr. H. sought an Order that the *VSA* violated his *Charter* rights because a non-biological gay male who intended to be a parent would not be recognized when he registered his name for the baby's birth certificate. Mr. H. sought damages against the Province of Alberta and costs on a retroactive basis. Mr. R. and Ms. D. responded to the application. The Minister of Justice and Attorney General of Alberta intervened.

The *FLA* has been amended since the filing of Mr. H.'s application (*Family Law Statutes Amendment Act*, SA 2010, c16, Royal Assent December 2, 2010) and includes some amendments to the presumption of parentage ("*Amended Act*"). Madame Justice Bensler however considered the current case based on whether Mr. H.'s *Charter* rights were infringed by the original *FLA* provisions.

Arguments

Mr. H. argued that, even though his genetic material was not used in the conception, he had intended on being a father and was involved as a spouse of the biological father prior to planning conception, and up until after the birth. Justice Eidsvik found that Mr. R. had planned for Mr. H.'s role to be that of a co-parent and father.

The Minister argued that there was not a *Charter* violation because "…when compared to any couple where neither party can carry a child, the Applicant [was] treated no differently under the *FLA*" (para 38). It argued that adoption is the method whereby non-biological parents become legally recognized. Where assisted conception is used the *FLA* does not make parents by operation of law simply because of an intent to parent. Instead, the Minister argued, "…there must be an appropriate biological connection coupled with an intention to parent" (para 43-44).

Did the legislation offend Mr. H's Charter rights?

Under section 13 of the *FLA* a person becomes a male parent if he has a spousal relationship with the birth mother. This creates an unfair disadvantage to gay male couples who intend on being parents, because neither of them will be in a spousal relationship with a birth mother.

Surrogacy did not apply in this case, but a comparison to section 12 of the *FLA* is useful. Under section 12, a woman who carries a baby as a surrogate can only cease to be a legal mother of the child by consenting through an adoption order after the birth of the child. Similarly, in section 13, the rights of the birth mother are enshrined, and the only way for the birth mother to give up her legal rights is through the adoptive process. Mr. H. failed to show that automatic relinquishment by the birth mother to an intended parent offended his section 15 *Charter* rights.

Is it discriminatory that the FLA does not recognize Mr. H. as a parent in addition to the birth mother?

The Court found that the *FLA* did discriminate against gay male couples. When a gay male's genetic material is used in conception, neither the biological father nor his spouse are considered to be a parent under the *FLA*. A heterosexual man who was in a relationship with Ms. D., during conception, would be considered to be S.'s father. Section 13(2)(b) of the *FLA* allows both male and female individuals to be deemed parents if they are in a spousal relationship with the biological mother of the child. Gay males will never be in a spousal relationship with the birth mother and so will always be excluded from recognition under this section.

The Court said:

> At the end of the day, I find that s.13(2) discriminates against gay males in that it fails to confer a benefit (recognized paternity) and forces gay male parents to endure an extended and protracted legal process in order to have their guardianship and parentage recognized (para 92).

Is the Law Saved under Section 1 of the Charter?

The law addresses a pressing and substantial objective. However, there was not a rational connection between the law and the goal of ensuring the welfare of children. S. lived with Mr. R. and Mr. H., but Ms. D. was later found to be the sole parent and legal guardian. The *FLA* is

under-inclusive when same-sex male parents are involved. In addition, the Intervener did not make a convincing argument against a three-parent model.

The Court went on to say that even if there was a rational connection, the law would fail on the minimal impairment and proportionality tests. Mr. H.'s rights were only recognized after he went to the Court of Appeal.

> …the act of becoming a parent and being recognized as such plays a major role in defining one's identity and sense of self. It is difficult to accept an argument that legislation which restricts one's status in this regard to that of guardian or which limits one's role and involvement in a child's life to an exercise of custody and access is minimally impairing (at para 110).

The government failed to demonstrate that it had minimally impaired the rights of same-sex couples, or that there was proportionality between the importance of the objective and the injurious effects.

Remedy

Mr. H. sought:

> a. a declaration of parentage under the *FLA*;
> b. changes to the *VSA* so that the birth registration recognized gay males as parents; and
> c. damages under the *Charter* to address the loss of Mr. H.'s relationship with S.

The Court found that reading-in to section 13 so as to acknowledge Mr. H's parental status would be unacceptable. The Court would have declared section 13 to be invalid, but it had already been repealed by the *Amended Act*.

Regarding damages, for Mr. H.'s court applications and the loss of relationship with S., the Court noted that Mr. H. had obtained a contact order in 2009 but had not increased his access to S. at that time. Mr. H. did not show that there was bad faith or negligence on the part of the Legislature, and therefore damages were not appropriate in this case.

Mr. H. requested a declaration of parentage as the legal father of the child S.. The Court said that both Mr. R., who had obtained guardianship, and Mr. H. were in a legal gap created by the lacking provisions in the *FLA*. Mr. H. was a primary caregiver of S. for the first three years of her life. It is contrary to the best interests of the child to limit recognition so that Ms. D. is the only legal parent. There are no other means to correct this legislative gap, therefore the Court used its inherent *parens patriae* jurisdiction to declare Mr. H. to be a legal parent of S.. However, the Court made note that S. had resided with Mr. R. for many years. Mr. R. is her primary caregiver, and has guardianship. The declaration of parentage did not alter the parenting and guardianship arrangements that are in place. Mr. H. is applying for guardianship rights through

the Courts. The *Amended Act* states in section 9 that a child may not have more than 2 parents. This means that Mr. R.'s only means of becoming a father is to challenge the constitutionality of the *Amended Act*.

Regarding Mr. H.'s application to make changes to the VSA, he did not adequately address this in argument and therefore failed to demonstrate an infringement. The Court awarded costs on a party-and-party basis.

February 15, 2012

British Columbia Supreme Court Releases Reference Decision on Polygamy – One Alberta Connection

By: Linda McKay-Panos

Case Commented On: *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588

In 2005, Brian Seaman, Melissa Luhtanen and I, on behalf of the Alberta Civil Liberties Research Centre (ACLRC), were engaged by Status of Women Canada to research and comment on specific issues with regard to *Criminal Code* section 293 (anti-polygamy provision). Our conclusions may have been surprising to some people because it appeared that we erred on the side of equality at the expense of civil liberties. However, the recent British Columbia Supreme Court (BCSC) decision, at least temporarily, as it may be overruled on appeal, seems to have vindicated our position. Looking at the list of intervenors (11 of them) and the length of the judgment itself, it seems that the Court dealt with the issues in a comprehensive manner.

The BCSC's judgment is over 1300 paragraphs long. It is indeed rare for a constitutional reference by an Attorney General to apply to the BCSC, as these types of cases usually go to the appellate court rather than the trial court. Because the reference was before the trial court, there were many witnesses and a great deal of evidence for Chief Justice Baumann to wade through. Chief Justice Baumann had to spend a fair bit of time addressing the rules pertaining to the admission and weight of the evidence. Also, because both the federal Attorney General and the British Columbia Attorney General argued that the polygamy prohibition is constitutional, the court appointed an *Amicus Curiae* ("friend of the court") to argue that the polygamy provision is unconstitutional. Finally, although the reference questions did not address the appropriate constitutional remedy, Chief Justice Baumann hypothesized an appropriate one. This is discussed later in the paper.

The case considered section 293 of the *Criminal Code*, RSC 1985 c C-46, which reads:

> 293(1) Every one who
>
> > (a) practises or enters into or in any manner agrees or consents to practise or enter into
> >
> > > (i) any form of polygamy, or
> > > (ii) any kind of conjugal union with more than one person at the same time,
> >
> > whether or not it is by law recognized as a binding form of marriage; or
> >
> > (b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (a)(i) or (ii),

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

(2) Where an accused is charged with an offence under this section, no averment or proof of the method by which the alleged relationship was entered into, agreed to or consented to is necessary in the indictment or upon the trial of the accused, nor is it necessary on the trial to prove that the persons who are alleged to have entered into the relationship had or intended to have sexual intercourse.

The BCSC was asked to address these two reference questions (para 16):

a) Is section 293 of the *Criminal Code of Canada* consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent?

b) What are the necessary elements of the offence in section 293 of the *Criminal Code of Canada*? Without limiting this question, does section 293 require that the polygamy or conjugal union in question involved a minor, or occurred in a context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence?

It is important to note that ACLRC's research task in its paper for the Status of Women was not to address the same issues, and in fact we may have concluded quite differently than the court, should we have addressed them in our research. Our research questions were:

1. The issue of polygamy causes a clash between religious freedom and gender equality rights. Using a legal analysis, what has the caselaw found regarding conflicting rights, under the *Charter*, in issues such as polygamy?
2. How does the non-prosecution of polygamy sections in the *Criminal Code* hinder the protection of women's and children's legal and equality rights?
3. What are the social and legal implications of legalized polygamy?

In addition, we were asked to restrict our discussion to polygamy as practiced in Bountiful, British Columbia.

Following is the executive summary of our paper (*Separate and Unequal: The Women and Children of Polygamy Ottawa: Status of Women Canada*, 2005):

"According to section 293 of the *Criminal Code of Canada*, it is illegal for people to practice polygamy, which is a type of matrimonial or conjugal union involving multiple spouses. Under s. 293, not only is any form of polygamy illegal but any type of polygamous union that *purports* to result from a rite of polygamy is illegal. However, there is a community of polygamists in British Columbia called Bountiful which, to date, the authorities in British Columbia have refrained from prosecuting. The apparent rationale for this non-prosecution has been a belief that s. 293 would not withstand a challenge under the freedom of religion provision, section 2(a), of the *Canadian Charter of Rights and Freedoms*.

This paper analyzes whether the anti-polygamy provision in the *Code* impinges on freedom of religion and whether there are significant enough harms resulting from polygamy's practice that would justify a limitation to freedom of religion. The paper is divided into two major sections. Part One addresses the historical and current practice of polygamy. The fundamental principles

that underlay this paper's analysis are also identified; i.e. democracy, rule of law and the prevention of harm.

The historical reality of polygamy throughout large parts of the non-Christian world is addressed in Part One. Rather than being a historical anomaly, polygamy represented an important social institution throughout much of the world in the pre-industrial age. However, it is difficult to reconcile many aspects of this social institution with the contemporary liberal model of a rights-based society premised on the normative values of individual freedom of choice, formal equality and rule of law. These normative values not only inform the social and political culture of modern Canada; they have also been embedded in the *Charter*. As such, these values are part of Canada's constitution and therefore are part of the supreme source of law in the land.

To further elaborate upon the harm associated with polygamy, we next examine the social and legal implications of *de facto* or full legal recognition of polygamy. The *de facto* recognition of polygamy, let alone formal legalization of the practice, would invite a situation that carries the potential for enormous challenges in terms of rewriting a whole array of laws that include how property is divided upon marital breakdown, child custody and support, and the devolution of property upon the death of a spouse.

Part Two traces the development of the concept of equality in Canada and how contemporary courts might resolve a conflict between the right to equality under the law and freedom of religion. How freedom of religion has evolved as a constitutional right in Canada is also discussed in Part Two. The evolution of the concept is traced through competing lines of judicial decisions. What emerges is a right that, although of fundamental importance, is not without limits. Canadian jurisprudence has identified three possible bases for limiting the right to freely espouse and freely practice a religion: a) where that right otherwise conflicts with another right; e.g. equality under the law, b) where a religious practice may harm an individual or pose a threat to public order, and c) where the state can demonstrate a significant societal interest in limiting the right. Part Two concludes that the anti-polygamy provision trenches on freedom of religion. However, we also note that the *Charter* s 1 analysis needs to be completed before we can say that s 293 is unconstitutional.

In Part Two, we also look at how freedom of religion might be balanced against gender equality rights. A tenable argument may be made that the *Charter* must be read in context as a whole document and that there is, therefore, no hierarchy of rights. Thus, a court faced with a challenge to s 293 under the *Charter*'s freedom of religion clause would have to balance that right against the equality provisions in the *Charter* and reconcile these rights. In any event, if a court did decide that s 293 impinged on religious freedom, it would also invariably undertake an analysis under s 1 of the *Charter* with a view to deciding whether that limit on religious freedom was justified. A probable frame of reference in a s. 1 analysis would be whether the anti-polygamy provision exists to prevent harm.

Part Two looks at the implications of not prosecuting polygamy in light of the equality provision of the *Charter*, section 15(1), and addresses whether the practice of polygamy is inherently harmful from the perspective of the equality rights of women and children. We conclude that by not prosecuting s 293 of the *Code*, justice officials are in effect complicit in denying to women

and children living in polygamous families their full rights as citizens. The effect of not prosecuting s 293 would seem to be, arguably, a *de facto* acceptance of polygamy by the authorities responsible for the enforcement and administration of justice.

To prosecute under s 293 would necessarily entail difficulty from an evidentiary perspective. However, not prosecuting the offence under s 293 means justice authorities are complicit in permitting some women and children in Canada to live in conditions where they are effectively being denied their full equality rights as guaranteed by the *Charter*. After carefully considering some of the complexities attendant to this issue, the authors conclude that s 293 would likely survive a *Charter* challenge, and they consequently make no recommendation for law reform."

In this paper, ACLRC did not address whether s 293 violates *Charter* s 7, although we may have concluded that it does.

After hearing all of the evidence, Chief Justice Bauman concluded that there was compelling evidence of harm in polygamy including (paras 7 to 13 and 779 to 793):

- Women in polygamist relationships are at an elevated risk of physical and psychological harm. They face higher rates of domestic violence, abuse and sexual abuse;
- Women in polygamist relationships have higher levels of depression and other mental health issues;
- Women in polygamous relationships face more severe economic hardships;
- Children in polygamous relationships experience higher infant mortality, and suffer more emotional, behavioural and physical problems. They also have lower educational achievement and are at a higher risk of physical and psychological abuse and neglect.

Chief Justice Bauman also found that polygamy is harmful to society as it engenders higher rates of poverty and institutionalizes gender inequality (para 13).

Chief Justice Baumann agreed with the ACLRC conclusion that section 293 offends *Charter* section 2(a) freedom of religion but is saved by the *Charter* section 1, as demonstrably justified in a free and democratic society. Chief Justice Bauman also concluded that section 293 violates the *Charter* section 7 liberty interests of children between 12 and 17 who are married into polygamy, and that the *Charter* section 1 does not save this violation. He ordered that section 293 be read down not to apply to prosecution of these children. Chief Justice Bauman concluded that the *Criminal Code* section 293 does not offend the *Charter* section 2(b) freedom of expression, nor section 2(d) freedom of association. Further the *Charter* section 15 is not offended as there is no religious or marital status discrimination.

The *amicus curiae* has indicated he will not be appealing the BCSC decision (see: Marc Ellison, "Polygamy Ruling Won't be Appealed" 21 December 2011 (Toronto) Globe and Mail (online), however, it is possible that the Attorneys General could appeal to the Supreme Court of Canada at a later date so that the decision would apply across Canada. As of this writing, there is no evidence of an appeal.

British Columbia Supreme Court Releases Reference Decision on Polygamy – One Alberta Connection

Comments:

Gossip Girl Quotes says:

February 16, 2012 at 6:51 am

> I just read through this posting and had to express gratitude personally. Very clear and succinct!

July 3, 2012

Non-Fatal Exclusion: The *Fatal Accidents Act*, Stepchildren, and Equality Rights

By: Jennifer Koshan and Jonnette Watson Hamilton

Case Commented On: *Dares v Newman*, 2012 ABQB 328

A father died in a motor vehicle accident. For his grief and the loss of his father's guidance, care and companionship, his biological child received $45,000 in bereavement damages from the at-fault driver's insurance company under section 8(2)(c) of the *Fatal Accidents Act*, RSA 2000, c F-8. His two adopted children, who had not spoken to him for twenty years, also received $45,000 each under the same provision. His two stepchildren, to whom he had stood in the place of a parent for twenty years – and who had received his guidance, care and companionship over two decades and who suffered grief on his death – received nothing. This case raises the issue of the extent to which government is entitled to deny benefits to certain claimants for the purpose of restricting legal action against private parties for tortious conduct causing death.

The stepchildren challenged both the interpretation and constitutionality of excluding stepchildren under section 8 of the *Fatal Accidents Act*. The Minister of Justice and Attorney General of Alberta intervened to defend the provision even though Alberta is the only common law province which allows bereavement damages but excludes stepchildren for whom the deceased stood in the place of a parent from receiving them. Madam Justice S. L. Hunt McDonald upheld both an interpretation of section 8 that excludes stepchildren and the constitutionality of the provision, finding that it did not offend section 15 of the *Canadian Charter of Rights and Freedoms*. We will focus on the equality issue in this post.

Facts

Ken Smith was killed in a motor vehicle accident in 2004. The defendant, Kris Newman, was at fault. Newman's insurance company settled the claim of Smith's common law spouse, Deborah Dares. However, Newman's insurer refused to pay the claim of Deborah Dares' biological children, Jeffrey Dares and Angela Dares.

Ken Smith and Deborah Dares began living together more than 20 years ago, when Jeffrey was eight years old and Angela was four. For two decades, Ken Smith raised Jeffrey and Angela as his own, referring to them as his children, just as they referred to him as their father. He taught them to bike, drive, fish, and swim. He walked Angela down the aisle at her wedding. Jeffrey and Angela's biological father was not involved in their lives; Ken Smith was the only father they had ever known. Justice Hunt McDonald had no difficulty in finding that Ken Smith had stood in *loco parentis* ("in the place of a parent") to Jeffrey and Angela. He provided guidance, care and companionship to them and Jeffrey and Angela experienced grief on Ken Smith's death due to their close relationship with him.

We are not told much about Ken Smith's biological child, Robert Smith. However, the evidence that Jeffrey and Angela were closer to Ken Smith than was his biological child was uncontested.

Ken Smith's two adopted children, Tracie-Lee Bennett and Sheila-Ann Smith, ceased communication with Ken Smith when he began living with Deborah Dares twenty years ago. They had not seen nor spoken to him since and they did not attend his funeral.

Fatal Accidents Act

All of the children of Ken Smith – biological, adopted and step – sought damages against Newman under section 8 of the *Fatal Accidents Act*. Section 1 is also relevant.

> 1. In this Act,
>
> (a) "child", except in section 8, includes a son, daughter, grandson, granddaughter, stepson and stepdaughter;
>
> 8. (1) In this section,
>
> (a) "child" means a son or daughter;
>
> . . .
>
> (2) If an action is brought under this Act, the court, without reference to any other damages that may be awarded and without evidence of damage, shall award damages for grief and loss of the guidance, care and companionship of the deceased person of
>
> (a) subject to subsection (3), $75 000 to the spouse or adult interdependent partner of the deceased person,
>
> (b) $75 000 to the parent or parents of the deceased person to be divided equally if the action is brought for the benefit of both parents, and
>
> (c) $45 000 to each child of the deceased person.

The damages for grief and loss of the guidance, care and companionship are commonly collectively referred to as "bereavement damages."

The history and purpose of section 8 is well documented in reports of the Alberta Law Reform Institute – Final Report No. 24: *Survival of Actions and Fatal Accidents Act Amendment* (April 1977), Report for Discussion No. 12: *Non-Pecuniary Damages in Wrongful Death Actions*, Final Report No. 66: *Non-Pecuniary Damages in Wrongful Death Actions* – and in the Alberta Court of Appeal decision in *Ferraiuolo v Olson*, 2004 ABCA 281, 357 AR 68 at paras 18-73 (a successful *Charter* challenge we will discuss below). It is also a fascinating bit of legal history, containing quite a bit of back and forth between the legislature and the courts, which we can only very briefly sketch here.

Before 1846, the common law did not allow actions for wrongful death. The deceased's estate could not recover damages of any kind from the wrongdoer (whether criminal or negligent) and

neither could the deceased's dependants. It was therefore cheaper for a wrongdoer to kill than to injure – injured victims could sue.

By the middle of the 1800s, with the advent of the industrial revolution, railways, and more deaths due to negligence, the common law's failure to recognize the harm done and its inability to deter negligent conduct causing death led to demand for reform. Surviving spouses and children were often left destitute, as well as grief-stricken. Statutory reform was of two types. "Wrongful death" or "fatal accident" legislation assisted surviving family members of the deceased victims of wrongful death. "Survival of actions" legislation allowed the estates of the deceased to bring tort actions against wrongdoers, to the ultimate benefit of the deceased's heirs.

The first fatal accidents statute, known as *Lord Campbell's Act*, was introduced in England in 1846.This Act conferred a cause of action on the wife, husband, parent and child of a victim of a wrongful death. *Lord Campbell's Act* served as the model for wrongful death statutes subsequently enacted throughout Canada, including one enacted in 1884 in the Northwest Territories, which then included what was to become the province of Alberta. Alberta has had its version of *Lord Campbell's Act* ever since, providing that a child (among others) was entitled to claim damages arising from the wrongful death of a parent.

The law has traditionally distinguished between pecuniary and non-pecuniary losses. Pecuniary loss refers to the loss of financial benefits such as the loss of future income or loss of support. Non-pecuniary loss refers to losses viewed as intangible and not easily measured, such as the emotional, psychological and physical losses suffered by survivors on the death of a family member. As a result of restrictive judicial interpretations of "damages", under Alberta's fatal accidents legislation surviving family members could not recover non-pecuniary damages for their grief or loss of companionship. An exception was made for minor children when the Supreme Court of Canada in *St. Lawrence & Ottawa Railway Co. v Lett* (1885), 11 SCR 422 characterized a child's loss of a parent's care, education and training as a pecuniary, i.e., financial, loss.

Survival of actions legislation was also introduced into what is now Alberta, in 1903. It conferred a cause of action on an estate of a deceased. Although the statute was originally limited to actions commenced by the deceased before his death, in 1937 the House of Lords in *Rose v Ford*, [1937] AC 826 concluded that English survival legislation conferred on a victim's estate a cause of action for non-pecuniary damages on wrongful death. Some provinces revised their legislation to restore the common law but Alberta followed *Rose v Ford*.

In 1977, what is now the Alberta Law Reform Institute (ALRI) published *Report No. 24*: *Survival of Actions and Fatal Accidents Act Amendment*. ALRI recommended that claims for damages for loss of expectation of life be abolished under survival of actions legislation, but also — as a trade-off — recommended compensating certain of the deceased's family members with damages for grief. The wrongdoer would pay damages not for the deceased's loss but instead for the deceased's family's loss because "natural feelings of survivors call for some pecuniary recognition" (ALRI *Report No. 24* at 14). It recommended damages for grief in the amount of $3,000 be available only to spouses and minor children of the deceased and parents of a deceased minor child.

In 1978 the Alberta legislature followed all but one of ALRI's recommendations, amending both the survival of actions legislation and adding what is now section 8 to the *Fatal Accidents Act*.

Damages of $3,000 for grief were automatically available to spouses and minor children of a victim and to parents of a deceased child, whether a minor or not.

The changes were dramatic for family members of the deceased who were not in the preferred class of surviving family members. Parents and minor children got a new right to claim a statutorily-prescribed amount for grief without any proof of damage. But an estate's beneficiaries who were not part of the preferred class of surviving family members had their right to share in the estate's recovery of non-pecuniary damages abolished. Those who a deceased had chosen to receive his or her estate no longer received non-pecuniary damages on behalf of the estate due to the amendments to the *Survival of Actions Act*, while under the *Fatal Accidents Act* and at common law they could not claim non-pecuniary damages on their own behalf.

The 1978 amendments were not well received. The amount of damages was seen as too low for the amount of harm inflicted, especially in the case of the wrongful death of minor children. They were far lower than the amounts the courts had been awarding estates for loss of expectation of life. In 1992, ALRI invited public input by publishing *Report for Discussion No. 12: Non-Pecuniary Damages in Wrongful Death Actions*. Following consultation it released *Final Report No. 66: Non-Pecuniary Damages in Wrongful Death Actions*. Its recommendations for amendments included expanding non-pecuniary damages to cover not only grief, but also loss of the guidance, care and companionship of the deceased; raising non-pecuniary damage awards for spouses or cohabitants and for parents of minor children and children 18 to 26 who were not married or cohabiting at the time of death to $40,000; and awarding minor children and children 18 to 26 who were not married or cohabiting at the time of death non-pecuniary damages in the sum of $25,000. In 1994, the Alberta legislature adopted all of these recommendations.

In 1997, the Alberta Court of Appeal interpreted the survival of actions legislation to allow compensation to the estate of a victim of wrongful death for the deceased's future loss of income: *Duncan Estate v Baddeley* (1997) 196 AR 161. In response, ALRI recommended the legislature abolish the estate's claim for the deceased's future loss of income and in 2002 the Legislature did so. Once again, surviving family members were denied any meaningful amount of compensation.

Next followed a series of challenges to the constitutionality of section 8 and the distinctions it drew. *Lemke v Juckes Estate* 2000 ABQB 776, was a successful section 15 challenge to the age limitation in the *Fatal Accidents Act* that prevented parents from suing for the wrongful death of a child 26 years of age and older. In response the Alberta legislature abolished all age limitations in the *Fatal Accidents Act* and increased the amounts of non-pecuniary damages payable. The only express limitations left were marital status and status as a stepchild, and the marital status limitation was struck down in *Ferraiuolo* as violating section 15 of the *Charter*. As a result of the successful challenge in *Ferraiuolo*, section 8 of the *Fatal Accidents Act* was amended to the form that was in force when Ken Smith died.

This brief recounting of Alberta's *Fatal Accidents Act* reveals a long and difficult struggle by those victimized by wrongful death to receive compensation for non-pecuniary damages inflicted on them by wrongdoers. The fight to obtain recognition and recompense for the grief suffered by close family members has been especially difficult.

The Statutory Interpretation Issue

The first issue Justice Hunt McDonald addressed was whether the references to "child" in section 8(2) (c) included a stepchild or a child to whom the deceased stood in *loco parentis*. The problem confronting Jeffrey and Angela is easy to see. Section 1 says that "child" includes six categories of persons: "son, daughter, grandson, granddaughter, stepson and stepdaughter" in all sections of the Act except section 8. Section 8 has a different definition of "child" for the purposes of bereavement damages, one that is expressly limited to a "son or a daughter."

Justice Berger had decided the same issue in *O'Hara v Belanger* (1989), [1990] 69 Alta L R (2d) 158, holding that stepchildren were not eligible to receive the then $3,000 in bereavement damages under section 8. In section 1, the legislature gave the word "child" a broad meaning, clearly implying that they intended the word "child" to have a narrower meaning in section 8 than in the rest of the act. His conclusion was bolstered by the statutory interpretation maxim *expressio unius est exclusion alterius* ("the express mention of one thing excludes all others") and by section 13 of the *Interpretation Act,* RSA 1980, c I-7, s 13 ("Definitions . . . are applicable to the whole enactment . . . except to the extent that a contrary intention appears in the enactment"). Justice Hunt McDonald found this reasoning persuasive (at para 72). The definition of "child" in section 8 of the *Fatal Accidents Act* therefore did not include stepchildren.

The Section 15 Issue

The key issue in *Dares v Newman* was whether section 8 of the *Fatal Accidents Act* contravenes the equality rights guaranteed under section 15(1) of the *Charter* by denying to stepchildren and/or to children to whom the deceased stood in the place of a parent, because of their status, the damages for grief and loss of guidance, care and companionship granted to biological and adopted children? Unfortunately, Justice Hunt McDonald's analysis of this issue is somewhat cryptic.

Justice Hunt McDonald first set out the law, based on *R v Kapp*, 2008 SCC 41, which established a new approach to the analysis of section 15 claims, and *Withler v Canada,* 2011 SCC 12, the Supreme Court's most recent section 15(1) decision. She noted (at para 90) the Supreme Court's commitment to substantive equality and the two-part test from *Law Society of B.C. v Andrews,* [1989] 1 SCR 143, restated in *Kapp* (at para 17):

1. Does the law create a distinction based on an enumerated or analogous ground?

2. Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

Because Jeffrey and Angela challenged a distinction based on other than an enumerated ground, Justice Hunt McDonald focused on the first part of this test. The enumerated grounds of discrimination listed in section 15(1) are race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. For the test for analogous grounds, she relied (at para 96) on *Withler* at paragraph 33, which held that "[a]n analogous ground is one based on 'a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity': *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 13." Based on this test, the Supreme Court has recognized sexual orientation, marital status, and citizenship as analogous grounds of discrimination. Justice Hunt McDonald then

quoted (at para 96) from the judgment of Bastarache and McLachlin JJ. in *Corbiere* at paragraph 13, where they expand on the "immutability" test:

> [T]he thrust of identification of analogous grounds...is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion. Other factors identified in the cases as associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a discrete and insular minority or a group that has been historically discriminated against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making.

Justice Hunt McDonald then summarized at length the arguments of the claimants, on the one hand, and the respondent and the intervenor, on the other hand (at paras 98-146), focusing on whether the distinction in section 8 of the *Fatal Accidents Act* is based on an analogous ground and on whether the distinction creates a disadvantage. Unfortunately, both sides based a great deal of their argument on *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, even though the focus of that case on human dignity and its formalistically applied comparator analysis and contextual factors was criticized in *Kapp* and a new approach to section 15 was formulated. As Justice Hunt McDonald correctly noted (in para 91), the Supreme Court has not used the *Law* test (nor its focus on human dignity) in jurisprudence subsequent to *Kapp*.

Justice Hunt McDonald's very brief analysis follows these summaries (at paras 147-162) and reads like a response to the arguments she summarized, rather than a complete analysis of the section 15 issues. Thus it is difficult to be sure what Justice Hunt McDonald actually decided on crucial points such as whether or not she recognized the claimants' status as an analogous ground and what exactly that ground was: status as stepchildren or as children for whom someone stood in the place of a parent or non-biological/non-adopted children.

On the analogous ground issue, the claimants based their arguments on "status of the child as a stepchild" (at para 99); they argued that the law distinguished between "natural children and stepchildren" (at paras 107, 117). The respondent and intervenor focused on stepchildren as the relevant status, even stating (at para 129) that "if the stepchild relationship, which is a more formal, more easily determined relationship in many respects, is not an analogous ground, then it is difficult to imagine how the *loco parentis* relationship could be an analogous ground."

The respondent and intervenor relied heavily on *McCrea v Bain Estate*, 2004 BCSC 208, an unsuccessful section 15 challenge to the *Wills Variation Act,* RSBC 1996, c 490. In *McCrea*, the Court found that stepchildren were not subject to historical social stigma and that there was no recent history of animus against stepchildren, so that stepchildren, as a group, are not disadvantaged. Historic disadvantage was therefore a major factor in what the respondent and intervenor saw as the test for analogous grounds. The respondent and intervenor did address immutability as well, arguing that a step-parent can choose to change the status of a stepchild through adoption and that it was appropriate for the choice to be the step-parent's. Thus, although the respondent and intervenor conceded (at para 124) "it may not be within the stepchild's power to unilaterally change his or her status," it was Ken Smith's failure to adopt

Jeffrey and Angela that was the focus of their argument on immutability (at paras 124-129). The claimants argued (at para 103) that *McCrea* was wrongly decided.

Justice Hunt McDonald appears to have accepted that the claimants succeeded on the first part of the *Kapp* test and established that the *Fatal Accidents Act* creates a distinction based on an enumerated or analogous ground. She agreed with the claimants' argument that the status of being a stepchild is immutable from the child's perspective (at para 147). The court's focus at this stage seems to have been solely on immutability (assuming that when she moved to consider historical disadvantage as one of "the other indicia of constitutionality under s. 15(1)" at paragraph 153, that Justice Hunt McDonald was moving on to the second part of the *Kapp* test). She did not explicitly state whether she found status as a stepchild to be an analogous ground (at paras 148-152).

On the disadvantage issue in the second part of the *Kapp* test, the claimants argued (at paras 109-117) that the *Fatal Accidents Act* withheld a benefit and that excluding stepchildren from bereavement damages perpetuated the stereotype that stepchildren are not as desirable as biological children or do not feel grief to the same extent as biological children. The respondent and intervenor, relying on the *Law* test, argued (at paras 131-145) that stepchildren are not an historically disadvantaged group; that the Act reasonably focused on the closest blood or legal relationships; that stepchildren are not excluded from all bereavement damages because they could receive them on the wrongful death of their biological parent even if they had no relationship with that parent; that bereavement damages are ameliorative because they are not available at common law; and that the distinction was based on the needs and circumstances of the majority of families even if it did not correspond perfectly to those needs, rather than being based on prejudice or stereotyping. The respondent and intervenor also made what they characterized as a "policy" argument that not all stepchildren are in relationships of care, guidance and companionship with their step-parents, potentially resulting in "windfall" awards if they were included in section 8. Alternatively, if they were included but subject to a *loco parentis* test of some kind, this would undermine the efficiency of the legislation (at para 145).

Justice Hunt McDonald held (at para 148) that the claimants had not provided enough evidence to prove that stepchildren or children in *loco parentis* relationships suffered "social disadvantage and prejudice," and (at para 154) that they had failed to provide evidence of a history of discrimination against stepchildren, relying heavily on *McCrea*. She suggested (at para 157) that the challenged law cannot itself create the disadvantage necessary to prove a breach of section 15; the discrimination must be "sourced from outside of the impugned legislation itself." While she expressed sympathy for the claimants (at para 158), this was not enough to establish a section 15 violation.

Commentary

We have several comments on Justice Hunt McDonald's judgment, relating to the evidentiary basis for her decision, her section 15 analysis, and section 1 considerations.

Dealing first with the evidence, Justice Hunt McDonald specifically mentioned (at para 160) that she reviewed legislation from other Canadian provinces. She summarized that legislation by saying that "some" provinces have made the "policy choice" to give some benefit to people on the basis of stepchild or *loco parentis* relationships, thereby sacrificing certainty and ease of the recovery of damages. This misstates the situation elsewhere. That legislation is summarized in the Government of Alberta's Discussion Paper: Review of Damage Amounts under Section 8 of

the Fatal Accidents Act (May 2012). In all other common law jurisdictions which authorize awards of bereavement damages, stepchildren and/or persons to whom the deceased stood in the place of a parent are eligible to receive those non-pecuniary damages. British Columbia and the three territories do not permit bereavement damages for anyone (see e.g. *Family Compensation Act*, RSBC 1996, c. 126). But the seven other provinces and the federal jurisdiction do include those who have the type of relationship to the deceased that Jeffery and Angela had to Ken Smith among those who can receive damages for grief and/or loss of guidance, care and companionship. It does not matter whether the amount of damages is set by statute (as it is in Saskatchewan and Manitoba) or awarded by a court on proof of loss (as in Ontario, New Brunswick, Prince Edward Island and Newfoundland and Labrador). In Manitoba, stepchildren are included in the category of "family member" (along with adult biological children, siblings, grandchildren and grandparents) rather than the category of "child," but they do automatically receive a set amount for bereavement damages: see section 3(1)(b) of *The Fatal Accidents Act,* CCSM c F50.

This inclusiveness elsewhere is not apparent in the government's discussion paper, which appears to misstate the group of persons eligible for bereavement damages in Ontario and PEI. In Ontario, under section 1(1) of the *Family Law Act,* RSO 1990, "child" includes a person whom a parent has demonstrated a settled intention to treat as a child of his or her family and those children are entitled to recover damages to compensate for the loss of guidance, care and companionship under section 61(2)(e). In Prince Edward Island, under the *Fatal Accidents Act*, RSPEI 1988, c F-5, section 1(a)(iii), "child" includes a person to whom the deceased stood in the place of a parent and "dependants", who are awarded damages for the loss of guidance, care and companionship under section 6(3)(c), includes "child." Thus, among the provinces which do award bereavement damages, Alberta is the only province which excludes stepchildren for whom the deceased person stood in the place of a parent.

A full review of legislation elsewhere would have responded to the "policy" concerns noted by the respondent and intervenor. Like the ALRI, Justice Hunt McDonald seems to have been very concerned about conceptual clarity in the class of family members who receive bereavement damages, preferring it over justice in individual cases. The Attorney General revealed its preference for formalism and water-tight categories over human relationships when it argued against the recognition of the *loco parentis* relationships on the basis that those relationships were less formal and less easily determined than the stepchild relationship (at para 129). They all tie conceptual clarity to Alberta's approach of an automatic award to anyone in the categories, without proof of damages. But Saskatchewan and Manitoba also give amounts set by statute rather than the courts, and they include stepchildren in their fatal accidents legislation.

As shown by the approach in Ontario and PEI, there are several ways to include stepchildren. But Justice Hunt McDonald noted (at para 139, in the middle of summarizing the government's argument) that expanding the preferred class to include stepchildren might result in them receiving more benefits because they have biological parents too. She appeared to believe that the only remedy would be to include stepchildren in the class, rather than adopting some sort of *loco parentis* test that would include Jeffrey and Angela but exclude Ken Smith's adopted children who had not had contact with him for 20 years.

Are these policy arguments even proper section 15(1) considerations? To the extent that the second *Law* factor – correspondence with actual needs and circumstances – relates to the harm of stereotyping (*Kapp* at para 23), these policy considerations are still relevant to how discrimination is defined in *Kapp* and subsequent cases. If stepchildren were to receive

compensation for non-pecuniary harms associated with the loss of a parent with whom they did not actually have a relationship, this would overshoot their actual needs. The corollary, though, is that stepchildren who did have a parental relationship with the deceased and were excluded from benefits by section 8 would be the victims of stereotypical categorization, as the law does not respond to their actual needs. Although the fact that legislation in other provinces might provide such benefits does not in and of itself prove discrimination for Alberta stepchildren, the existence of that legislation shows that there are alternatives that avoid the stereotypical categorization in section 8 of the *Fatal Accidents Act*.

On the other hand, there is altogether too much about "policy reasons" in the section 15 analysis, when policy concerns properly belong in a section 1 analysis. In addition to the policy matters noted above, Justice Hunt McDonald stated (at para 158) that "[a] finding of substantive discrimination against stepchildren will have sweeping and far-reaching consequences." A focus on these sorts of policy considerations rests on the government's purpose, which is a section 1 rather than section 15 matter. This critique dates back to the *Law test*, which was acknowledged in *Kapp* (2008 SCC at paras 21-22), but it remains embedded in section 15 through the correspondence factor, now part of the analysis of whether there is stereotyping. This case is a good example of how and why the failure to keep section 1 considerations out of section 15(1) persists despite *Kapp*'s new approach.

Another concern with the section 15(1) analysis in this case is Justice Hunt McDonald's suggestion (at para 157) that the challenged law cannot create the disadvantage; the discrimination must be "sourced from outside of the impugned legislation itself." The question of whether the challenged law must "perpetuate disadvantage" in addition to creating disadvantage is one left open by *Kapp*. This type of approach would require proof of historic disadvantage of the claimant group, raising again an issue discussed in *R. v Turpin,* [1989] 1 SCR 1296, and *R v Hess; R v Nguyen,* [1990] 2 SCR 906, and a disagreement between Justice Wilson and Justice McLachlin that has to date not been resolved. There is no acknowledgement of this debate in *Dares v Newman*. The idea that a law cannot discriminate on the basis of a new ground — such as carrying genes that predispose as yet unrecognized groups of people to characteristics thought undesirable by those with the ability to impose their definitions attributes an unwarranted infallibility to our legal and political systems.

On the issue of historic disadvantage suffered by stepchildren — leaving aside whether historic disadvantage is required — it strikes us as relatively simple to prove this through the law itself. For example, at common law the mere establishment of a "step" relationship imposed no legal obligation on a husband to support the children of his wife by another man. That exemption probably reflects old ideas about the sanctity of blood ties and the indissolubility of marriage: Bernard J. Berkowitz, "Legal Incidents of Today's "Step" Relationship: Cinderella Revisited" (1970) 4 Family Law Quarterly 209 at 210. Part of the argument against including stepchildren in support legislation is that it would discourage marriage to women who have children (Berkowitz at 228) although that dreadful argument is not even relevant in this case. It is, however, in accord with the Attorney General's emphasis on the step-parent's right to choose whether to adopt (at paras 124-28). Neither the AG nor the court took into account that step-parent adoption is not always a matter of choice. They did not factor in the statutory law that states that a biological parent must consent, but often will not because adoption severs all ties. Nor did they consider that encouraging ties with more than one father or mother might be in the child's best interests in some cases. Also, given that cohabitants as well as spouses have been able to recover under the statute for years now, the insistence on the formality of adoption for children but not their parents, in this day and age, seems odd.

The court and government positions in this case prioritized both genetic ties and intentionality. Susan B. Boyd, in "Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility" (2007) Windsor Yearbook of Access to Justice 1, reviewed recent Canadian cases dealing with legal parenthood, and found that they variously emphasize bio-genetic ties and intention. She notes (at 1) that legal systems have barely begun to rethink their norms and presumptions to take account of the reality that sexuality and procreation have increasingly become uncoupled both technologically and socially, and baby-making of all sorts, including the hi-tech and clinical kind, has increasingly occurred outside heterosexual marriage. In the case of same sex partners who plan a pregnancy but cannot both be biological parents, the concepts of "stepparent" and "stepchild" seem altogether inappropriate. (For a comment on a case discussing some of the legal complexities around parentage in such cases, see Melissa Luhtanen's ABlawg post, Non-biological father from separated same-sex couple declared a legal parent). The dichotomy relied on by the parties and court — between "natural children and stepchildren" (at paras 107, 117) — strongly suggests a stereotype of stepchildren as "not natural" and is out of step with the decoupling that Boyd writes about.

These types considerations show that not only were stepchildren historically disadvantaged but they continue to be disadvantaged today in that their legal rights are tied to the decisions of others, which are often legally constrained as well. A stepchild often has a strong interest in his or her stepparent's health and life, often depending on that stepparent for physical well-being, social and intellectual development, and a place within the family, including inheritance and other legal incidents. To the extent that laws such as section 8 of the *Fatal Accidents Act* fail to recognize this, they should be seen as discriminatory.

Another concern with Justice Hunt McDonald's decision relates to her failure to explicitly find status as a stepchild to be an analogous ground. Once a ground is found to be analogous, it will be so in future cases as well (*Corbiere* at para 10), so her lack of clarity on this point is unfortunate.

Dares v Newman also raises issues concerning the role of section 15(2), which protects ameliorative laws and programs from claims of discrimination. Section 8 of the *Fatal Accidents Act* has been characterized elsewhere as ameliorative legislation designed to benefit those most dependent upon and vulnerable to a family member's wrongful death. In *Dares*, the government argued that section 8 was ameliorative, but in the context of amelioration being one of the four contextual factors in *Law*. Since *Kapp*, section 15(2) is supposed to have independent force in the section 15 analysis, rather than simply being a factor relevant to whether there was discrimination. In *Dares*, however, the government does not appear to have argued section 15(2). To do so, it would have needed to show that the benefits in the Act were targeted at ameliorating the circumstances of a disadvantaged group (biological and adopted children who have lost a parent through the wrongful acts of another) and that the exclusion of stepchildren did not fail to serve or advance the goals of the Act (see *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37, [2011] 2 SCR 670 at para 45). It may have been difficult for the government to meet this test in the circumstances of the case, although the court's finding that stepchildren are not themselves a disadvantaged group may have operated in the government's favour.

The exclusion of stepchildren from the receipt of benefits under the *Fatal Accidents Act* raises questions about the extent to which the government is entitled to deny benefits to certain claimants, not for the purpose of limiting entitlement to publicly-funded social programs, but rather for the purpose of restricting legal action against private parties for tortious conduct causing death. In *Dares v Newman*, the government argued the case as though the money was coming out of its purse. Even ALRI has been more concerned about the possible rise in insurance premiums every time the class of recipients is expanded than they have been about making tortfeasers – such as impaired drivers – pay. Are these appropriate considerations for denying private benefits to potentially deserving claimants? Even if they are, these considerations belong under section 1 of the *Charter* as matters of justification, rather than under section 15.

This case did not get to section 1, but in *Ferraiuolo*, the government advanced two main reasons for the limitations on the members of the preferred class of surviving family members who can recover non-pecuniary damages on wrongful death. ALRI had recommended the age and marital status limitations to "obtain certainty in the class and avoid litigating on the basis of a dependency test": Report No. 66 at 5. ALRI had also voiced concern about what it called an "unacceptable" increase in insurance premiums: Report No. 12 at 124-131, and see also Report No. 66 at 130. These rationales were rejected as pressing and substantial objectives for violating *Charter* equality rights in *Ferraiuolo* (at paras 142-144 and 151-155). They should also have been rejected as considerations in *Dares v Newman*, especially, in the case of certainty, in the section 15(1) analysis.

Non-Fatal Exclusion: The *Fatal Accidents Act*, Stepchildren, and Equality Rights

Comments:

Dave Laidlaw says:

July 11, 2012 at 10:52 am

> Jonnette and Jennifer,
> Thank you for highlighting the policy "choices" of Alberta in this area.

September 19, 2012

Fowl Play? A Look into Recent Canadian Reform Efforts for Backyard Chicken Legislation

By: Heather Beyko

Case Commented On: *R v Hughes*, 2012 ABPC 250

The idea of local food sustainability is hard to argue with. Locally grown fresh food is valued among many and local food producers benefit greatly from community support and little to no operating or exporting costs. Yet the law can forbid certain actions that some may suggest are integral to advancing local food sustainability and the right to choose where your food comes from, or in this case, which chicken your eggs come from.

On June 30th, 2010, local food activist Paul Hughes was charged pursuant to section 27 of the City of Calgary's *Regulation, Licensing and Control of Animals Bylaw* (also known as the *Responsible Pet Ownership Bylaw*, No. 23M2006) which prohibits the keeping of livestock anywhere in the City of Calgary except where permitted under the City of Calgary's *Land Use Bylaw* (No. 1P2007) in an agricultural setting. Mr. Hughes had been keeping six live chickens in his private backyard for the purpose of acquiring their eggs for his own food supply, and decided on this day to call the City of Calgary's Animal and Bylaw Services to report his chickens. After the Peace Officers arrived to his residence, Mr. Hughes was issued a warning ticket indicating that he was to remove the chickens from his backyard within 30 days. Mr. Hughes immediately made it clear to the Peace Officers that he had no intention of complying with the ticket, and was therefore formally charged.

It soon became apparent that Mr. Hughes welcomed the charge so that he could bring a *Charter* challenge in a formal trial. As founder and president of the Calgary Liberated Urban Chicken Klub (CLUCK), Mr. Hughes, along with several other food advocates, believes that there are many benefits to raising hens in an urban setting such as improved local food security and the ability to contribute to a just and sustainable food system. Other advantages include the convenience of fresh eggs from your own backyard (straight from the chickens that you've raised yourself) and the fact that chickens reduce organic waste, produce fertilizer, eat bugs and reduce pests, and are generally "people-friendly" (CLUCK Groups Online). Not only did Mr. Hughes believe that these benefits were not being recognized by the City of Calgary, he also believed that his *Charter* rights were infringed, namely sections 2(a), 2(b), 2(d), 7, and 15(1).

The Pro-Backyard Chicken Movement

CLUCK is certainly not the only pro-urban chicken group. Several of these groups have started across Canada and in the United States, and a "pro-backyard chicken movement" has been formed over the past years. One of the first major online portals for backyard chicken owners and those contemplating the practice was created back in 1999 under the name BackyardChickens.com. It soon racked up more than 40,000 members who were adding up to 7,000 posts per day as of 2009 (Shelley Arnusch, "Raising Chickens In Calgary," *Avenue*

Calgary (27 February 2010)). Several similar websites have since been conceived with the goal of educating members not only on how to raise a good backyard chicken, but also what the current laws are, how to lobby the government and how to avoid the sanctions of prohibitive legislation by avoiding the possibility of getting caught. Mr. Hughes of CLUCK, who now also spear-heads the public Calgary Food Policy Council group, has taken advantage of the online information sharing world by creating a CLUCK Facebook page which now has over 1,200 members, a Calgary Food Policy Council Facebook page, as well as a Twitter account, Google groups pages and a couple of food sustainability-related blogs (such as the Calgary Food Policy Council Blog, and the Paulin8 Blog). CLUCK now has 28 chapters around the country (Anthony A. Davis, "Is keeping hens in the city a charter right?", *Maclean's* (12 March 2012)), and many now refer to it as the Canadian Liberated Urban Chicken Club (with Chapter name).

In 2008 and 2009, the economic recession brought higher prices for many essential commodities, food being one of them. Food activists began to complain about their food security while reinforcing their views that local food sovereignty should not only be tolerated, but encouraged (Jacqueline Jolliffe, "Balking at Bocking: Urban Chicken Policy in Canada", Policy Comment prepared for JustFood Ottawa (23 July 2010) at 1). An ongoing debate has since formed between food activists and regulatory bodies about the legal and practical effects of raising backyard chickens for local egg production.

The Great Debate: Advantages and Disadvantages of Raising Backyard Chickens and How Municipalities are Responding

While municipalities recognize the many advantages to keeping urban egg-laying hens, it is also important to recognize the negative effects that this practice can have on the greater community, such as possible threats to our public health and welfare and the concern over the humane treatment of chickens. Those who support backyard chickens have argued that the government has either over-exaggerated the potential negative effects of backyard chickens or they simply do not understand that the benefits of raising urban hens outweigh the disadvantages, which the food activists argue are few.

Nevertheless, some Canadian cities have embraced the idea of backyard chickens. Currently, Canadian municipalities that allow backyard chickens include:

- City of Vancouver, BC (ss. 7.15-7.16, *Animal Control By-law*, No. 9150);
- City of Victoria, BC (Declaration)
- District of Saanich, BC (s. 38, *Animals Bylaw*, *2002*, No. 8556);
- District of Oak Bay, BC (ss. 26-28.2, *Animal Control Bylaw*, No. 4013);
- Township of Esquimalt, BC (Part 6, *Animal Bylaw 2002*, No. 2495);
- City of Richmond, BC (Part 3, *Animal Control Regulation Bylaw*, No. 7932);
- Town of Gibsons, BC (not explicitly prohibited in bylaws);
- City of Surrey, BC (Part 4(B), s. 7, *Zoning By-law*, No. 12000);
- City of New Westminster, BC (not explicitly prohibited in bylaws);
- City of Rossland, BC (s. 9.1, *Animal Control Bylaw*, No. 2357);
- City of Airdre, AB (not explicitly prohibited in bylaws);
- City of Grand Prairie, AB (not explicitly prohibited in bylaws);
- Town of Peace River, AB (Part 1, s.1, *Animal Control Bylaw*, No. 1832);
- City of Fort Saskatchewan, AB ("chicken" is included in the definition of "domestic animal", *Animal Control Bylaw*, C1-02);
- City of Waterloo, ON (s. 8 and Schedule "C", *Animal Control By-law*, No. 09-047);

- City of Guelph, ON (s. 1, *Exotic and Non-Domestic Animals By-law*, No. (1985)-11952);
- City of Brampton, ON (s. 11, *Animal Control By-law*, No. 261-93);
- City of Niagara Falls, ON (Schedule "C", *Animal Control By-law*, No. 2002-129);
- City of Quinte West, ON (*Backyard Hens Licensing and Control By-law*, No. 11-138);
- City of Gatineau, QB (Chapter 6, *Animal Control Bylaw*, No. 183-2005) (in French only); and
- City of Whitehorse, YT (s. 49, *Animal Control Bylaw*, No. 2001-01).

The City of North Vancouver and the City of Burnaby are in the planning stages of amending their bylaws.

The municipalities listed above either do not explicitly prohibit backyard chickens in their respective animal bylaws or have embraced the movement by creating specific regulations allowing backyard chickens. These regulations may specify the maximum number of chickens, the size and dimensions of the coops, and provisions requiring the owner to properly nourish the chickens. While some of these bylaws are silent on whether residential owners can slaughter backyard chickens for their meat, it is generally prohibited as these chickens are meant to be kept for the purposes of local egg production only and not generally as "broiler" chickens. Roosters are also typically forbidden.

Some cities have opted to test the waters first with a pilot project, typically of one to two year's length. These pilot projects are designed to enable municipalities to see for themselves the advantages of raising egg-laying hens while at the same time measuring the possible negative effects such as neighbour complaints, waste production, smell and possible disease transmission.

One example is Kingston, Ontario, where the municipality is currently in the final stages of their 18-month pilot project. The municipality of Kingston agreed to the pilot project after the Urban Agriculture Kingston group submitted a report to their City Council in April 2010 (Urban Agriculture Kingston, "Kingston Backyard Hens: An Eggcellent Idea Whose Time Has Come", Final Report (April 2010)). The report sought to dispel the "myths" about backyard chickens commonly believed by those opposed to the practice. Some of these "myths" include the assertions that backyard chickens are smelly, noisy, attract pests, increase predator populations, increase the risk of avian flu transmission, affect water quality and decrease property value. The Urban Agriculture Kingston group argued that these beliefs were misguided (for example, chickens are not smelly – it's their waste that creates the bad smells, which, if cleaned on a regular basis, would not be a problem). The report submits that the type of people who raise backyard chickens are the type to be especially concerned about the environment, food safety, self-sufficiency, cleanliness and maintenance and therefore would ensure that any negative effects of backyard chicken raising would be kept to a minimum. The municipality of Kingston was sure to include several property and maintenance requirements as set out in section 4.17(a) to 4.17(r) of their *By-law to Regulate Animals* (No. 2004-144) for the purposes of the pilot project.

While some municipalities such as Kingston have seemingly accepted the practice of raising backyard chickens, others have not been as receptive and have refused to amend their bylaws to allow for such an activity. In the community of Campbellford in Trent Hills, Ontario, neighbours had been complaining that a residence had six chickens in their backyard in June 2011. After being charged for keeping backyard chickens, and in hopes of convincing City Council to amend the current bylaw that prohibits the practice, the owners of that residence provided the municipality with a petition of 92 signatures supporting a change and asked City Council to hear

their arguments. After hearing their arguments, the municipality of Trent Hills subsequently contracted a consulting company to conduct a policy review in order to explore the implications of allowing backyard chickens in an urban area.

However, after additional public consultation and close consideration of the policy review, the municipality of Trent Hills decided against amending their bylaws to allow for backyard chickens, citing that "there was ample opportunity for persons living in Trent Hills to live on a rural property where it is legal to raise livestock, including chickens, goats, sheep, ducks, etc." ("Livestock in Urban Areas – Compliance Achieved" Trent Hills Press Release (27 June 2012)). The residential owners have since voluntarily removed their chickens and the charges were dropped.

As the goal of these municipalities is to provide safe and viable communities, the pilot projects have been and will likely continue to be the key ingredient required to convince Canadian municipalities whether or not to have a permanent bylaw exception allowing the general public to raise hens in their backyards.

R v Hughes: The Decision

The lack of judicial decisions on backyard chickens in Canada has put municipalities on the edge of their seats anticipating the release of the *R v Hughes* (*Hughes*) decision.

Prior to the *Hughes* case, the only notable related case was *R v Smedley*, (2008 NSSC 397), where a family had kept chickens in their backyard in very "luxurious" coops. The family was charged pursuant to section 4.12(a)(ii) of the *Land Use By-law for Beaver Bank, Hammonds Plains and Upper Sackville within Halifax Regional Municipality* (PDF). Section 4.12(a)(ii) stipulates that accessory buildings (such as coops) shall not be used for keeping livestock except where agriculture is a permitted use. The family argued that these chickens were their beloved "family pets" and although they did not keep them for the purposes of egg production, the eggs were a "happy coincidence". The family had spent $2,500.00 to build the coops and had put extreme efforts into ensuring the coops were aesthetically pleasing, and moreover, not a nuisance to their neighbours. On appeal, the Nova Scotia Supreme Court affirmed the decision from the Nova Scotia Provincial Court stating that "fowl", a category of livestock prohibited in non-agricultural urban residences, included chickens, whether or not the owner saw them as "family pets".

Although the *R v Smedley* case was primarily concerned with statutory interpretation rather than *Charter* rights, it has provided aspiring backyard chicken owners with an understanding of how to recognize the strict nature of urban livestock regulation that is inherent in every municipality. And now with the recent *Hughes* decision given on September 5th, 2012, those municipalities across Canada that have not yet legislated permissive backyard chicken provisions may rely on the Honourable Judge Skene's 31 page decision to justify their position that backyard chickens will continue to be defined as livestock not appropriate for urban raising.

At trial, Mr. Paul Hughes argued that his charge pursuant to section 27 of the *Responsible Pet Ownership Bylaw* (the *Bylaw*) is *ultra vires* the jurisdiction of the City of Calgary (the City), infringed a number of his *Charter* rights, and that being restricted from raising backyard chickens was inconsistent with Article 25(1) of the *Universal Declaration of Human Rights*.

Mr. Hughes admitted that the charge was appropriately laid (chickens are included in the definition of "Livestock" under the *Bylaw*, and his residence is not considered an extensive agricultural area, which, under the City's *Land Use Bylaw*, may allow this activity if an official permit was sought and granted). Nevertheless, Mr. Hughes saw this as an opportunity to challenge the law based on his rights, and the pro-backyard chicken community was by his side supporting him throughout the whole challenge.

After reviewing testimony from other backyard chicken owners and considering the fact that there had been minimal complaints in the City regarding this practice, the court first addressed Mr. Hughes' claim that section 27 of the *Bylaw* is *ultra vires* the jurisdiction of the City. Mr. Hughes asserted that although the City has the power to pass bylaws, the pith and substance of section 27 and the definition of livestock in the *Bylaw* is consistent with the notion of "food" and therefore outside of the City's ability to regulate. This was immediately dismissed by the court for lack of clarity, persuasiveness and authoritative support (para 88). Because the City, pursuant to section 7 of the *Municipal Government Act* (RSA 2000, c M-26), can regulate for the safety, health and welfare of people, the protection of people and property, nuisances, animals and activities in relation to them, Judge Skene determined that Mr. Hughes' *ultra vires* claim was without validity as section 27 of the *Bylaw* is in fact *intra vires* (paras 91 and 92).

Following this, the court entered into a discussion regarding Mr. Hughes' *Charter* claims. With respect to Mr. Hughes' claim under section 2(a) of the *Charter* (freedom of conscience and religion), he claimed that section 27 of the *Bylaw* restricted him from exercising his chosen method of acquiring food and therefore infringed his section 2(a) rights by not allowing him to act on his own conscience. The court however ruled that Mr. Hughes is "not being compelled to agree with the appropriateness of the bylaw. Hughes has honestly held views, opinions and thoughts respecting what he believes are his rights as a citizen to raise urban hens, but that does not equate to an interference with his freedom of conscience" (para 102).

With respect to his claim regarding section 2(b) *Charter* rights (freedom of thought, belief, opinion and expression), Mr. Hughes argued that section 27 of the *Bylaw* suppressed or banned his expressive activity of raising backyard chickens. Judge Skene disagreed, stating that raising backyard chickens did not constitute expressive activity and therefore any infringement on his section 2(b) rights was non-existent (paras 111 to 113).

For the claim that section 27 of the *Bylaw* infringed his section 2(d) *Charter* rights (freedom of association), the court explained that Mr. Hughes did not provide a compelling explanation as to why this right was infringed. In essence, all that Mr. Hughes argued was that his choice of activity and his choice of food constituted an association with "food liberty" (para 114). The court was not prepared to characterize Mr. Hughes' activities as "association" and therefore dismissed his section 2(d) claim, asserting that section 27 of the *Bylaw* did not have the purpose or effect of restricting Mr. Hughes' freedom of association (para 121).

Subsequently, Judge Skene considered Mr. Hughes' claim that his section 7 *Charter* rights (the right to life, liberty and the security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice) were also infringed. Mr. Hughes claimed that section 27 of the *Bylaw* violates his protective sphere of personal privacy by criminalizing his decisions around food and food liberty without evidence of harm of the activity (para 122). He also argued that raising backyard chickens was an activity that was central to his lifestyle, being an advocate for the poor and disadvantaged who are unable to afford commercially produced food available at local grocery stores. His choices of food, Mr. Hughes

argued, is one of those fundamental life choices that goes to the core of what it means to be an autonomous human being (para 124).

The court referred to paragraphs 85 to 87 of *R v Malmo-Levine* (2003 SCC 74) where it was determined that the recreational use of marijuana does not constitute a lifestyle that attracts *Charter* protection. After using *R v Malmo-Levine* as an analogy, Judge Skene concluded that a restriction on Mr. Hughes' ability to raise backyard chickens does not interfere with fundamental life choices (para 127). With respect to his security of the person argument, Mr. Hughes did not prove that there was a state-imposed psychological stress or that his physical integrity was at risk, elements that are required to be proven in order to show an infringement on the security of the person (as C.J.C. Dickson defined in *R v Morgentaler*, [1988] 1 SCR 30). Although Mr. Hughes testified that there were several health benefits to consuming backyard eggs, this was not enough to show that his security of the person had been violated, and therefore the court concluded that he had failed to establish a section 7 *Charter* infringement (para 130).

Mr. Hughes' final *Charter* claim regarded section 15(1) (every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination). Mr. Hughes claimed that section 27 of the *Bylaw* discriminated against him on the basis of his poverty, or "financial disability". Judge Skene referred to the two-part test for establishing a section 15(1) infringement as conceived in *R v Kapp* (2008 SCC 41) and later confirmed in *Withler v Canada (Attorney General)* (2011 SCC 12). The test requires that 1) the law creates a distinction based on an enumerated or analogous ground, and that 2) the distinction creates a disadvantage by perpetuating prejudice or stereotyping (para 133). The court determined that Mr. Hughes could not establish the first part of the test, as "financial disability" is not an analogous ground, but rather can change depending on circumstances (para 134). The lack of evidence presented to the court that poverty could be recognized as an analogous ground (para 136) forced Judge Skene to dismiss Mr. Hughes' section 15(1) *Charter* claim stating that Mr. Hughes "has more work do" in order to prove a distinction that is based on a proven analogous ground worthy of *Charter* protection (para 148).

In the end, because Mr. Hughes failed to prove any *Charter* infringements, a section 1 *Oakes* analysis (as found in *R v Oakes*, [1986] 1 SCR 103), was unnecessary.

Regarding Article 25(1) of the *Universal Declaration of Human Rights*, which states that "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, …" (GA Res 217(111), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810, (1948) 71), the court declined to provide an analysis on whether or not section 27 of the *Bylaw* was inconsistent with this provision. Perhaps this is due to the fact that Mr. Hughes merely referred to it in his arguments and did not specifically claim this issue. Also alluded to by Mr. Hughes but not analyzed at trial was his belief that his multicultural rights were being ignored, and that section 27 of the *Charter*, which states that the *Charter* "shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians", should be an element of consideration.

Public Protest and Public Consultation

It is interesting to note that Judge Skene asserted that much of what Mr. Hughes said at trial would have been more appropriate for presentation in front of the City Mayor and City Alderman as his submissions are parallel to the concept of lobbying and protest. However it was also determined that when Mr. Hughes did have the chance to speak to the Standing Policy

Committee (SPC) on Community and Protective Services in 2010, he was given a mere five minutes of petitioning (para 12). Nevertheless, the City of Calgary did at one point consider a pilot project of one year where certain residents would be allowed to raise backyard chickens, and much of this was inspired by the push from local food activists, including Mr. Hughes. The City saw this as an opportunity to show their move towards strong support for local food sustainability and production while also having the chance to evaluate the risks and benefits of raising backyard chickens. Yet, after the City had drafted permit regulations and was ready to gear up for the pilot project, the SPC put a halt to the program without giving specific reasons on June 2nd, 2010. City Council followed suit by rejecting the proposal on June 19th, 2010.

The City's Chief Bylaw Officer testified at the *Hughes* trial that before the *Bylaw* was enacted in 2006, there was approximately two years of public consultation regarding the purposes and possible effects of the *Bylaw* (para 23). At no time during that consultation did the City liaise with existing backyard chicken owners specifically. The issue of keeping livestock on a residential property "came up", but all that was decided was that agricultural animals should remain on agricultural properties (para 24).

Although the Provincial Court of Alberta did not provide Mr. Hughes with the result he was hoping for, he has demonstrated that he is not giving up his fight for the ability to raise backyard chickens. Local governments and the greater community will be sure to continue to hear from him and other food activists until the lobbyists are satisfied that municipalities are doing all they can to accommodate the local food sustainability movement.

Conclusions

The *Hughes* decision is an important one and will most definitely be considered by municipal governments when creating or amending legislation in this area. American municipalities are well ahead of Canada when it comes to permissive backyard chicken legislation, with 166 cities (and counting) that allow the practice (Barbara Liston, "New pecking order for U.S. chickens: backyard city coops", *Reuters, US Edition*, (May 15, 2012)). It must be recognized however that Canada is continuing to grow into a state of pro-food sustainability (more and more community gardens are popping up (see here), and Farmer's Markets are becoming the go-to place for fresh local food). Furthermore, as education and technology have allowed for greater advancements in urban food production, it has also been integral to Canadian backyard chicken advocates to voice their opinions and experiences in relation to the right to adequate food, the right to choose one's own food and the right to raise their own food. It has also become important to the urban chicken-raising community to educate the general public, and particularly their offspring, on how to raise a good backyard chicken.

Time will tell whether or not the backyard chicken movement will expand or deplete. But for now, Calgarians can be rest assured that their neighbours won't be managing their own backyard farms – legally, at least.

Heather Beyko would like to thank Ola Malik, Municipal Prosecutor with The City of Calgary, and University of Calgary Faculty of Law Professor Jennifer Koshan for their editorial comments on a draft of this article.

Fowl Play? A Look into Recent Canadian Reform Efforts for Backyard Chicken Legislation

Comments:

Chris says:

December 26, 2013 at 10:08 pm

> Thanks for a great piece with lot's of info. I'm currently trying to get Maple Ridge to get their bylaws fixed.

IK says:

December 28, 2013 at 11:22 am

> I certainly do not support bylaws that prohibit "specific" animals (e.g. chickens).
> I personally dislike dogs and cats (for various reasons), and it is possible I would prefer my neighbors to have chickens rather then dogs or cats…
> I would agree with the safety justification for prohibiting animals in general (and having guidelines as to the specific species) on the basis of imminent danger. For example, should a tiger escape your house (or poisonous snake, or some other imminently dangerous animal) he can quickly kill the first passer-by.
> But a chicken does not pose immediate or imminent danger. So if a chicken is suffering from salmonella, and escapes the enclosure, a kid on the street who comes in contact with it may become ill and very seriously (I am not sure if it could be fatal) . But in this chain – multiple things must coincide and occur together to render a devastating effect (e.g. a newborn child is unlikely to wonder the street without a parent present which reduces the likelihood of the sick chicken to give a cuddle to the baby) – which means the risk is very low (risk being a function of likelihood or occurrence and severity of the consequences).
>
> There are bylaws that cover nuisance, noise and emissions in terms of smell or excrement, etc.. – so if your practice of keeping the chickens crossed any of these rules, your neighbors would be able to make a complaint and seek redress.
>
> Otherwise, if you or I wish to keep the chickens, we should be able to do so.
> After all, I wish they could prohibit the squirrels – their claws on the roof of my house is disturbing to me, and those wild birds that people around me like to watch and listen too – well their singing wakes me up at the least opportune time…
> sounds absurd, does not it?
>
> well why is the chicken any different than a wild bird, or a squirrel?

Andy says:

December 30, 2013 at 2:41 am

> Likewise… great piece of writing – thanks for taking the time to produce it. I am currently trying to get Kelowna to move into the 21st Century and stop being elitist!

Erin M says:

July 28, 2014 at 12:45 pm

> I am currently getting signatures on a petition to take another run at getting Sidney BC to allow chickens. I have read a LOT of bylaws and believe that Sidney is the only municipality on Vancouver Island that does not allow chickens.

June 5, 2013

Roundtable on *Quebec v A*: Searching for Clarity on Equality

By: Jennifer Koshan and Jonnette Watson Hamilton

Case Commented On: *Quebec v A*, 2013 SCC 5 (case summary available here)

On May 13, 2013, we led the Faculty of Law's first roundtable discussion of the summer on the Supreme Court's most recent equality rights decision, *Quebec (Attorney General) v A.* Participants included faculty members, researchers from the Alberta Civil Liberties Research Centre and Alberta Law Reform Institute, and a number of JD and graduate students. Coincidentally, a virtual roundtable on the case is also ongoing at the moment, moderated by Sonia Lawrence, Director of Osgoode Hall's Institute for Feminist Legal Studies (IFLS), with participation from law profs Robert Leckey, Hester Lessard, Bruce Ryder, and Margot Young. Many of the issues raised in the IFLS discussion were also debated in our roundtable.

Quebec v A, also known as the Eric and Lola case, involved an equality rights challenge to the *Civil Code of Québec*, SQ 1991, c 64 (CCQ), and its exclusion of *de facto* spouses from the property-sharing and spousal support provisions that apply upon the breakdown of marriage and civil union relationships. This exclusion was challenged by A (Lola), a woman who was in an on and off *de facto* relationship with B (Eric) for several years and had three children with him. The parties met in Brazil, A's home country, when she was a 17 year old student and he was a wealthy 32 year old business man. A moved to Quebec a few years later to reside with B. For the most part A did not work outside of the home, and B provided financially for her and the children's needs. Although A wanted to get married, B told her that he did not believe in marriage.

The parties separated in 2002 after living together for seven years. A and B agreed on A's claim to the use of the family residence, and a court order awarded A and B joint custody of the children and ordered B to pay over $34,000/month to A for child support plus other expenses. Although these matters were resolved, A challenged the constitutionality of the CCQ provisions that excluded her, as a *de facto* spouse, from the spousal support and property-sharing benefits available to married and civil union spouses.

A had mixed success in the Quebec courts. The Quebec Superior Court rejected her arguments and held that the impugned provisions of the CCQ did not violate her *Charter* equality rights. The Quebec Court of Appeal allowed her appeal in part, finding that the provision excluding A from spousal support benefits was of no force or effect but suspending that declaration for 12 months. The Court of Appeal upheld the Superior Court's decision that excluding *de facto* spouses from the CCQ's property-sharing provisions did not violate the *Charter*. B and the Attorney General of Quebec appealed the Court of Appeal's decision to strike down the spousal support exclusion, and A appealed its decision that the property-sharing exclusions were constitutionally valid.

Supreme Court Decision

The first issue for the Supreme Court was whether excluding *de facto* spouses from the CCQ provisions mandating property-sharing and spousal support on the breakdown of marriages and civil unions violated the equality guarantee in section 15(1) of the *Charter.* Justice Abella wrote the majority decision on this issue, with Deschamps (writing for herself, Cromwell and Karakatsanis JJ) and McLachlin CJ (writing only for herself) indicating they agreed with her that there was a violation of section 15(1). LeBel J, writing also for Fish, Rothstein, and Moldaver JJ, dissented on section 15(1) by holding that there was no discrimination.

The second issue was whether any violation of section 15(1) was justified under section 1 of the *Charter*. McLachlin CJ held that it was, thereby swinging the majority on the outcome to a 5:4 decision that there was no unjustified discrimination. To complicate matters further, Deschamps J agreed with McLachlin CJ that the discrimination was justified with respect to the property-sharing exclusions but was not justified for the spousal support-sharing exclusion. Abella J was the only justice who held that neither type of exclusion was justified under section 1.

We have provided a summary of the decision we circulated to workshop participants, written by Jonnette Watson Hamilton (and linked to this post at the top). It distills the 259 page, 450 paragraph decision into about 12 pages. This post will focus on the questions for discussion dealt with at the roundtable, assuming readers are familiar with the reasons for decision.

Roundtable Discussion

Question One: What is Quebec v A actually precedent for, and how much of an impact will it have on equality jurisprudence?

The first topic of discussion was: What is *Quebec v A* actually precedent for, and how much of an impact will it have on equality jurisprudence? As noted in Jonnette's summary, the sheer length of the decision, the many differences among the four opinions, and the lack of clear and concise formulations of the section 15(1) test put the precedential value of this decision in jeopardy.

Prior to *Quebec v A*, the governing test for section 15 came from *R v Kapp,* 2008 SCC 41, [2008] 2 SCR 483 at para 17 and *Withler v Canada (Attorney General),* 2011 SCC 12, [2011] 1 SCR 396 at para 30:

(1) Does the law create a distinction based on an enumerated or analogous ground?

(2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

In *Kapp* and *Withler*, Abella J and McLachlin CJ wrote joint reasons for decision, and they were both part of the section 15(1) majority in *Quebec v A*. Yet their approaches to section 15(1) are quite different in *Quebec v A*, particularly on the second question from the *Kapp/Withler* test. Justice Abella questioned the wisdom of relying too heavily on prejudice and stereotyping as the measures of discrimination, as opposed to disadvantage and substantive equality more broadly (see e.g. paras 325, 327). For her, prejudice and stereotyping reflect discriminatory attitudes, and an exclusive focus on attitudes fails to recognize an effects-based approach to section 15 that captures discriminatory conduct (at para 328). In her application of section 15 to the CCQ's exclusion of *de facto* spouses, Abella J focused primarily on the historic disadvantage faced by

de facto spouses (see e.g. para 349). McLachlin CJ stated that she agreed with Abella J's section 15 analysis (at para 416), and did seem to concur with a couple of Abella J's key findings: first, that prejudice and stereotyping were not crucial factors for finding discrimination, as opposed to being simply "useful guides" (at para 418), and, second, that choice is a matter to be considered under section 1 of the *Charter* rather than under section 15 (at paras 334-337 (Abella J) and 429-431 (McLachlin CJ). See also the reasons of Deschamps J at para 384)). However, in her application of section 15 to the CCQ, McLachlin CJ noted the historical prejudice and "false stereotypes" faced by *de facto* spouses (at para 423). Her application of the test suggests that she may not be willing to set aside prejudice and stereotyping as the key measures of discrimination as readily as Abella J. McLachlin CJ also differentiated her section 15 reasons from those of Abella J by discussing the continued relevance of the four contextual factors from *Law v Canada (Minister of Employment and Immigration),* [1999] 1 SCR 497 (at para 418) and by invoking *Law* for the purpose of section 15 (at para 417) and for its focus on the reasonable section 15 claimant (at paras 419, 427).

While Deschamps J's section 15 reasons were quite brief, she agreed with Abella J's reliance on historic disadvantage (at para 385) and she did not discuss prejudice or stereotyping. For the dissent, LeBel J continued to see prejudice and stereotyping as (at least) crucial factors, if not the only factors, in proving discrimination under the second step of the *Kapp/Withler* test (see e.g. paras 169, 179). Thus there is no clear statement from a majority of the Court eschewing the focus on prejudice and stereotyping, particularly in light of McLachlin CJ's judgment.

Discussion at the roundtable focused on why the Court seems so intent on establishing a clear test for section 15, rather than on principles that should be applied in assessing equality rights claims (which was the approach in the Court's first section 15 decision, *Andrews v Law Society of British Columbia,* [1989] 1 SCR 143). It was noted that while a test provides clarity for litigants and lower courts (as well as law teachers and students), it sometimes ends up being applied by rote, as was the *Law* test, with a resulting inattention to underlying principles. Participants noted that this is not unlike the approach the Court has taken with respect to the standard of review in the administrative law context, where there is a desire to send a clear message to lower courts but the result when the test is applied is often fracturing or inattention to principles. On the other hand, the test for discrimination in the human rights context has not been clarified by the Court, in spite of pleas for it to do so (see e.g. *Moore v British Columbia (Education)*, 2012 SCC 61), leading to much uncertainty for litigants and lower courts. Perhaps the Court is reluctant to rely on principles, rather than a test, because principles can be applied in such disparate ways.

At the same time, in formulating the test for discrimination, members of the Court are not always careful in their choice of words. For example, Abella J referred to "arbitrary disadvantage" at one point in her reasons (see para 331), which could be seen to undercut her remarks about the need to stay away from section 1 considerations in the section 15 analysis. And Lebel J was not clear about whether he viewed prejudice and stereotyping as being the only ways of proving discrimination (see *Quebec v A* summary at pages 8-9). If the Court is intent on establishing a clear test for section 15, that clarity was not communicated even within particular sets of reasons for decision in *Quebec v A*.

It remains to be seen whether the case will be ignored, or will be considered as a tweak of the *Kapp/Withler* approach, and to what extent. It seems fairly safe to say that *Nova Scotia (Attorney General) v Walsh*, 2002 SCC 83, [2002] 4 SCR 325 is overruled and all discussions of choice should henceforth take place only under section 1. It is much more difficult to predict the effect

of *Quebec v A* on the test for discrimination. If McLachlin CJ's reasons are ignored and LeBel J is taken for what he says and not what he does, *Quebec v A* might change the test for discrimination to allow a claimant to succeed by proving disadvantage as a result of any number of causes, including but not limited to prejudice or stereotyping.

Question Two: What should be the role of prejudice and stereotyping in section 15 cases? Should stereotyping and prejudice both be seen to require negative attitudes / assumptions?

The second question for discussion was: What should be the role of prejudice and stereotyping in section 15 cases? Should stereotyping and prejudice both be seen to require negative attitudes / assumptions? There were no participants in our roundtable discussion who favoured exclusive reliance on prejudice and stereotyping as the test for discrimination. Opinions differed somewhat on whether stereotyping and prejudice should be seen as requiring negative attitudes and assumptions. To do so would prove especially problematic for adverse effects cases. If these remain the main synonyms for discrimination, it was agreed that the terms should be interpreted as broadly as possible.

In terms of how the various members of the Court actually defined these terms, Abella J viewed prejudice as "the holding of pejorative attitudes based on strongly held views about the appropriate capacities or limits of individuals or the groups of which they are a member", while stereotyping "is a disadvantaging attitude … that attributes characteristics to members of a group regardless of their actual capacities" (at para 326). For her then, only prejudice seems to require negative or malevolent attitudes. McLachlin CJ did not explain the terms in her concurring reasons under section 15, although she relied on "false stereotyping" in her application of the test for section 15(1) (at paras 418, 423, 428), suggesting that her focus is on false rather than negative assumptions. Deschamps J did not define nor rely on prejudice and stereotyping in her judgment.

LeBel J defined prejudice with reference to the work of Denise Réaume, who argues that prejudice "denies a class of persons a benefit out of *animus* or contempt. It directly connotes a belief in their inferiority, a denial of equal moral status" (see "Discrimination and Dignity" (2003), 63 La L Rev 645 at 679-80, cited in *Quebec v A* at para 195). Although prejudice thus seems to require negative attitudes, LeBel J noted that laws may be unintentionally prejudicial, i.e. prejudicial in their effects. For example, laws that "restrict access to a fundamental social institution or impede full membership in Canadian society" may "indicate that the government action expresses, or has the effect of perpetuating, prejudice against — i.e., a lower or demeaning opinion of — certain persons" (at para 200). As an example of unintentional prejudice, Justice LeBel used the case of *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, which involved the denial of equal access to health care to deaf persons based on a failure to accommodate their need for sign language interpretation (at paras 199, 200). This example suggests a fairly broad interpretation of prejudice that may seem at odds with the definition provided earlier. As for stereotyping, Justice LeBel referred to laws that are "premised upon personal traits or circumstances that do not relate to individual needs, capacities or merits" (at para 201). His focus seemed to be on the accuracy of the assumptions, although he did refer several times to "negative stereotypes" (see e.g. paras 202, 203).

Roundtable participants also discussed the role of stereotyping in cases such as *Withler* and *Gosselin v Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429. Although the majority opinion in *Gosselin* suggested that stereotyping must be negative to be captured by section 15, *Withler* took a broader approach to stereotyping that captured both negative and false

assumptions, a view which is arguably accepted in *Quebec v A*. It was agreed that a focus on intentional discrimination is a narrow approach that should be avoided.

Question Three: How can assumptions about "choice" lead to a finding of stereotyping and thus discrimination under section 15(1), yet still justify the exclusion of de facto spouses under section 1?

The third question for discussion was: How can assumptions about "choice" lead to a finding of stereotyping and thus discrimination under section 15(1), yet still justify the exclusion of *de facto* spouses under section 1? This was essentially a rhetorical question flowing from McLachlin CJ's finding that assumptions about choice in *de facto* relationships are based on false stereotypes, yet discrimination faced by *de facto* spouses under the CCQ is justified on the basis of choice under section 1. This logic seemed perplexing if not outright contradictory to many participants. It was agreed that McLachlin CJ's reasoning was at best utilitarian – discrimination against *de facto* spouses was seen as justifiable because it was in the overall public interest to continue to promote choice of relationships (see paras 435-448). Participants questioned the basis for Chief Justice McLachlin's deference to the government's justification for excluding *de facto* spouses, since this was a case of private rather than public benefits. It was noted that the Court may remain sensitive to accusations of judicial activism, so that may have been a factor in her deference. We also discussed the similarity of McLachlin CJ's section 1 reasons in this case with her decision in *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567, which she herself cited for the proposition that only means that "actually achieve the government's objective" are to be considered under section 1 (at para 442). For McLachlin CJ, a scheme which presumptively provided for spousal support and property division, subject to opt-out provisions, could not promote choice to the same extent as an opt-in scheme, and thus could not be seen as a viable alternative under section 1's minimal impairment test (at para 443). Although this places women such as A in an "unfortunate dilemma," this disadvantage was not seen as "disproportionate to the overall benefits of the legislation" by the Chief Justice (at para 448). Women such as A are thus treated as sacrificial lambs on the altar of choice and autonomy, just as the religious freedoms of Hutterite drivers in *Hutterian Brethren of Wilson Colony* were sacrificed for the sake of security.

Question Four: What does Quebec v A suggest about the fundamental incompatibility between equality and freedom?

McLachlin CJ's section 1 reasons also helped frame the fourth question for discussion: What does *Quebec v A* suggest about the fundamental incompatibility between equality and freedom? Participants noted that this case really brings these values into stark contrast. For Abella J, equality trumped freedom of choice, and for LeBel J, it was *vice versa*. McLachlin CJ attempted to give each value prominence in section 15 and section 1 respectively, resulting in the incoherence noted earlier. As one participant said, McLachlin CJ's swing vote in *Quebec v A* suggests that the case has no rational outcome as far as equality and freedom of choice are concerned.

Question Five: What might be the impact of Quebec v A in Alberta, where the Matrimonial Property Act continues to exclude common law spouses from the legislative assumption of equal property division?

The fifth question was: What might be the impact of *Quebec v A* in Alberta, where the *Matrimonial Property Act* continues to exclude common law spouses from the legislative

assumption of equal property division? One participant noted that while the Alberta government intervened in *Quebec v A*, the decision may not apply in the same way here, given the Court's focus on the particular histories and current circumstances of *de facto*, civil union and married spouses under the CCQ. There is a core of matrimonial property under the CCQ that is subject to equal division that the parties cannot contract out of, again suggesting that the *Quebec v A* decision might be distinguished. In terms of whether it makes a difference that Quebec has a unique category protecting civil unions, this could be seen as a response to the same sex marriage litigation in the late 1990s, and probably does not support the argument that the availability of more "choices" of relationships in Quebec also distinguishes that province from others.

It is also important to note that in Alberta, spousal support is available to *de facto* spouses by virtue of the *Adult Interdependent Relationships Act*, SA 2002 c A-4.5, and it is only with respect to matrimonial property that married and unmarried spouses are treated differently. Because *Quebec v A* was 8:1 on the issue of property rights, with only Abella J finding that this exclusion was unjustifiably discriminatory, this decision may not provide strong support for a challenge to Alberta's *Matrimonial Property Act.* On the other hand, if the majority reasons on equality and choice are followed, and the particular circumstances of the CCQ that seemed to motivate the decision of Deschamps J are distinguished, perhaps the case will prove to be a strong precedent for such a challenge.

Participants also discussed BC's new *Family Law Act,* SBC 2011, c 25, which provides for an opt-out rather than opt-in scheme for unmarried spouses. It was noted that both this regime and the *Quebec v A* decision itself (and its surrounding publicity) may serve to notify members of the public that their relationship choices (or lack thereof) may have certain legal consequences. The point was also made that it would be useful to know whether schemes that presume equal division of property and availability of spousal support with opt-out provisions are actually being used, and how the gendered power dynamics of heterosexual relationships and some of the heteronormative assumptions inherent in such schemes may play out in this context.

Question Six: Is the gender split in Quebec v A significant?

A sixth question was suggested by a participant at the beginning of the roundtable and also builds on the point just made. Participants remarked upon the gender split in *Quebec v A*, with all of the female justices plus Cromwell J finding discrimination in the CCQ's exclusion of *de facto* spouses, and only male justices finding that there was no discrimination.

It is also interesting to consider the gender split in terms of who the various justices see as the paradigmatic *de facto* spouses. For Abella J, the paradigmatic *de facto* spouse appears to be someone — a woman — who is vulnerable to the economic harms that may flow from the breakdown of a relationship, and requires protection. For LeBel J, the relationship between *de facto* spouses is primarily characterized as involving freedom of contract rather than gendered power imbalances. One participant rather cynically suggested the male judges were protecting a man's right to a 17-year-old girlfriend. Participants also noted a link to the dispute between Abella J and LeBel J about whether, once recognized, an analogous ground is forever an analogous ground. For Abella J, marital status will always be an analogous ground, perhaps

because of its basis in historical disadvantage (see paras 317, 334). It was suggested that, coupled with her paradigmatic *de facto* spouse, Abella J presents a picture of women as forever vulnerable and forever in need of protection. For LeBel J, however, analogous grounds are time sensitive and grounds of discrimination can disappear, especially if they are related to customs and social behaviour (see para 182).

October 18, 2013

The *Vriend* Case 15 Years Later

By: Jennifer Koshan

Case and Legislation Commented On: Vriend v Alberta, [1998] 1 SCR 493; *Alberta Human Rights Act*, RSA 2000, c A-25.5

This year marks the 15th anniversary of the Supreme Court of Canada decision in *Vriend v Alberta*, [1998] 1 SCR 493 [*Vriend*] in which the Court unanimously held that the lack of protection for discrimination based on sexual orientation in Alberta's human rights legislation was an unconstitutional violation of *Charter* equality rights (for a previous post on the *Vriend* decision by Linda McKay Panos, see here). To celebrate the anniversary Delwin Vriend visited Alberta this week, and his visit included participation in a public forum organized by the Sheldon Chumir Foundation for Ethics in Leadership, as well as a visit to my human rights class at the law school.

The public forum began with remarks from a number of panellists on the legal protection of discrimination based on sexual orientation at the international, national and provincial levels. Blair Mason, Chief Commissioner of the Alberta Human Rights Commission, noted that Mr. Vriend's human rights claim had been blocked by the Alberta government back in 1991, after he was fired from his position as a lab instructor at King's College in Edmonton for being gay. The government instructed the Commission not to accept complaints based on sexual orientation. Chief Commissioner Mason described how Mr. Vriend had pursued his complaint in spite of the barriers and opposition he faced, including intractability and prejudice on the part of the government. The Chief indicated that such interference with the independence of the Commission would not be tolerated today.

At both the public forum and in my human rights class, Mr. Vriend talked about the saga of the case from his perspective. Although he was not involved in framing the legal strategy, he was highly involved in the media response, which had its challenges. There were also access to justice challenges. Mr. Vriend initially had paid counsel representing him, but was eventually represented by pro bono lawyers. In spite of this, disbursements in the case totalled approximately $75,000, offset by fundraising efforts and ultimately a donation on the part of the family of one of his lawyers. As a class, we talked about the fact that human rights commissions are intended to be accessible processes that complainants can navigate without a lawyer, but that option was closed to Mr. Vriend. The inability of Alberta's human rights commission to file complaints was raised as a continuing access to justice issue in Alberta as well (see the *Alberta Human Rights Act*, RSA 2000, c A-25.5, s 20). In spite of these challenges, Mr. Vriend was clear that he would make the same decision today to bring a constitutional challenge.

Another issue that was discussed at the public forum and at the law school was the Alberta government's continued refusal to explicitly amend its human rights legislation to include sexual orientation until 2009. A majority of the Supreme Court in *Vriend* had granted the remedy of reading sexual orientation in to our human rights legislation, but in spite of this, it took the government 11 years to change its *Act*. Although complaints based on sexual orientation were accepted before the formal amendment was made, Linda McKay Panos described on the panel how this state of affairs created uncertainty, especially for newcomers.

And the eventual addition of sexual orientation came with a price. In 2009, the government added s 11.1 to the newly named *Alberta Human Rights Act*, which requires school boards to give notice to parents when teaching materials and lessons will deal with issues related to religion, human sexuality or sexual orientation. Parents may then request an opt out for their children. At the public forum, Dan Shapiro from the Chumir Foundation described how this section is having a chilling effect on discussions of sexual orientation in classrooms in Alberta (for the Foundation's position paper on s 11.1, see here).

The lack of explicit protection of gender identity in the *Alberta Human Rights Act* was also raised in both forums. At the same time, the Human Rights Commission has indicated that it will accept complaints on this basis under the ground of gender, and there are some cases raising gender identity discrimination that are currently working their way through the human rights system in this province (see e.g. *Greater St. Albert Roman Catholic Separate School, District No. 734 v Buterman*, 2013 ABQB 485).

The federal government was also taken to task for failing to participate in a recent high level meeting of foreign ministers on discrimination against LGBT persons at the United Nations in September.

At both the forum and law school, there was discussion on the progress made in the area of LGBT rights, but also of the work that remains to be done. There is still a lack of formal protections against discrimination on the basis of sexual orientation and gender identity at the international level. Violence, oppression, discrimination and hatred continue to be perpetrated against LGBT persons nationally and internationally. Delwin Vriend's visit to Alberta provided an excellent opportunity to reflect on these matters, and many people expressed their thanks to him for that, as well as for his courage and tenacity in pursuing his rights in Alberta.

The *Vriend* Case 15 Years Later

Comments:

Terry Paden says:

October 18, 2013 at 12:26 pm

> Since the Premier of Alberta is a member of the Alberta Bar isn't she more obligated than most in the Alberta Government to discover and rectify the Alberta Government's continued long term resistance to updating our statutes on matters like human rights? Personally, I have not seen any evidence in the press that she has undertaken such statutory updating.
>
> I have wondered if by not doing so she is not providing the leadership that law students might expect from a provincial Premier who is a law school graduate and an Alberta Bar member.
>
> Terry Paden

Susan Wright says:

October 20, 2013 at 2:34 pm

> Thank you for this postscript to Mr Vriend's saga. It is unconscionable that our legal protections have not yet caught up with what we'd expect in a province that says it protects human rights.

Jennifer Koshan says:

October 24, 2013 at 2:27 pm

> Thanks for your comments, Terry and Susan. One thing that came up at the public forum is that the Justice Minister, who is now responsible for Alberta's human rights legislation, has said that he will not consider repealing s11.1 because there have been no complaints about this section. Members of the public who object to it were encouraged at the forum to make their voices heard to the government.

Gina says:

October 26, 2013 at 1:04 pm

> All things considered, if the Justice Minister has not received any complaints then the system is broken. The government is hindering the entire process and it is saddening that sexual orientation is not able to be discussed freely and openly in classrooms. I hope that in the near future further protections are given to the LGBT community although even

here in the States we are behind the times and need to catch up. The department of Managed Health Care and the department of Insurance this year had to issue directives in order for health insurance companies to comply with the law in regards to covering transition related care.

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December 19, 2013

Should Homelessness be an Analogous Ground? Clarifying the Multi-Variable Approach to Section 15 of the *Charter*

By: Joshua Sealy-Harrington

Case Commented On: *Tanudjaja v Canada (Attorney General)*, 2013 ONSC 5410

This post discusses a decision from the Ontario Superior Court which rejected "homelessness" as an analogous ground under section 15 of the *Canadian Charter of Rights and Freedoms*. I divide the analysis into two sections: (1) a discussion of the analytical flaws in the court's approach to analogous grounds, and (2) an application of a multi-variable approach to the potential ground of homelessness to demonstrate its apparent viability as an analogous ground. This case should be of concern to ABlawg readers interested in section 15 jurisprudence as well as those advocating for the interests of the homeless.

(1) A Flawed Approach to Homelessness as an Analogous Ground

In *Tanudjaja v Canada (Attorney General)*, 2011 ONSC 5410, Lederer J of the Ontario Superior Court of Justice allowed motions by the Federal Crown and the Ontario Provincial Crown for an order dismissing the application by Tanudjaja and others for *Charter* relief. In particular, Lederer J allowed motions dismissing applications that alleged breaches of sections 7 and 15 of the *Charter* flowing from legislative changes that resulted in increased homelessness and inadequate housing.

As a preliminary note, Lederer J's analysis of homelessness as an analogous ground is *obiter dicta*. He concludes that whether or not homelessness is an analogous ground is irrelevant because "the actions and decisions complained of do not deny the homeless a benefit Canada and Ontario provide to others or impose a burden not levied on others" (at para 128). Despite its *obiter* nature, my discussion focuses exclusively on his analysis regarding analogous grounds.

Lederer J alludes to the various factors that have been considered in the jurisprudence for assessing analogous grounds (at para 127). However, he ultimately rejects homelessness as an analogous ground because of a novel requirement for analogous grounds that he identifies and which I will label as "definability" (at para 134). In his own words, a lack of definability may be described as follows:

> [131] [T]here is no means to understand the parameters that would define those who make up the analogous group. Who would be the members? On what basis is the group said to be analogous? In these circumstances, it is impossible to come to a substantive understanding of what the analogous ground is.

To be clear, according to Lederer J, an indefinable ground is one which fails to outline an objectively ascertainable group of people that belong to it. As he explains with respect to homelessness:

> [129] In the circumstances of this Application, it is not possible to identify who is "homeless" […] homelessness is not, for the purposes of this Application, restricted to those without homes. […] It may be that what is being referred to as "the homeless" includes those without "affordable, adequate and accessible" housing. What is adequate housing? Presumably, this depends on the circumstances of the individuals involved.

I have three observations about Lederer J's approach to analogous grounds: (a) he lacks a jurisprudential basis for a "definability" requirement, (b) he appears to conflate definability with a different idea (heterogeneity) in his reasoning which results in a lack of analytical clarity, and (c) neither definability nor heterogeneity are conclusive when assessing analogous grounds.

(a) Why Definability is Not a Requirement of the Analogous Grounds in the Jurisprudence

In support of a purported definability requirement for analogous grounds, Lederer J cites *Polewsky v Home Hardware Stores Ltd* (1999), 68 CRR (2d) 330 (ONSC) [*Polewsky*], where "poverty" was rejected as an analogous ground. He also claims that the Ontario Court of Appeal "recognized this limitation" (that is, the definability requirement) in *Falkiner v Ontario (Ministry of Community and Social Services)* (2002), 59 OR (3d) 481 (CA) [*Falkiner*], where "social assistance recipients" was recognized as an analogous ground.

With regard to *Falkiner*, the Court of Appeal did not adopt a definability requirement in its reasoning. Rather, in that case, social assistance recipients was recognized as an analogous ground after a consideration of many other factors including historical disadvantage and continuing prejudice, immutability, protection in human rights statutes, and heterogeneity (at paras 82-93).

The other key decision cited by Lederer J – *Polewsky* – in one passage appears to consider a definability requirement:

> [59] A third reason lies in a consideration of those who make up the group of people who are in financial need. The poor in Canadian society are not a group in which the members are linked by shared personal or group characteristics. The absence of common or shared characteristics means, in my view, that poverty is not an analogous grounds to those enumerated. Those enumerated grounds are defined by one or more shared characteristics whether it be race, nationality, colour, religion, sex, age or disability.

Arguably, lacking a "shared characteristic" could be interpreted as lacking definition (in so far as groups may be defined by their shared characteristics). However, upon further inspection, that is not the interpretation advanced by Gillese J in *Polewsky*.

Later in her reasoning, Gillese J clarifies that lacking a shared personal characteristic is equivalent with being a "disparate and heterogeneous group" (at para 60). In particular, Gillese J provides the example of agricultural workers as such a disparate and heterogeneous group. However, agricultural workers are also definable (by a common occupation), which in turn precludes the possibility that the court was applying a definability requirement. As a consequence, *Polewsky*, like the other authorities that Lederer J relies on, cannot be read as creating a definability requirement.

(b) Conflating Indefinability with Heterogeneity

For the sake of clarity, I will begin with a basic definition of indefinable and heterogeneous groups. An indefinable group is one which lacks clear parameters for identifying its members. A heterogeneous group is one which has a diverse membership.

Lederer J's reliance on *Polewsky* as a key authority results in unclear reasoning. In particular, Lederer J seems to conflate his basis for rejecting homelessness as an analogous ground (indefinability) with a factor considered in *Polewsky* when rejecting poverty as an analogous ground (heterogeneity).

This conflation of concepts is demonstrated in Lederer J's closing remarks, where his basis for rejecting homelessness as an analogous ground subtly transitions from indefinability to heterogeneity. First, he rejects homelessness as an analogous ground because it is indefinable:

> [134] Homeless is not a term that, in the context of this case, can be understood. Without an understanding of the common characteristics which defines the group, it cannot be established as an analogous ground under s. 15(1) of the *Charter* (emphasis added).

Then, he discusses the heterogeneity of homelessness:

> [135] There is a list of groups which are said, in the Application, to be protected from discrimination under s. 15(1) of the *Charter* and disproportionately affected by the lack of adequate housing. It includes: "women, single mothers, persons with mental and physical disabilities, Aboriginal persons, seniors, youth, racialized persons, newcomers and persons in receipt of social assistance" […] What discrimination can there be when all of the groups identified as being subject to this discrimination, taken together, include virtually all of us? (emphasis added).

Finally, he again rejects homelessness as an analogous ground, this time because it is heterogeneous:

> [136] Homelessness is not an analogous ground under s. 15(1) of the *Charter*. The Application does not propose to protect "discreet and insular minorities". It is an attempt to take "disparate and heterogeneous groups" and treat them as an analogous ground under s. 15(1) of the *Charter*. Such groups do not obtain this protection (emphasis added).

However, "heterogeneous" groups are not necessarily "indefinable." In fact, broad and diverse groups are often definable. For example, agricultural workers (the heterogeneous group discussed in the reasoning of *Polewsky*) may include all sorts of individuals (young, old, different religions, different races) who are still defined by a common occupation. Similarly, Lederer J appears to concede that a narrower conception of homelessness would also be definable. He qualifies that homelessness is indefinable "in the circumstances of this Application" (at para 129) because it is defined as having "inadequate housing" as opposed to having no housing at all. By implication, he suggests that if the homeless were simply defined as having no housing at all then such a group would be definable. Yet, such a group also encompasses a broad and diverse set of people. While the larger and more diverse a group becomes, the more difficult it may be to find a common thread tying them together, such a thread may nonetheless exist. As a consequence, I would argue that Lederer J improperly conflates

indefinability with heterogeneity and ends up misapplying what is, in the jurisprudence, a relevant factor when assessing analogous grounds: status as a "discrete and insular minority" (see e.g. *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1 at 152 [*Andrews*] and *Miron v Trudel*, [1995] 2 SCR 418, 124 DLR (4th) 693 at para 148 (QL) [*Miron*])).

(c) Why Neither Definability nor Heterogeneity are Conclusive of the Analogous Grounds

It is unclear whether Lederer J rejects homelessness as an analogous ground because it is indefinable, heterogeneous, or both. Regardless, an analysis of only these two factors is incomplete because definability is irrelevant to the question of analogous grounds and heterogeneity is only one of many factors to be considered.

Definability cannot be a factor when assessing analogous grounds because it is not an attribute of the enumerated grounds. The basic analytical approach to analogous grounds is the drawing of analogies from the enumerated grounds for the purpose of identifying new sufficiently similar grounds worthy of protection under section 15 (see *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 173 DLR (4th) 1 at para 13 [*Corbiere*]). Analogousness is an attribute which is intrinsically relative. To describe something as analogous begs the question: analogous to what? In the case of analogous grounds under the *Charter*, the legal question is whether or not the potential ground is analogous to the enumerated grounds. Thus, any consideration when identifying analogous grounds must be an attribute which attaches to the enumerated grounds.

Many enumerated grounds lack definability. For example, suppose a law discriminated against black people (that is, based on the enumerated ground of race). How would one qualify for membership within that group? A certain threshold of dark skin? A certain ethnic background? Other attributes classically (read stereotypically) associated with black people? Just like homelessness, the "parameters" that define what it means to be black (or any race for that matter) are not defined (unsurprisingly, given the constructed nature of race: see Ian F Haney López, "The Social Construction of Race" in Richard Delgado, ed, *Critical Race Theory: The Cutting Edge* (Philadelphia: Temple University Press, 1995) 191 available here). As another example, consider a government action that discriminated against Muslims (the enumerated ground of religion). Are all different denominations of Islam included? What if someone is non-practicing? What if different denominations have conflicting definitions of who fits under the umbrella of Muslim? Again, being Muslim may also lack clear parameters.

Admittedly, my characterization of definability is not identical to Lederer J's. He considered homelessness indefinable because, in part, lacking "adequate housing" must be assessed on an "individual basis" (at para 129). In other words, depending on the size and make up of a particular family, more or less housing may be required for it to qualify as "adequate" housing. Regardless, his ultimate concern (unclear parameters, unclear membership) equally applies to multiple enumerated grounds. As a consequence, definability cannot be a requirement of the analogous grounds.

Heterogeneity is also not decisive of the analogous grounds, though it may be a relevant factor. Lederer J appears to rely on the notion of "discrete and insular minorities" for his consideration of heterogeneity (at para 136).

Whether or not a ground encompasses a "discrete and insular minority" (which is arguably the opposite of a disparate and heterogeneous group) has been considered by the courts (see e.g. *Andrews*, at 152 and *Miron*, at para 148 (QL)). However, this factor alone cannot be a gatekeeper to the analogous grounds. For example, in *Andrews* and *Miron*, whether or not the grounds in question encompassed a discrete and insular minority was considered along with other factors when determining analogousness. Furthermore, the limited weight of heterogeneity becomes apparent with a consideration of the currently protected grounds. For example, the first recognized analogous ground was citizenship (in *Andrews*). In that case, the Supreme Court held that it was contrary to the *Charter* to discriminate against "non-citizens" with respect to qualifying as legal professionals. Yet, non-citizens, just like the homeless, are a heterogeneous group. The same can be said for all of the enumerated grounds. Race (any type), age (at any stage of life), and sex (male, female, intersex, etc) all intersect with various other identities throughout Canadian society. All of these groups (with minor restrictions, like 5 year olds not being parents) would contain all of the "women, single mothers, persons with mental and physical disabilities, Aboriginal persons, seniors, youth, racialized persons," etc that Lederer J referred to when rejecting homelessness as an analogous ground because of its diverse membership (at para 135).

While representing a "discrete and insular minority" is an aspect of analogous grounds, it is merely a factor to be considered. Additionally, while it is beyond the scope of this comment, the concept of "discrete and insular minorities" does not appear to have the same meaning that Lederer J assigns to it, namely, a small and homogenous group. In particular, when commenting on early jurisprudence that considered "discrete and insular minorities," Dale Gibson interpreted this factor as relating to historical disadvantage which, if anything, furthers the argument for homelessness as an analogous ground (see Dale Gibson, "Analogous Grounds of Discrimination Under the Canadian *Charter*: Too Much Ado About Next to Nothing" (1991) 29 Alta L Rev 772 (QL)).

(2) A Multi-Variable Approach to Homelessness as an Analogous Ground

Generally, analogous grounds are described as personal characteristics that are either (1) immutable, like national origin, or (2) constructively immutable, like religion (*Corbiere*, at para 13). However, this tidy dichotomy overlooks the complex multi-variable analysis the Supreme Court often applies.

In "Assessing Analogous Grounds: The Doctrinal and Normative Superiority of a Multi-Variable Approach," (2013) 10 JL & Equality 37 (HeinOnline) ["Assessing Analogous Grounds"], I argue that the existing jurisprudence surrounding section 15 goes beyond the concept of immutability and is open to many different variables such as those outlined in L'Heureux-Dubé J's multi-variable approach from her concurring reasons in *Corbiere*. As a consequence, I will consider the ground of "homelessness" in light of immutability, constructive immutability, and several other indicia that have been applied by the Supreme Court in *Charter* jurisprudence when characterizing analogous grounds: difficulty and cost of change, vulnerability, historical disadvantage, and presence of the ground in human rights codes.

A multi-variable approach to analogous grounds favours the recognition of homelessness as an analogous ground.

Homelessness is not, strictly speaking, immutable. However, whether or not homelessness satisfies the test for "immutability" applied by the Supreme Court does not have a clear answer. As I argued in "Assessing Analogous Grounds":

> L'Heureux-Dubé J states in *Egan* that "the common characteristic of all of the enumerated grounds other than religion is that they involve so-called 'immutable' characteristics." However, how would the Court characterize the actual immutability of generally stable, yet changeable, enumerated grounds such as sex and colour? How would the Court characterize the immutability of enumerated grounds that change over time but often due to factors beyond our control, such as age and temporary disability? (at 49).

Put differently, for the court to characterize the enumerated grounds (except for religion) as immutable means that the court has a flexible understanding of what it means for something to be "immutable." Most notably:

> [T]he Court has at times allowed for a very flexible and thus unpredictable understanding of immutability. For example, McLachlin J in *Miron* describes marital status as immutable "albeit in an attenuated form" because "it often lies beyond the individual's effective control" ("Assessing Analogous Grounds," at 49).

As a consequence, the analysis of the immutability of homelessness must look beyond the fact that it is subject to change (like sex and colour). That is not to say that a sex-change operation or skin bleaching is necessarily as common as escaping or entering homelessness. That being said, if "often [lying] beyond the individual's effective control" can qualify as an "attenuated" form of immutability, then homelessness could very well meet that standard.

Whether homelessness is constructively immutable is also unclear. The leading decision on constructive immutability is *Corbiere*, which held that a personal characteristic is constructively immutable if (1) it is changeable only at unacceptable cost to personal identity, or (2) the government has no legitimate interest in expecting an individual to change the personal characteristic (see "Assessing Analogous Grounds," at 40-41). Such an approach, which implicitly assumes that personal characteristics are desirable, is confusing when they are not desirable. As I discussed in the context of the potential ground of "drug addiction":

> Many potential grounds of discrimination struggle to satisfy this test. For example, escaping drug addiction is possible (though "very difficult") and becoming someone who is no longer an addict does not result in unacceptable cost to personal identity. If anything, being a drug addict is the cost and escaping addiction the benefit ("Assessing Analogous Grounds," at 52-53).

Homelessness similarly struggles to fit within this framework of constructive immutability.

Escaping homelessness, like addiction, would be mischaracterized as a "cost" rather than a benefit. Furthermore, describing the government's "legitimate interest" in "expecting" the homeless to change their circumstance, when the homeless probably want to change their circumstance, is an equally strained analysis. Regardless, a similarly undesirable trait related to financial disadvantage – receipt of social assistance – was held to fit within "the expansive and

flexible concept of immutability" endorsed by the court in *Falkiner* (at para 89). Consequently, while the characterization of undesirable traits as constructively immutable is strained, it is still possible, and has jurisprudential support.

Despite the ambiguity that results from applying the concepts of actual and constructive immutability to homelessness, the remaining factors in a multi-variable approach favour its inclusion as an analogous ground.

Homelessness is certainly difficult to change, encompasses a vulnerable community, and is subject to historical disadvantage (see generally here). Provincial human rights codes also support the recognition of homelessness as an analogous ground under the *Charter*. The Manitoba Human Rights Code, CCSM c H175, protects against discrimination based on "social disadvantage" (s 9(2)(m)), which it defines as "diminished social standing or social regard due to (a) homelessness or inadequate housing" (s 1). Furthermore, other provincial human rights legislation has recognized grounds that demonstrate a trend toward greater equality protections for the financially disadvantaged (seee.g. the Newfoundland and Labrador Human Rights Act, 2010, SNL 2010, c H-13.1, s 9(1): "social origin" and "source of income"; the Nova Scotia Human Rights Act, RSNS 1989, c 214, s 5(1)(t): "source of income"; and the Ontario Human Rights Code, RSO 1990, c H.19, s 2(1): "receipt of public assistance").

In sum, a brief overview of the factors in a multi-variable approach tends to favour the recognition of homelessness as an analogous ground. The next time the question of homelessness as an analogous ground comes before the courts it should not be undermined by Lederer J's *obiter* remarks which misapplied the proper multi-variable approach to section 15 of the *Charter*.

April 2, 2015

Can the Homeless Find Shelter in the Courts?

By: Joshua Sealy-Harrington

Case Commented On: *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852

Late in 2014, the Ontario Court of Appeal considered a *Charter* challenge to provincial and federal (in)activity allegedly contributing to homelessness and inadequate housing (*Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852 ("*Tanudjaja CA*")). The appellants sought to overturn a motion judge's decision striking their application at the pleadings stage (*Tanudjaja v Canada (Attorney General)*, 2013 ONSC 5410 ("*Tanudjaja SC*")). A majority of the Court of Appeal (the "Majority") upheld the motion judge, while the dissenting judgment (the "Dissent") would have overturned the motion judge and allowed the *Charter* challenge to proceed to trial. This comment analyzes both judgments and concludes that the Dissent provides a more compelling analysis of the governing legal principles and their application in this case.

The Issues

Two legal issues are discussed in *Tanudjaja CA*, namely, whether the motion judge correctly dismissed the application because:

1. it was not justiciable for being
    1. too political, or
    2. too vague; and
2. it disclosed no reasonable cause of action regarding violations of
    1. section 7 of the *Charter*, or
    2. section 15 of the *Charter*.

I discuss each of these issues in turn and conclude that the Dissent is preferable on all accounts.

1. The Application is Justiciable

The Majority and Dissent both agree that, in essence, an issue is justiciable if the courts are competent to address it (Majority at para 35; Dissent at para 80). Accordingly, the justiciability inquiry in *Tanudjaja CA* was whether the courts are competent to adjudicate the appellants' *Charter* application relating to homelessness and inadequate housing.

In my view, the Majority's two main arguments – that such *Charter* applications cannot be adjudicated because they are too political or too vague – can be refuted.

a. The Application is Not Too Political

The Majority claims that the application is not justiciable because it boils down to Canada and Ontario giving "insufficient priority" to issues of homelessness and inadequate housing – a

political matter best left to the legislature (Majority, at paras 19-22). This analysis is flawed because it (1) mischaracterizes the application and (2) disregards how the competence of the courts often intersects with political issues.

First, the Majority mischaracterizes the application. Specifically, the Majority conflates assigning the level of priority given to homelessness and inadequate housing (a political inquiry for the legislature) and adjudicating whether or not that level of priority falls below the level demanded by the *Charter* (a legal inquiry for the courts). I fully agree that the strategic considerations weighing on a legislature in its fight against poverty, and the specific approach it adopts in that fight, would be inappropriate for the courts to assign. But the applicants in *Tanudjaja* were not seeking a court-imposed legislative framework governing poverty-reduction. Rather, they were seeking declarations and orders implementing "effective" poverty-reduction programs (see Majority, at para 15) – presumably, because the applicants considered effective programs to be the threshold demanded by the *Charter*.

Admittedly, the applicants sought extensive remedies, some of which would have partially constrained legislative autonomy. In particular, one of the orders sought by the applicants required that the new legislation be "developed and implemented in consultation with affected groups" and include "timetables", "monitoring regimes", and "complaints mechanisms" (Majority, at para 15). But one of several remedies sought by the applicants being arguably overreaching should not render their claim non-justiciable. Moreover, the thought of a poverty-reduction strategy that ignores affected groups and that lacks timetables, monitoring, and complaints mechanisms appears destined to be ineffective. While imposing such requirements on the legislature may seem overreaching, that view raises the question as to what a *Charter*-compliant regime, without such basic requirements, would even look like.

In addition to mischaracterizing the application, the Majority disregards how courts often appropriately adjudicate issues with political dimensions. On this point, the Dissent cites Dean Lorne Sossin who aptly observes that courts may equally be accused of improperly deciding on "political" or "policy" matters when analyzing section 1 of the *Charter* (Dissent, at para 78) – an exercise indisputably within their competence. Indeed, through the enactment of the *Charter*, the court is duly empowered to rule on legal issues with undeniable political dimensions. For example, consider the Supreme Court's ruling in *Carter v Canada (Attorney General)*, 2015 SCC 5. In *Carter*, the Court concludes, without any concern about justiciability, that the ban on physician assisted death breaches the *Charter* "to the extent that" it applies to a specific court-imposed group of individuals: competent adults who clearly consent and have a grievous and irremediable medical condition that causes enduring and intolerable suffering (at para 147). And yet, delineating such a specific group of individuals is steeped in the "moral, strategic, ideological, historical, [and] policy considerations" the Majority considers beyond the scope of competent adjudication in *Tanudjaja CA* (at para 21).

Similarly, the application in *Tanudjaja*, despite its political implications, addressed a legal question within the competence of the courts, namely, whether Canada and Ontario's approach to poverty-reduction complies with sections 7 and 15 of the *Charter*. Courts should not consider questions with political dimensions non-justiciable. Indeed, in *Reference Re Canada Assistance Plan*, [1991] 2 SCR 525 ("*CAP*") the Supreme Court distinguished questions that are "purely political" from questions with a "sufficient legal component" (at 545; emphasis added). In other words, a legal issue must, arguably, be exclusively political to be non-justiciable. Otherwise, while the question may have numerous political implications (like physician assisted death from *Carter*), it nonetheless has a legal component appropriate to the jurisdiction of the court.

To be fair, there is some grey area between a question that is "purely political" (*i.e.* 100% political/0% legal) and a question that has a "sufficient legal component" (90% political/10% legal?). The Supreme Court's use of the word "sufficient" in *CAP* connotes an obscure threshold of legality that must be reached to satisfy justiciability, and that threshold remains undefined in the jurisprudence (see *e.g. Reference Re Secession of Quebec*, [1998] 2 SCR 217 at paras 26-28 and *Reference Re Same-Sex Marriage*, 2004 SCC 79 at paras 8-11).

In any event, the application in *Tanudjaja* – a *Charter* complaint on behalf of "a large, marginalized, vulnerable and disadvantaged group who face profound barriers to access to justice" (Dissent, at para 88) – had, in my view, a sufficient legal component. I am sympathetic to the concern that applicants may attempt to reroute purely political questions through the courts with creative phrasing that superficially engages the *Charter*. But the application in *Tanudjaja* is far from superficial. Substantive equality is the "animating norm" of section 15 of the *Charter* (*Withler v Canada (Attorney General)*, 2011 SCC 12 at para 2) and that norm will remain "meaningless for a vast number of Canadians" without greater attention to the experience of the poor (Martha Jackman, "Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination under the Canadian Charter and Human Rights Law" (1994) 2:1 Rev Const Stud 76 at 78). Further, section 7 of the *Charter* addresses, in part, autonomy and quality of life (see *Carter* at para 62) – two things the homeless notoriously struggle to achieve. While section 7 is typically construed as providing for negative rights (*i.e.* a right to not have autonomy interfered with by government actions), the Court left open the possibility of section 7 providing positive economic rights (*i.e.* a duty on the government to provide a minimum standard of living) in *Gosselin v Québec (Attorney General)*, 2002 SCC 84. Accordingly, the application in *Tanudjaja* is not an illegitimate case abusing the broad strokes of the *Charter*. Rather, *Tanudjaja* is a critical opportunity to explore economic rights under the *Charter* on behalf of some of the most economically disenfranchised individuals in Canadian society.

b. The Application is Not Too Vague

The other main argument advanced by the Majority regarding justiciability is that the application is too vague. Specifically, the Majority argues that the broad application – which impugns the "decisions, programs, actions and failures to act" by Canada and Ontario – is too general, and accordingly, lacks a "sufficient legal component" for competent adjudication by the court (at para 27). This argument, too, is flawed.

First, the Majority later concedes that "constitutional violations caused by a network of government programs" should remain open to judicial scrutiny, "particularly when the issues may otherwise be evasive of review" (at para 29). But homelessness and inadequate housing are precisely such issues. In particular, homelessness and inadequate housing are influenced by a complex web of state activity. Indeed, the Majority recognizes that housing policy is "enormously complex […] influenced by matters as diverse as zoning bylaws, interest rates, procedures governing landlord and tenant matters, income tax treatment of rental housing" etc (Majority, at para 34). That complexity leaves the government's approach evasive of review, and according to the Majority's own logic, such an approach should not be immune from review simply because that review fails to impugn a specific law.

Second, if we assume, for the purposes of the justiciability analysis, that the *Charter* imposes positive obligations on the state, then it is not technically necessary for the application to identify specific laws for review. Depending on how positive rights evolve in the courts, assessing

whether a *Charter*-imposed minimum standard of living was satisfied may depend on deficient economic outcomes (*i.e.* the minimum standard not being met) rather than deficient laws (*i.e.* the government's inadequate approach to meeting that minimum standard). Accordingly, specific laws need not always be impugned in an application to substantiate a breach of the government's positive obligations under the *Charter*, and in turn, the failure to identify specific laws should arguably not be fatal to such a *Charter* application. Admittedly, such a broad view of positive obligations under the *Charter* has yet to be affirmed by the Supreme Court. In particular, the Court has only gone so far as to require that benefit programs which the government elects to provide must provide such benefits in a manner that complies with the *Charter* (see *e.g. Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at paras 72-73). But arguments about how the Court is unlikely to affirm such a broad conception of the *Charter* belong under the analysis of whether the application discloses a reasonable cause of action, not whether the application was justiciable.

The Majority also argues that the vagueness of the complaint makes established *Charter* principles too awkward to apply and potential remedies too difficult to determine. In particular, the Majority argues that, without a specific impugned law, the analysis under section 1 of the *Charter*, which is predicated on the law's purpose and means, is impossible to conduct (at paras 27-28 and 32).

However, the Dissent refutes this position satisfactorily. In particular, the Dissent makes two arguments in response to the Majority's view that the application is non-justiciable because it is too vague, namely, that:

1. the application should not be barred because of its novelty, especially given the need for novel applications in the evolution of *Charter* jurisprudence (at para 84); and
2. the difficulty of crafting appropriate remedies (such as an order compelling the government to implement effective poverty-reduction strategies) does not preclude the court from granting declaratory relief, which was also sought in the application (at para 85).

In sum, the application is neither too political, nor too vague, to be justiciable. Rather, the application is sufficiently rooted in legal principles to fall within the competence of the courts and should not have been struck at the pleadings stage merely because of potential difficulties when applying those legal principles to the application.

I note, parenthetically, that some of the Majority's observations regarding justiciability are more suited to the analysis of whether or not the application discloses a reasonable cause of action. For example, the Majority, in the course of its justiciability analysis, describes section 7 conferring a positive right to housing as a "doubtful proposition" in light of prior decisions denying such positive rights (at para 30). But justiciability relates to whether or not the court is competent to adjudicate the claim, not whether the court is likely to grant the claim. Instead, such observations should have been dealt with under the second issue: whether the application discloses a reasonable cause of action, which I turn to next.

2. The Application Discloses a Reasonable Cause of Action

The Majority does not discuss whether the application discloses a reasonable cause of action because it dismissed the appeal on the basis of justiciability (at para 37). However, having addressed the flaws in the Majority's justiciability analysis, I will now reinforce the arguments

raised by the Dissent regarding how the application discloses a reasonable cause of action (*contra* Gerard Kennedy, "The Right Result for the Wrong Reason: The Court of Appeal's Decision in Tanudjaja").

The Dissent begins its analysis on this point by outlining the legal test regarding striking an application for lacking a reasonable cause of action. Specifically, the Dissent provides that an application should only be struck for lacking a reasonable cause of action if one of various synonymous conditions is satisfied, namely:

1. it being "plain and obvious" that the claim discloses no reasonable cause of action;
2. there being no chance that the plaintiff might succeed; or
3. the action being "certain to fail."

(Dissent, at paras 45-46).

Of particular importance to this application, the Dissent notes that "novelty alone is not a reason to strike a claim" and similarly, that a motion to strike should not be used "as a tool to frustrate potential developments in the law" (Dissent, at para 47). As McLachlin CJ aptly observes in *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 21:

> Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. […] The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions […] Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

With that in mind, the applicants' claims under sections 7 and 15 of the *Charter* are not certain to fail, and accordingly, should not have been struck.

a. The Section 7 Claim is not Certain to Fail

The motion judge dismissed the applicants' section 7 claim, in essence, because section 7 has not yet been interpreted to impose a positive obligation on the state to provide life, liberty, and security of the person (*Tanudjaja SC*, at para 31). This is a flawed basis on which to dismiss the application because whether section 7 provides for positive rights is a legitimate and arguable claim worthy of the court's attention.

First, the text of section 7, on a plain reading, provides for a positive right to life, liberty and security of the person. Specifically, section 7 reads:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice (emphasis added).

The phrasing of section 7 is conjunctive, and arguably provides for two rights:

1. the positive section 7 right: "the right to life, liberty and security of the person;" and

2. the negative section 7 right: "the right not to be deprived [of the right to life, liberty and security of the person] except in accordance with the principles of fundamental justice" (emphasis added).

In contrast, section 9 of the *Charter* only provides for a negative right, which limits the state's actions against citizens without imposing positive obligations on the state: "[e]veryone has the right not to be arbitrarily detained or imprisoned (emphasis added).

To be clear, my point is not that the *Charter* must be interpreted literally as providing for a right to eternal life (which would be absurd) or that statutory interpretation of the *Charter* is limited to textual analysis (which belies the established purposive approach to *Charter* interpretation). Rather, my point is that there is a weak textual basis for interpreting section 7 of the *Charter* as without positive obligations when such obligations are entirely consistent with the phrasing of the provision (see generally *Gosselin*, at paras 319-28 per Arbour J, dissenting).

Second, the Supreme Court expressly left open the possibility of positive section 7 rights in *Gosselin* at paras 82-83, per McLachlin CJ for the majority:

> One day s. 7 may be interpreted to include positive obligations […] It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases […] The question therefore is not whether s. 7 has ever been – or will ever be – recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards […] I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances.

Indeed, the Majority and Dissent in *Tanudjaja CA* both agree that the Supreme Court has not precluded the possibility of positive obligations under section 7 of the *Charter* (Majority, at para 37; Dissent, at para 81).

Accordingly, striking a claim simply because it relies on positive *Charter* obligations is inappropriate. In particular, striking the application at the pleadings stage, before the record could be reviewed to determine whether homelessness qualifies as one of the "special circumstances" that warrant positive intervention, was premature (Dissent, at paras 64-66). Indeed, if there was ever a suitable case for imposing positive *Charter* obligations on the state – an admittedly onerous obligation – the basic necessity of adequate housing would be it.

b. The Section 15 Claim is not Certain to Fail

In a previous ABlawg post, I outlined the errors made by the motion judge when he concluded that homelessness is not an analogous ground of discrimination under section 15 of the *Charter* (see Joshua Sealy-Harrington, "Should Homelessness be an Analogous Ground? Clarifying the Multi-Variable Approach to Section 15 of the Charter"). In sum, the motion judge's analysis of analogous grounds was flawed because it:

1. implied a requirement for analogous grounds – which I labelled "definability" – based on an erroneous reading of the jurisprudence;

2. conflated this false definability requirement with a legitimate factor relating to the identification of analogous grounds, namely, status as a discrete and insular minority; and
3. misunderstood the proper approach to identifying analogous grounds which weighs multiple factors rather than considering those factors as each independently required for a ground to be analogous.

In addition to those errors, I echo the observations of the Dissent regarding the motion judge's erroneous dismissal of the applicants' section 15 claim. Specifically, I echo the Dissent's concerns about the motion judge ruling that homelessness and inadequate housing are not "caused" by state activity without a review of the record put to the court (Dissent, at paras 70-72). At the furthest extreme, governments have been known to participate in intentional discriminatory housing practices (see *e.g.* Ta-Nehisi Coates, "The Racist Housing Policies That Built Ferguson"). To be clear, my point is not that the current plight of the Canadian homeless has the same causal relationship to state activity as the struggle by Black Americans against segregation, or even that the Canadian government has deliberately sought to discriminate against the homeless in its housing policies (not that such intent is required for a violation of section 15: see *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 174-75). But we cannot claim to understand the struggles of the homeless, or the state's role in contributing to that struggle, without a review of the evidence. Indeed, to reach preliminary conclusions about the causes of homelessness without reviewing evidence is likely to rely on the prejudicial reasoning section 15 is specifically meant to counteract (*i.e.* that the homeless are the authors of their own misfortune).

Conclusion

The application in *Tanudjaja* should have proceeded to trial for a decision following a full review of the record; not because it would have clearly succeeded, but because it would not have been "certain to fail."

Admittedly, a finding of positive rights under the *Charter* would be a marked departure from the Supreme Court's prior jurisprudence and would have wide-ranging implications for government activity. But, as the Dissent concedes, the Supreme Court left the door to such positive rights "slightly ajar" (at para 37). Further, inadequate housing is an ideal candidate for such positive rights. Positive obligations, which are onerous to demand from the state, should be limited to the basic necessities of life – necessities without which life, liberty and security of the person cannot be achieved. Adequate housing is fairly characterized as such a necessity. Accordingly, if there was ever a case to test the limits of positive *Charter* rights, this was it.

The appellants have sought leave to appeal at the Supreme Court of Canada. Given the devastating impact of homelessness throughout Canada, we can only hope that the Supreme Court will decide to hear the appeal, overturn the motion judge's decision, and give those without inadequate housing their day in court.

Can the Homeless Find Shelter in the Courts?

Comments:

Jean says:

April 4, 2015 at 9:34 am

> Just a thought but what about those homeless people who don't want to utilize shelters at their disposal. What should the courts do about them? Are they to be left to fend for themselves? Most of them are mentally unstable and you always hear about 1 or 2 homeless deaths every winter.

Joshua Sealy-Harrington says:

June 25, 2015 at 2:47 pm

> In a disappointing decision, the Supreme Court denied leave to appeal in Tanudjaja earlier today (see here: http://scc-csc.lexum.com/scc-csc/news/en/item/4942/index.do).
>
> A couple days ago, Paul Daly wrote an excellent post predicting that leave would be granted, and more generally discussing the burdensome evidentiary expectations placed on Charter litigants (http://www.administrativelawmatters.com/blog/2015/06/23/an-age-of-facts-r-v-smith-2015-scc-34/).
>
> I am concerned about how the need to compile a burdensome trial record and the possibility that a claim may be dismissed without that record even being considered will deter claimants from advancing meritorious claims.

December 24, 2013

Teaching *Bedford*: Reflections on the Supreme Court's Most Recent *Charter* Decision

By: Jennifer Koshan

Case Commented On: *Canada (Attorney General) v Bedford*, 2013 SCC 72

Much commentary has already been written on the Supreme Court's decision in *Bedford* and the implications the case has for the regulation of prostitution in Canada. My interest in this post is to reflect on how to approach *Bedford* when teaching constitutional law next term. I think *Bedford* brings some clarity to the case law on section 7 of the Charter, and as Sonia Lawrence has noted here, the decision helps dispel some of the problematic thinking around "choice" and causation in constitutional cases, though I would have liked to see the Court go further here. The Court also could have done more by way of taking a contextual approach in its consideration of the prostitution laws. The evidence presented in the case clearly provided a compelling enough picture of the harms of these laws for the Court to find a violation of section 7, but it is disappointing to see no explicit references to the gendered and racialized nature of prostitution nor to the rich and diverse literature in this area, some of which was cited in the submissions of interveners (see e.g. here, here and here). Finally, the case can also be seen as an example of the relative success that section 7 claims have had of late at the Supreme Court, especially in comparison to the lack of success of section 15 claims.

Doctrinal Clarity and Dismissal of Choice

Bedford is consistent with other recent decisions such as *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134 (*PHS*) at para 93 (McLachlin CJ), where the Court found that the security of the person interest under section 7 of the *Charter* is engaged where laws or government actions threaten health and bodily integrity (in that case, by refusing to extend approval for a safe injection site for intravenous drug users). In *Bedford*, another unanimous decision written by the Chief Justice, the Court agreed with the applicants that the criminal prohibitions on bawdy-houses, living on the avails of prostitution, and communicating for the purposes of prostitution "do not merely impose conditions on how prostitutes operate. They go a critical step further, by imposing dangerous conditions on prostitution; they prevent people engaged in a risky — but legal — activity from taking steps to protect themselves from the risks." (at para 60). The case applies rather than elaborates on previous definitions of security of the person. Like *PHS*, however, it is interesting to see that the Court in *Bedford* was not content to limit its analysis to the obvious violation of the liberty interest inherent in the criminal prohibitions against prostitution. In *Bedford*, the Court explained its rationale as follows:

The focus is on security of the person, not liberty, for three reasons. First, the Prostitution Reference [*Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 SCR 1123] decided that the communicating and bawdy-house provisions engage liberty, and it is binding on this point. The security of the person argument is a novel issue and an important

reason why the application judge was able to revisit the Prostitution Reference. Second, it is not clear that any of the applicants' personal liberty interests are engaged by the living on the avails provision; rather, they have pleaded that they fear that it could apply to their employees or their loved ones. Lastly, it seems to me that the real gravamen of the complaint is not that breaking the law engages the applicants' liberty, but rather that compliance with the laws infringes the applicants' security of the person.

(At footnote 1, emphasis in original)

Bedford also adds to the jurisprudence in its dismissal of the arguments of the Attorneys General of Canada and Ontario that "it is the choice of the applicants to engage in prostitution, rather than the law, that is the causal source of the harms they face" (at para 73). This argument is similar to that advanced by the AG Canada in *PHS* with respect to injection drug use. In *Bedford*, the Court clarified the case law by indicating that the appropriate standard of causation is the "sufficient causal connection" test, which requires "a sufficient causal connection between the state-caused [effect] and the prejudice suffered by the [claimant]" (at para 75, quoting from *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307, at para 60 (emphasis added in *Bedford*)). The Court also cited *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44 at para 21 for the point that "A sufficient causal connection standard does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant, and is satisfied by a reasonable inference, drawn on a balance of probabilities" (at para 76). Furthermore, causation should be assessed with attention to the context of the case at hand.

Applying this test to the facts in *Bedford*, the Court rejected the AGs' arguments about choice and lack of causation for several reasons. First, many prostitutes – especially those involved in street prostitution – have "no meaningful choice" but to engage in risky activities associated with prostitution. Here, the Court pointed to the marginalization of this group of prostitutes, and the ways in which "financial desperation, drug addictions, mental illness, or compulsion from pimps" may result in "little choice but to sell their bodies for money" (at para 86). Second, the Court noted that prostitution is not itself illegal, nor was this a case where the claim was "a veiled assertion of a positive right to vocational safety" (at para 88). Third, the fact that it is the actions of pimps and johns that are "the immediate source of the harms suffered by prostitutes" did not pose a causation problem, since the state still played a role "in making a prostitute more vulnerable to that violence" (at para 89). Fourth, the Court rejected the AGs' calls for deference to government policy decisions and for attention to the floodgates that a positive decision in *Bedford* would open up for similar claims. According to the Court, the principles of fundamental justice stage of section 7 analysis is the appropriate place to consider such arguments (at paras 90-91).

The Court's analysis of choice in *Bedford* builds on its ruling in *PHS*, where drug addiction was found to be an illness rather than a matter of personal choice, and where the federal AG's arguments about government policy choices were put off to a later stage of analysis (2011 SCC 44 at paras 101 and 104). The Supreme Court did not go as far as the Ontario Court of Appeal did in *Bedford*, however, on the role of choice. At the Court of Appeal, the Court rejected the implication "that those who choose to engage in the sex trade are for that reason not worthy of the same constitutional protection" (*Bedford v Canada (AG)*, 2012 ONCA 186 at para 123). This is a more principled rejection of "choice" than that of the Supreme Court, which relied on the factual finding that the claimants' actions were not actually a matter of choice. I also take issue with the Supreme Court's suggestion that it might have rejected any claim of a "positive right to

vocational safety." This comment is rather troublesome in the Alberta context, where certain groups of workers are excluded from the Occupational Health and Safety Act, RSA 2000, c O-2, and should surely have a decent claim to inclusion in the protections that that legislation provides to other workers. More broadly, this statement is another example of the Court's reticence to protect so-called positive rights under section 7, which it has expressed in cases such as *Gosselin v Québec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429 at paras 81-83.

Bedford also adds to the section 7 jurisprudence at the principles of fundamental justice stage. The Court provided the following introduction to those principles:

> [96] The s. 7 analysis is concerned with capturing inherently bad laws: that is, laws that take away life, liberty, or security of the person in a way that runs afoul of our basic values. The principles of fundamental justice are an attempt to capture those values. Over the years, the jurisprudence has given shape to the content of these basic values. In this case, we are concerned with the basic values against arbitrariness, overbreadth, and gross disproportionality.

The Court acknowledged that there is overlap between these values, but maintained that they are distinct principles that can be defined on their own as well as in relation to each other (at para 107). Collectively, these principles are aimed at "two different evils"; first, "the absence of a connection between the infringement of rights and what the law seeks to achieve", which embraces arbitrariness and overbreadth, and second, "depriving a person of life, liberty or security of the person in a manner that is … connected to the purpose, but the impact is so severe that it violates our fundamental norms" (i.e. gross disproportionality) (at paras 108-9).

In terms of the definitions of these principles, arbitrariness is "the situation where there is no connection between the effect and the object of the law" (at para 98). In other words, "There must be a rational connection between the object of the measure that causes the s. 7 deprivation, and the limits it imposes on life, liberty, or security of the person" (at para 111). Overbreadth occurs where "the law goes too far and interferes with some conduct that bears no connection to its objective" (at para 101). Laws that are overbroad are therefore arbitrary in part (at para 112). The Court also clarified the degree of lack of connection that is required for laws to be arbitrary or overbroad, which it left open in *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791 (paras 131-2 and 232) and *PHS* (para 132). According to the Court in *Bedford*, "the root question is whether the law is inherently bad because there is no connection, in whole or in part,between its effects and its purpose" (at para 119, emphasis in original). This lack of connection can occur when the effect of the law is to undermine its purpose, such that it is "inconsistent" with its objective, or when "there is simply no connection on the facts between the effect and the objective, and the effect is therefore "unnecessary"" (para 119). This approach thus encompasses both definitions of arbitrariness from *Chaoulli*.

Gross disproportionality, the third relevant principle of fundamental justice, occurs where "the effect of the law is grossly disproportionate to the state's objective" (at para 103). The Court indicated that this principle "only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure" (at para 120). Put another way, "The connection between the draconian impact of the law and its object must be entirely outside the norms accepted in our free and democratic society" (at para 120). The Court gave as an example a sentence of life imprisonment for the offence of spitting on a sidewalk.

The Court also clarified the interplay between section 7 and section 1 of the Charter. It specified that any beneficial impact that a law may have is not to be considered at the section 7 stage, rather section 1 is where to assess "whether the negative impact of a law on the rights of individuals is proportionate to the pressing and substantial goal of the law in furthering the public interest" (at para 125). This calls into question the majority's analysis in *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, where Sopinka J found that societal interests are an appropriate consideration under the principles of fundamental justice. Nor are the principles of fundamental justice concerned with numbers – arbitrariness, overbreadth and gross disproportionality are qualitative rather than quantitative assessments and a problematic effect even on one person may be sufficient to violate the relevant principle (at para 122). Lastly, the Court indicated that while violations of section 7 will normally be difficult to justify under section 1 of the Charter, there may still be cases where justification is possible, "[d]epending on the importance of the legislative goal and the nature of the s. 7 infringement in a particular case" (at para 129).

Applying these principles to the facts, the Court found that the harmful effects of the bawdy house provisions on the safety of prostitutes were grossly disproportionate to the purpose of the provisions, preventing nuisance (at paras 131, 134-6); the living on the avails provision was overbroad in that it did not distinguish between those who actually exploited prostitutes and those who might increase their safety and security (at para 142); and the communicating provision was contrary to the principles of fundamental justice because its "negative impact on the safety and lives of street prostitutes is a grossly disproportionate response to the possibility of nuisance caused by street prostitution" (at para 159). None of these violations of section 7 could be justified under section 1 of the Charter.

Context

The Court's failure to take a fully contextual approach is something I have commented on in response to some of its recent decisions in the area of violence against women (for example, *R v Ryan*, 2013 SCC 3, commented on here, and *R v JA*, 2011 SCC 28, commented on here). In Bedford, there is certainly some reference to the context of prostitution and its harms (see e.g. paras 64, 86-92), but there is no analysis of the gendered and racialized nature of these harms. For example, the only references to "women" in the judgment are in the Court's description of the applicants' evidence (at paras 9 to 14) and in the context of other decisions referred to by the Court. Again, this approach can be contrasted with the Ontario Court of Appeal judgment, where Justices MacPherson and Cronk acknowledged that it was overwhelmingly marginalized women who are prostituted (2012 ONCA 186 at para 358). As noted earlier, the Supreme Court also fails to cite to the literature on prostitution written by feminists, critical race scholars and NGOs. These omissions may be related to the Court's holding that the application judge's findings on social and legislative facts were entitled to deference (at paras 48-56), but this is still a disappointing aspect of the ruling.

Section 7 versus Section 15

I wrote about the relative success of section 7 claims redressing the harms of government (in)action as compared to equality rights claims under section 15 of the *Charter*. *Bedford* continues the trend of successful section 7 cases such as *PHS* and *Victoria (City) v Adams*, 2009 BCCA 563, which can be contrasted with the lack of success in section 15 cases such as *Withler v Canada (AG)*, 2011 SCC 12, [2011] 1 SCR 396, *Alberta (Aboriginal Affairs and Northern*

Development) v Cunningham, 2011 SCC 37, [2011] 2 SCR 670, and *Quebec (Attorney General) v A*, 2013 SCC 5. There are, however, other cases before the courts that will continue to push decision makers on equality rights and on the intersections between section 7 and section 15. For example, in , the Supreme Court is being called upon to reconsider the constitutionality of Canada's assisted suicide laws under both sections 7 and 15. The recent decision in *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 is another example of how the harms of government action (in this case the failure to accommodate imprisoned women with children) can amount to violations of sections 7 and 15 of the *Charter*. And in the prostitution context more specifically, both section 7 and section 15 arguments are being raised in another challenge to the criminal prohibitions against prostitution (see *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524, for the decision on standing in this case). It is to be hoped that in these cases, the courts will find the harms of inequality to be no less significant than the harms protected under section 7.

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Teaching *Bedford*: Reflections on the Supreme Court's Most Recent *Charter* Decision

Comments:

Joshua Sealy-Harrington says:

December 24, 2013 at 1:20 pm

> I really enjoyed this post Jennifer! Refreshing to hear a critical perspective on Bedford. Lots of great observations in here.
>
> With respect to wanting the court to take a "fully contextual approach," I'm curious about where such considerations, in your view, would fit best in the judgment. Is your concern that inadequate attention to the racial and sexual dimensions of issues like prostitution and sexual assault undermines the legal reasoning under ss 7 and 15 or that it is simply important for the court to demonstrate an appreciation of the social realities surrounding these issues?

Jennifer Koshan says:

December 31, 2013 at 10:24 am

> Thanks for your comment Josh. A violation of section 15 of the Charter was not one of the claims made by Bedford et al, though it was raised in intervener factums and at the ONCA level. My point was intended to suggest that it is important for courts to pay attention to the demographics of groups who may be affected by laws (or the striking down of those laws) in particular ways, i.e. it was a social context point.

Jennifer Koshan says:

June 10, 2014 at 8:56 am

> On June 4 the federal government introduced Bill C-36, *An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts* (*The Protection of Communities and Exploited Persons Act*), http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6646338&File=4. The Bill's preamble recognizes "the exploitation that is inherent in prostitution and the risks of violence posed to those who engage in it", as well as "the disproportionate impact [of prostitution] on women and children." In a press release, the Minister of Justice indicates that the focus of the law is on decreasing the demand for prostitution by criminalizing the purchase of sexual services, as well as criminalizing

those “who financially benefit from the exploitation of others through prostitution” (see http://news.gc.ca/web/article-en.do?mthd=index&crtr.page=1&nid=853709). However, the Bill also continues to criminalize sex workers by criminalizing communicating for the purpose of selling sexual services in public places where a child could reasonably be expected to be present (see section 15 of the Bill). This provision is apparently intended to protect communities from the harms associated with prostitution. It should be recalled that the communication provision was struck down in Bedford because its “negative impact on the safety and lives of street prostitutes is a grossly disproportionate response to the possibility of nuisance caused by street prostitution” (at para 159). Is the government’s articulation of a new rationale satisfactory to change that outcome?

May 7, 2014

A Vital Judgment: Upholding Transgendered Rights in Alberta

By: Jennifer Koshan

Case Commented On: *C.F. v Alberta*, 2014 ABQB 237

Alberta's Director of Vital Statistics interpreted her home statute, the *Vital Statistics Act* (RSA 2000, c V-4 (Old *VSA*), later repealed and replaced by SA 2007, c V-4.1 (New *VSA*)) in a way that required transgendered people to have genital reconstructive surgery in order to be eligible to have the sex on their birth certificate changed. C.F., a trans female, challenged this interpretation as contrary to her rights under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* (*Charter*). In a ground breaking decision released on April 22, 2014, Justice B.R. Burrows of the Alberta Court of Queen's Bench found in favour of C.F. and ordered the Director to issue her a new birth certificate. The Alberta government has included amendments to the *Vital Statistics Act* in section 9 of Bill 12, the *Statutes Amendment Act, 2014*, which was introduced in the legislature on May 5, 2014.

Facts and Arguments

C.F. was born physically male, but believed herself to be female during her childhood years. As an adult, she transitioned to living as a female, and legally changed her name in June 2011 to reflect this. The Director of Vital Statistics issued a birth certificate with C.F.'s new name, but it still reported her sex as "male". C.F. sought to have her birth certificate changed, but was advised that section 22 of the Old *VSA* required that "her anatomical sex structure be surgically changed from male to female and that two physicians depose in affidavits that such a change had taken place" before such an alteration could be made (at para 5). C.F. was "perfectly content with the anatomical sex structure she was born with" (at para 8), and relied on section 24(3) of the Old *VSA* for the change to her birth certificate, which provided that:

> 24(3) If, after a registration has been received or made by the Director, it is reported to the Director than an error exists in the registration, the Director shall inquire into the matter and, on the production of evidence satisfactory to the Director verified by statutory declaration, the Director may correct the error by making a notation of the correction on the registration without altering the original entry.

Error was defined in section 1(i) of the Old *VSA* to mean "incorrect information, and includes the omission of information."

In December 2011, C.F. submitted a statutory declaration with her section 24(3) application which attested to her lived identity as a female. She also submitted a letter from a psychiatrist specializing in transgenderism which confirmed that C.F. "has undergone a transformation to being full time in the female gender role for the rest of her life" (at para 12). In her written submissions, C.F. argued that the designation of her sex on her birth certificate as "male" was incorrect information, constituting an error that the Director should correct (at para 13).

The Director rejected C.F.'s application in March 2012 on the basis that "The sex indicator on your birth registration was completed based on evidence of your anatomical sex. As the registration documents are completed directly after birth, the sex indicator was completed indicating male based on the evidence at the time, and an error did not occur" (at para 14). The Director indicated that an application under section 22 of the Old *VSA* following genital surgery would be required in order to change the sex on C.F.'s birth certificate. It should be noted that under the New *VSA*, section 30 also requires genital surgery before a transgendered person is entitled to a change to their birth registration; section 60 continues to provide the Director with discretion in the case of "errors."

C.F. brought an application for judicial review and *Charter* relief, arguing that the Director's decision violated her rights under sections 7 and 15(1) of the *Charter* (as well as making some procedural fairness arguments).

Section 7 of the *Charter* protects the rights to life, liberty and security of the person. C.F.'s argument here was that the Old *VSA* and the Director's interpretation of the Act "deprived her of liberty and security of the person by making it impossible for her to have an accurate birth certificate unless she submitted to unwanted and potentially dangerous surgery" (para 19). The Court noted that this argument was not pursued in written or oral submissions, but nor was it formally abandoned (C.F. apparently was not represented by counsel at the QB hearing).

Section 15(1) is the *Charter*'s equality rights provision. C.F.'s argument under this section was that the Old *VSA* and the Director's interpretation of the Act discriminated against trans people, who are "forced to have birth registrations that do *not* reflect their lived sex unless they submit to Genital Surgery" (at para 20, emphasis in original). C.F. submitted that this amounted to discrimination on the combined grounds of sex, mental or physical disability, gender identity, and trans status.

In its response, the Director argued that the Old *VSA* not discriminatory, rather it provided a benefit to a disadvantaged group, i.e. transgendered persons who had undergone genital surgery. The Director relied on section 15(2) of the *Charter*, which permits governments to establish ameliorative programs targeted at disadvantaged groups and thereby avoid claims of discrimination by other groups. The Director did not rely on section 1 of the *Charter*, which allows reasonable limits on *Charter* rights that are demonstrably justifiable in a free and democratic society.

Decision and Commentary

In his decision, Justice B.R. Burrows focused on the section 15 issues raised by C.F. and the government. He quickly dismissed the Director's section 15(2) argument, finding that section 22 of the Old *VSA* and the accommodation it provides to transgendered persons who have genital surgery "is entirely irrelevant to transgendered persons, like C.F., who do not so wish or who are not so willing" (at para 28). Rather, the discrimination "results from the birth registration system not recognizing or accommodating the fact that [C.F.] has transitioned and is now female" (at para 28).

Though he did not cite the leading cases on section 15(2) of the *Charter* in this part of his decision, Justice Burrows' reasons are largely in line with *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 and *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37, [2011] 2 SCR 670. These cases provide that if a section 15(1) claimant can prove an adverse

distinction based on a protected ground, the government then has an opportunity to argue that the distinction is "saved" by section 15(2) on the basis that it is an ameliorative program targeted at a disadvantaged group (*Cunningham* at paras 43-44). According to *Cunningham*, even programs that are underinclusive of particular disadvantaged groups can be saved by section 15(2), provided that the programs are truly ameliorative in purpose, and the exclusion of the claimant group "serves or advances" the ameliorative goal (at para 45). In other words, section 15(2) "permits governments to assist one group without being paralyzed by the necessity to assist all, and to tailor programs in a way that will enhance the benefits they confer while ensuring that the protection that s. 15(2) provides against the charge of discrimination is not abused for purposes unrelated to an ameliorative program's object and the goal of substantive equality" (at para 49).

In *Cunningham*, the exclusion from Métis settlement legislation of Métis persons who were also registered as Indians was found to serve and advance the purpose of that legislation, which was to "[establish] a Métis land base to preserve and enhance Métis identity, culture and self-governance, as distinct from surrounding Indian cultures and from other cultures in the province" (at para 62; for a critique see Jonnette Watson Hamilton and Jennifer Koshan, "The Supreme Court of Canada, Ameliorative Programs, and Disability: Not Getting It" (2013) 25(1) Canadian Journal of Women and the Law 56-80, available here).

Justice Burrows did not consider whether there was a distinction based on a protected ground before considering section 15(2). But apart from that analytical oversight, his decision that the government could not rely on section 15(2) seems correct. Even if section 22 of the Old *VSA* could be seen to have an ameliorative purpose in that it provides post-operative transgendered persons with the benefit of having their birth certificates changed, it is difficult to see how the exclusion of those trans persons who are unwilling to have surgery could "serve or advance" this benefit, as required by *Cunningham*. This is not the sort of case where the government would be "paralyzed by the necessity to assist all", given that applications by transgendered persons to change their birth registration are likely rare and relatively low-cost. Nor was the exclusion of trans people in C.F.'s position needed "to tailor programs in a way that will enhance the benefits they confer." It could also be argued that the *VSA* is the sort of "broad societal legislation" to which section 15(2) was not intended to apply (see *Kapp* at para 55). The issue was not with section 22 in isolation, but with the overall failure of the *VSA* regime to allow C.F. and others like her to change their birth certificates.

Turning to section 15(1), Justice Burrows set out the two part test for discrimination from *Kapp*:

> (1) Does the law create a distinction based on an enumerated or analogous ground?
>
> (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? (*C.F.* at para 30, citing *Kapp* at para 17).

In his analysis of step one of the *Kapp* test, Justice Burrows relied on a recent decision of the Ontario Human Rights Tribunal considering a similar regime for changing birth certificates in Ontario. In *XY v Ontario (Minister of Government and Consumer Services),* [2012] OHRTD No 715, 2012 HRTO 726, the Ontario government had conceded that the regime requiring genital surgery drew a distinction based on disability, sex, or both grounds. At the time of the case, Ontario had not yet amended its human rights legislation to include gender identity as a protected ground (see *Human Rights Code*, RSO 1990, c H.19, amended SO 2012, c 7, s 1). The Ontario Human Rights Tribunal held that in light of the government's concession, it was clear that transgendered persons were protected under the *Code*, and that it need not determine whether

that was on the basis of sex and/or disability. It cited a number of cases supporting the conclusion that transgendered persons are protected on either or both of those grounds (at para 88, citing *Hogan v. Ontario (Health and Long-Term Care)*, 2006 HRTO 32 (CanLII), (Gender Identity Disorder found to be "disability"); *Vancouver Rape Relief v. BC Human Rights*, 2000 BCSC 889 (CanLII) at para 59, as cited in *Hayes v. Barker*, [2005] BCHRTD No. 590, at para 31-32 (sex); *MacDonald v. Downtown Health Club for Women*, 2009 HRTO 1043 (CanLII) (sex); *Kavanagh v. Canada (Attorney General)*, [2001] CHRD No. 21 at para 135 (sex and disability); *Sheridan v. Sanctuary Investments Ltd. (c.o.b. B.J.'s Lounge)*, [1999] BCHRTD No. 43 at para 97 and 110 (sex and disability)).

Justice Burrows noted that while there was no similar concession by Alberta in this case, he had no difficulty finding that the *VSA* birth registration regime treated transgendered persons differently than non-transgendered persons, as well as from transgendered persons willing to undergo genital surgery. Persons in the claimant group were prevented from obtaining a birth certificate that reflected their lived sex. This was found to be a distinction based on sex, or, "if "sex" … is interpreted so narrowly as to exclude the characteristics of transgendered persons that make them transgendered, then, at very least, the distinction is made on a ground analogous to sex" (at para 39).

It is unfortunate that Justice Burrows did not take the next step and formally recognize gender identity or status as a transgendered person as an analogous ground for the purposes of section 15 of the *Charter*. Analogous grounds are those that reflect personal characteristics that are "immutable or changeable only at unacceptable cost to personal identity" or that "the government has no legitimate interest in expecting us to change to receive equal treatment under the law." See *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 at para 13 (SCC), [1999] 2 SCR 203. It was not open to the Ontario Human Rights Tribunal to take this step in the *XY* case, since human rights legislation only protects specifically listed grounds of discrimination and not grounds analogous to those, as section 15 of the *Charter* does. Although the failure to explicitly recognize gender identity did not undermine C.F.'s claim, it may mean that transgendered persons must continue to rely on sex and/or disability to mount claims of discrimination under the *Charter*. Disability in particular can be a difficult ground to bring forward in this context. As noted in *XY* (at para 5), many transgendered persons do not see their gender identity as a disability, yet they must rely on the grounds available to them where gender identity has not been recognized as a protected ground.

In addition, Justice Burrows' characterization of the claimant group as "transgendered persons" could be seen as a bit too broad, since their comparison to "transgendered persons willing to undergo genital surgery" reveals that the distinction is actually drawn on the basis of willingness to have surgery. Nevertheless, since *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396, a mirror comparator analysis is no longer required in section 15(1) cases. It is clear that transgendered persons in the position of C.F., who wish to have their birth certificates reflect their true gender identity without surgery, are treated differently and disadvantageously under the *VSA* regime.

As for the second part of the test for section 15(1), Justice Burrows noted that "the focus should be on the impact of the impugned law on the "human dignity" of the group alleged to have been treated unequally" (at para 32). This is incorrect – in *Kapp*, the Court abandoned human dignity as the focal point for discrimination, noting the problems that focus had caused in section 15(1) claims (at para 22). But Justice Burrows' subsequent analysis of step 2 does not actually focus on human dignity, but rather on prejudice and stereotyping, the actual focal points in *Kapp*.

Here, Justice Burrows referred to affidavit evidence from a psychiatrist, Dr. Dan Karasic, which established the "the disadvantage, vulnerability, stereotyping, and prejudice suffered by transgendered persons" (at para 40). Dr. Karasic's evidence also indicated that the great majority of transgendered persons do not have genital surgery, due to difficulties in access as well as personal preferences. Lastly, he spoke to the importance of having access to legal documents reflecting a transgendered person's lived sex in terms of reducing risks of violence, harassment and discrimination (at paras 42-45).

The evidence of C.F. substantiated much of the expert evidence. The treatment she received at the hands of the government was described by Justice Burrows as "insensitive at best" (at para 48). He noted how C.F. was required "to discuss her status as a transgendered person and the state of her genitalia with strangers", or as C.F. put it, "transgendered people's genitals are essentially a form of public property; it's open to anybody to ask about them, because they are what defines somebody's sex, according to Alberta" (at para 49). Not having an accurate birth certificate also prevented C.F. from obtaining an accurate passport, which adversely affected her employment situation.

The response of the Director to C.F.'s evidence and submission (at para 52) was called "remarkable" by Justice Burrows (at para 53); the word "paternalistic" also comes to mind:

> In response, Alberta states that giving a transgendered person an official government document with a sex designation which is dissonant with their gender identity does not convey any message about the validity of a person's gender identity – it simply reflects known facts determined at birth. … Changing the facts as known and recorded at birth to reflect a subsequently developed gender identity would send the message that there is something shameful about a birth sex that is inconsistent with a gender identity, and in need of correction, when the inconsistency is in fact an integral part of the transgendered person's identity. In short, altering the birth record to conform to a subsequently developed gender identity sends the message that transgendered people need to hide (or need to be ashamed of) their true identity as transgendered persons who identify with the opposite sex.

As noted by Justice Burrows, this response sends the message to transgendered people "that the prejudice, stereotyping and vulnerability they feel either do not exist or are insignificant", and "that though their fellow human beings are all either male or female … they should fearlessly "come out" as members of a third sex … and expect to be accepted without question" (at para 56). He found that the *VSA* birth registration regime thereby perpetuated the prejudice and stereotyping experienced by transgendered persons, and amounted to discrimination contrary to section 15(1) of the *Charter*.

Justice Burrows' decision does not cite the latest Supreme Court authority on section 15(1), *Quebec (Attorney General) v A*, 2013 SCC 5, [2013] 1 SCR 61, where a majority of the Court called into question whether prejudice and stereotyping should still be seen as crucial markers of discrimination requiring proof in every section 15 case (at para 325 per Abella J; for ABlawg commentary see here). But this omission was not critical to the outcome of *C.F. v Alberta*, as this was a case where prejudice and stereotyping could clearly be shown. It is interesting to note, however, that there was also evidence of the historical disadvantage experienced by transgendered persons in *C.F.* (at para 46), and the perpetuation of this disadvantage could have been seen as an alternate means of finding discrimination in this case on the basis of *Quebec v A*.

In terms of remedies, Justice Burrows held that to the extent the *VSA* did not permit C.F. to obtain a birth certificate consistent with her lived sex, it was inconsistent with the *Charter* and was of no force or effect. He also granted C.F. a personal remedy under section 24(1) of the *Charter*, ordering the Director of Vital Statistics to issue C.F. a birth certificate recording her sex as female within 30 days of the judgment (at paras 64-65).

As noted above, the Alberta government introduced an amendment to the *Vital Statistics Act* in Bill 12, the *Statutes Amendment Act, 2014*, on May 5, 2014. Section 9 of Bill 12, which is expected to pass this week, would add the following section to the *VSA*:

> 30 (1.1) The Registrar may, in a circumstance provided for in the regulations and subject to any conditions in the regulations, amend the sex on the person's record of birth and may, with the consent of the other party to the marriage, amend the sex on the record of a subsisting marriage, if any, of the person that is registered in Alberta.

Although the scope of the regulations is still to be seen, this section appears to do away with the requirement of an error before the Registrar can exercise his or her discretion to change the birth certificate of a transgendered person. According to Government House Leader Robin Campbell, who spoke to the amendment at Second Reading on May 6:

> Changes to the Vital Statistics Act will allow changes to the requirement for individuals to amend their sex indicator on birth records and birth certificates in a manner which is seen as less discriminatory. Service Alberta has been actively monitoring changes in other jurisdictions and collaborating with the Vital Statistics Council for Canada on this issue. The proposed amendments will authorize the creation of regulations to allow a change of sex identifiers on birth records or certificates. While the regulations are being revised, requests for a change of sex on a birth certificate from transgendered individuals will be addressed on a case-by-case basis to accommodate those individuals who have not had sex reassignment surgery. This change shows our government's commitment to addressing this issue while allowing time for consultation and analysis to ensure that we are getting it right. (Alberta Hansard, May 6, 2014 at 736).

Conclusion

The *C.F.* case is an important victory for transgendered persons in Alberta wishing to change their birth registration without undergoing genital surgery. More broadly, the recognition that distinctions drawn on the basis of being transgendered amount to distinctions based on sex and that transgendered persons face historic disadvantage will also be useful for cases pending under the *Alberta Human Rights Act*, RSA 2000, c A-25.5. As noted above, it would have been preferable for *Charter* purposes if Justice Burrows had recognized gender identity as an analogous ground. But under the *Alberta Human Rights Act,* gender identity is not yet explicitly protected, so claimants must rely on gender (or disability) as the relevant ground. The Alberta Human Rights Commission has signaled that it will accept complaints of discrimination on the basis of gender identity under the ground of gender, and there is a case currently before the Commission involving a claim by a transgendered person of employment discrimination (See *Greater St. Albert Roman Catholic Separate School, District No. 734 v Buterman*, 2014 ABQB 14, confirming the Chief Commissioner's decision to send this claim to a tribunal hearing).

There is a wonderful line from Justice Sheila Greckol in the *Buterman* case that is a pertinent way to close this post: "Human rights process is not only for the lion-hearted and well-heeled conversant with litigation, but also for the timorous and impecunious — for all Albertans." (2014 ABQB at para 184). The fact that C.F. successfully asserted a difficult rights claim under the *Charter* while self-represented makes her victory all the more remarkable.

Thanks to Jonnette Watson Hamilton for comments on an earlier version of this post.

A Vital Judgment: Upholding Transgendered Rights in Alberta

Comments:

Jennifer Koshan says:

May 7, 2014 at 7:27 pm

> I was contacted by C.F. yesterday, who advised that though she was self-represented, the focus on s 15 rather than s 7 was tactical, and that some of the omissions in the Court's decision were not for lack of argumentation on her part.
>
> Regarding Bill 12, the Trans Equality Society of Alberta (TESA) has issued a press release critiquing the proposed amendments to the Vital Statistics Act. See http://www.tesaonline.org/object-to-current-vsa-amendment.html. TESA's main objections are that the substantive changes will be via regulation rather than statute, which may not allow for proper consultation, and that the proposed amendments do not deal with potential privacy concerns arising from the publication of legal name changes.
>
> Bill 12 passed third reading on May 7, 2014 and the amendments to the Vital Statistics Act will come into force upon proclamation.

Jennifer Koshan says:

November 25, 2014 at 8:37 pm

> The Trans Equality Society of Alberta (TESA) issued a press release on Nov 24, 2014 arguing that Bill 6, an omnibus bill introduced in the Alberta Legislature on Nov 18, "fails to address urgent legislative concerns raised previously" with respect to the protection of transgender rights in Alberta. See http://www.tesaonline.org/known-issues-ignored.html.

November 24, 2014

Assisted Suicide and Adverse Effects in Discrimination: Where Will the Supreme Court Go in *Carter*?

By: Jennifer Koshan and Jonnette Watson Hamilton

Case Commented On: *Carter v Canada (Attorney General),* 2012 BCSC 886, rev'd 2013 BCCA 435, leave to appeal to SCC granted 2014 CanLII 1206 (SCC)

We recently posted a paper on SSRN that is forthcoming in the Review of Constitutional Studies, dealing with the Supreme Court of Canada's approach to adverse effects discrimination under section 15(1) of the *Charter*. Adverse effects discrimination occurs when laws that are neutral on their face have a disproportionate and negative impact on members of a group identified by a prohibited ground of discrimination. Although the Court has recognized adverse effects discrimination as key to the *Charter*'s guarantee of substantive equality, it has decided only 8 such cases out of a total of 66 section 15(1) decisions released since 1989, none since 2009. Only 2 of the 8 claims were successful (see Appendix I in our paper). Our analysis shows several obstacles for adverse effects discrimination claims, including burdensome evidentiary and causation requirements, courts' acceptance of government arguments about the "neutrality" of policy choices, narrow focusing on prejudice and stereotyping as the only harms of discrimination, and failing to "see" adverse effects discrimination, often because of the size or relative vulnerability of the group making the claim.

In light of the very small number of successful adverse effects claims and the problems in the case law, it is interesting to note that in October 2014 the Supreme Court heard 2 section 15(1) appeals involving adverse effects discrimination: *Carter v Canada (Attorney General)* and *Taypotat v Taypotat,* 2012 FC 1036, 2013 FCA 192; leave to appeal to SCC granted 2013 CanLII 83791 (SCC). This post will focus on *Carter*, a challenge to the ban on assisted suicide under the *Criminal Code*, RSC 1985, c C-46, and the adverse effects discrimination arguments the Supreme Court is considering in that case. We acknowledge that the Court is far more likely to decide *Carter* on section 7 grounds—much of the Court's focus during oral arguments was on whether the ban violates the rights to life and security of the person in ways that are arbitrary, overbroad or grossly disproportionate, contrary to the principles of fundamental justice (see Webcast of the Carter Hearing, October 15, 2014). Nevertheless, *Carter* raises important equality issues as well.

Many ABlawg readers will know that *Carter* is the second challenge to the assisted suicide provisions of the *Criminal Code*. The first challenge was dismissed 5:4 in *Rodriguez v British Columbia*, [1993] 3 SCR 519. *Rodriguez* included an adverse effects discrimination claim under section 15(1), which was denied by the majority on the basis that, even if there was a violation of equality rights, it would be saved by section 1 of the *Charter* (at para 185). In contrast, a dissenting judgment by then Chief Justice Lamer (Cory J concurring) found that although the assisted suicide prohibition was neutral on its face, it prevented the choice of suicide, open to other Canadians, by terminally ill persons with disabilities that made them physically unable to end their lives unassisted (at para 48). This amounted to adverse effects discrimination on the

basis of disability for those two judges. Justices L'Heureux-Dubé and McLachlin (as she then was), in a separate dissenting judgment, found that the prohibition on assisted suicide violated the right to security of the person under section 7 of the *Charter*. As for section 15, they stated that "this is not at base a case about discrimination … and … to treat it as such may deflect the equality jurisprudence from the true focus of s. 15 — 'to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society'" (at para 196). Their judgment reflects the difficulty that courts sometimes have seeing adverse effects discrimination.

In *Carter*, the new challenge to the constitutionality of the prohibition against assisted suicide was successful before Justice Lynn Smith of the British Columbia Supreme Court (BCSC) under sections 7 and 15(1) of the *Charter* (2012 BCSC 886). However, a majority of the Court of Appeal overturned her decision, finding that she should have dismissed the claim because of the precedent of *Rodriguez* (2013 BCCA 435). The Supreme Court is re-considering *Rodriguez* substantively, so it is useful to consider the parties' arguments at the BCSC and Justice Smith's reasons under section 15(1) in some depth.

***Carter* (BCSC)**

The section 15(1) claim in *Carter* was that the criminal prohibition against assisted suicide had an adverse impact on the terminally ill who are materially physically disabled. Under the first step of the current test for discrimination from *R v Kapp,* 2008 SCC 41, [2008] 2 SCR 483 and *Withler v Canada (Attorney General),* 2011 SCC 12, [2011] 1 SCR 396, Justice Smith considered whether the law created a distinction based on a prohibited ground of discrimination. She found that this step was satisfied because the law, in effect, drew a distinction based on physical disability. Justice Smith rejected the federal and BC governments' argument that since *everyone* is precluded from committing suicide with assistance, there was no distinction, indicating that this argument "ignores the adverse impact/unintended effects discrimination analysis central to the substantive equality approach" (at para 1073). In addition, she noted that "[i]t is not necessary for every member of a disadvantaged group to be affected the same way in order to establish that the law creates a distinction based upon an enumerated or analogous ground" (at para 1074).

The governments also argued that the claim should fail at the first step of the test because some people who desire assisted suicide are motivated by lack of will, rather than disability. The governments suggested that the physically disabled could still commit suicide by refusing food or drink. This argument could be seen as going to causation because it implies that it is not the law that creates the adverse impact but rather the choices made by some of the claimants. Justice Smith dismissed this argument, saying that "there are means of suicide available to non-disabled persons that are much less onerous than self-imposed starvation and dehydration, and it is only physically disabled persons who are restricted to that single, difficult course of action" (at para 1076).

Step two of the *Kapp / Withler* test focuses on "whether the distinction perpetuates disadvantage or prejudice, or stereotypes people in a way that does not correspond to their actual characteristics or circumstances", which requires "consideration of the actual impact of the law" (at paras 1080, 1081). The claimants argued that that the assisted suicide provisions perpetuated disadvantage, because "those with grievous illnesses suffering from physical disabilities are disadvantaged and … the law disadvantages them further" (at para 1087). They also argued that

the law stereotyped them by implying that physically disabled persons "lack sufficient autonomy or agency to make such momentous decisions" (at para 1088).

The governments argued that the law should be seen as a "neutral and rationally defensible policy choice," relying on the Supreme Court's decision in *Alberta v Hutterian Brethren of Wilson Colony,* 2009 SCC 37, [2009] 2 SCR 567 (for posts on that decision see here and here). This argument was dismissed by Justice Smith, who noted that *Hutterian Brethren* "included no discussion of adverse impact discrimination" and concluded that "[i]t would be mistaken … to read the … decision as a repudiation of the adverse impact analysis approved in the long line of cases I have referred to…" (at para 1093).

Under step two of the *Kapp* / *Withler* test, Justice Smith considered the contextual factors relevant to whether discrimination perpetuates prejudice or stereotyping. The most contentious factors were, first, the correspondence between the grounds of discrimination and the actual need, capacity, or circumstances of the claimants and, second, ameliorative purpose.

On the correspondence factor, the governments argued that the ban on assisted suicide was in line with the actual needs and circumstances of persons with physical disabilities, who faced "heightened risk" of being persuaded to ask for assistance in dying "in an 'ableist' society" (at paras 1115, 1118 and 1128). The claimants replied that to treat all persons with physical disabilities as vulnerable would deny their autonomy to make fundamental decisions about death, a denial amounting to paternalistic stereotyping (at para 1122). Justice Smith agreed with the claimants, concluding that the assisted suicide prohibition had the effect of depriving non-vulnerable people "of the agency that they would have if they were not physically disabled" (at para 1130). She also dismissed the governments' argument that the law was not discriminatory because it had an ameliorative purpose, noting that this factor is only relevant where "the person or group excluded from ameliorative laws or activities is more advantaged in a relative sense," which was not the case here (at para 1140).

Justice Smith's overall conclusion was that the ban on assisted suicide "perpetuates and worsens a disadvantage experienced by persons with disabilities" and therefore violates section 15(1) of the *Charter* (at para 1161). The law failed the minimal impairment stage of the section 1 analysis because "a less drastic means of achieving the objective of preventing vulnerable persons from being induced to commit suicide at times of weakness would be to keep the general prohibition in place but allow for a stringently limited, carefully monitored system of exceptions" (at para 1243). Justice Smith granted the claimants a declaration that the provisions banning assisted suicide were of no force and effect "to the extent that they prohibit physician-assisted suicide by a medical practitioner in the context of a physician-patient relationship" (at para 1393).

In our opinion, Justice Smith's judgment in *Carter* appropriately rejects the government arguments that rely on claims of neutrality, rigid analysis of distinctions and grounds, and adherence to narrow understandings of discrimination.

***Carter* (SCC hearing)**

As noted above, one of Justice Smith's findings at trial was that "[i]t is not necessary for every member of a disadvantaged group to be affected the same way in order to establish that the law creates a distinction based upon an enumerated or analogous ground" (at para 1074). This point is well accepted in section 15 cases. In *Carter*, there was a lot of debate about the composition of the relevant group in the Supreme Court of Canada's hearing of oral arguments. Joe Arvay,

counsel for the Appellants, indicated that while his clients' section 15(1) claim applied only to terminally ill persons who were physically unable to commit suicide, their section 7 claim encompassed the larger group of persons desiring physician assistance to commit suicide even if they were not physically unable to take their lives (see Webcast of the Carter Hearing). The Appellants indicated that they preferred the claim to be decided under section 7 for this reason and, in fact, did not prioritize their section 15(1) arguments at the oral hearing, relying on their factum for those submissions when the clock ran out.

The Attorney General of Canada and some interveners raised questions about whether the claimants and others in their position constituted a vulnerable group as compared to persons with disabilities who might be taken advantage of if an exemption to the criminal law was created (see Factum of the Attorney General of Canada at para 137; Factum of the Intervener Council of Canadians with Disabilities and the Canadian Association for Community Living at para 20). Nevertheless, Canada conceded that the law created a distinction for the purposes of section 15(1) (Factum of the Attorney General of Canada at para 125). As a result, it is not surprising that the government did not maintain its "neutral policy choice" argument at the Supreme Court (although that argument was put forward by the Euthanasia Prevention Coalition in its intervention).

As we have indicated, causation problems are also common in adverse effects discrimination cases. The Attorney General of Canada did not maintain its causation argument at the Supreme Court level in *Carter* either but the Euthanasia Prevention Coalition did contend in its factum (at para 19) that the assisted suicide prohibition "is not the cause of any adverse treatment of people with disabilities." A response to this argument can be found in the Supreme Court's decision in *Canada (Attorney General) v. Bedford*, [2013] 3 SCR 1101, 2013 SCC 72, where the Court held that a challenge to the prostitution provisions of the *Criminal Code* could not be defended on the basis that the laws were not the sole cause of the harms related to prostitution. *Bedford* confirms that *Charter* claimants are only required to show a sufficient causal connection between government action and the harms they suffered (at para 75). This kind of connection is clearly present in *Carter*.

Although many adverse effects claims involve unintentional discrimination, it is important to recognize that *Carter* is a claim of intentional adverse effects discrimination. Canada has maintained the prohibition against assisted suicide in spite of the evidence and argument in *Rodriguez* that the law has a disproportionate and potentially discriminatory impact on some terminally ill persons with physical disabilities. It is the intentional nature of the government's actions in ignoring the impact of the assisted suicide law that makes it possible to argue stereotyping in this case, even though stereotyping is usually difficult to prove in adverse effects discrimination claims. Whether the law engaged in stereotyping was a major focus of the parties' and interveners' arguments at the Supreme Court, with debate focusing on whether the government made inappropriate assumptions about the vulnerability of the relevant group. For the Appellants and some interveners, the blanket prohibition against assisted suicide stereotyped persons with disabilities as "incapable of demonstrating rationality and autonomy" (Factum of the Appellants at para 124) as well as "patronizing and infantilizing" them (Factum of the Intervener Dying with Dignity at para 15). For the Attorney General of Canada and other interveners, the law appropriately took the vulnerability of persons with disabilities into account and had an "ameliorative purpose" (Factum of the AG Canada at paras 135,137; Factum of the Euthanasia Prevention Coalition at paras 23-24).

The decision in *Carter* on whether the law is discriminatory may turn on whether there is evidence of stereotyping, but the Court's recent section 15(1) decision in *Quebec (Attorney General) v A,* 2013 SCC 5, [2013] 1 SCR 61 allows it to focus on disadvantage more broadly (see our comments on that case here). If it takes this broader approach, it should not be difficult for the Court to find that the assisted suicide prohibition perpetuates the disadvantage experienced by some persons with disabilities.

Carter also raises the question of whether the category of adverse effects discrimination should be retained under section 15(1) of the *Charter*. The existence of a distinction between direct and adverse effects discrimination has been called into question under human rights legislation (see *British Columbia (Public Service Employee Relations Commission) v BCGSEU,* [1999] 3 SCR 3 at paras 27-30). This issue is a live one, as one of the interveners in *Carter* maintained that "this is not at base a case about discrimination" (Factum of the Council of Canadians with Disabilities and the Canadian Association for Community Living at para 21). We agree with those commentators who argue that retaining the category of adverse effects discrimination is important to the courts' ability to recognize systemic discrimination (see e.g. Dianne Pothier, "Tackling Disability Discrimination at Work: Toward a Systemic Approach" (2010) 4 McGill J L & Health 17; Colleen Sheppard, "Of Forest Fires and Systemic Discrimination: A Review of *British Columbia (Public Service Employee Relations Commission) v BCGSEU*" (2000-2001) 46 McGill L J 533). The fact that in *Rodriguez* only two judges found the assisted suicide prohibition violated section 15(1) suggests that the adverse effects category is a useful lens for determining whether a law has discriminatory effects.

Given the issues arising under adverse effects discrimination cases, and the strong connection between adverse effects discrimination and substantive equality, we hope that the Supreme Court will take the opportunity to decide *Carter* under section 15(1) of the *Charter,* rather than deciding the case solely on the basis of section 7.

February 18, 2015

Supreme Court of Canada Strikes Down Ban on Physician Assisted Death

By: Jennifer Koshan

Case Commented On: *Carter v Canada (Attorney General)*, 2015 SCC 5

In a landmark decision, on February 6, 2015 the Supreme Court of Canada unanimously struck down the criminal prohibition against physician assisted death (PAD) in *Carter v Canada*, 2015 SCC 5. By declining to follow its 1993 decision in *Rodriguez v British Columbia*, 1993 CanLII 75 (SCC), [1993] 3 SCR 519, which had upheld the prohibition, *Carter* marks the third time in the first few weeks of 2015 that the Court has overruled previous *Charter* decisions (see also *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 and *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, which will be the subject of a future ABlawg post). In *Carter*, the Court held that the ban on PAD violates the rights to life, liberty and security of the person contrary to the principles of fundamental justice under section 7 of the *Charter*, and could not be justified as a reasonable limit under section 1. As predicted, however, the Court declined to deal with the claim that the ban on PAD also violates equality rights contrary to section 15(1) of the *Charter*.

The Decision

Carter focuses on persons who have a grievous and irremediable medical condition causing suffering that is intolerable to them, and who clearly consent to the termination of life. The Court indicated that for such persons, denial of PAD presents a "cruel choice" – they can take their own lives prematurely, or suffer until they die from natural causes (at para 1). This choice engaged the right to life under section 7 of the *Charter*, which protects individuals from government actions that increase the risk of death directly or indirectly (at para 62). While the Court took no position on whether the right to life also includes a more qualitative right to die with dignity, it did affirm that section 7 does not create a "duty to live" (at para 63). The prohibition against PAD also violated the right to liberty, which protects individual autonomy and life choices, and the right to security of the person, which protects physical and psychological integrity free from state interference. As noted by the Court, "an individual's response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy" (at para 66).

Section 7 of the *Charter* requires proof that the violation of life, liberty or security of the person is contrary to the principles of fundamental justice. In *Carter*, the Court considered several arguments concerning these principles. First, it held that the prohibition against PAD was not arbitrary, as the objective of the prohibition – to protect the vulnerable from ending their lives in times of weakness – was furthered by a total ban on PAD (at para 84). However, the ban was seen to be overbroad, as its objective went further than necessary given that not all persons seeking PAD are vulnerable to such inducements (at paras 86-88). In light of this conclusion, the Court found it unnecessary to deal with the argument that the ban violated the principle of fundamental justice concerning gross disproportionality (at para 90). It also declined to consider

the argument that a new principle of fundamental justice, parity between criminal sanctions and moral blameworthiness, should be recognized (at paras 91-92).

The overbreadth of the law also led to the finding that it could not be justified as a reasonable limit under section 1 of the *Charter*. While protecting the vulnerable – including persons with disabilities and the elderly – was seen as a pressing and substantial objective, the Court rejected the government's argument that an absolute ban on PAD was reasonably necessary to achieve this objective. The justification argument thus failed the minimal impairment stage of the *Oakes* test (*R v Oakes*, [1986] 1 SCR 103). The evidence showed that a regime permitting PAD with safeguards to allow physicians to ensure patient competence, voluntariness, and the absence of coercion, undue influence and ambivalence was feasible and would minimize the risks associated with PAD (at para 106). Evidence of risks of a "slippery slope" from other jurisdictions permitting PAD – such as Belgium and the Netherlands – was not considered persuasive in the Canadian context. The Court clarified that some of the controversial cases arising in these jurisdictions, including euthanasia for minors and for persons with psychiatric conditions, would not fall within the scope of its decision (at para 111). It also clarified that its decision was not intended to compel physicians to provide PAD, noting that their freedom of conscience and religion – protected under section 2(a) of the *Charter* – would need to be reconciled with the rights of patients (at para 132).

The relevant sections of the *Criminal Code,* RSC 1985, c C-46, were declared void as applied to persons with grievous and irremediable medical conditions causing suffering intolerable to them who consent to the termination of life (at para 127). The Court suspended this remedy for 12 months to allow Canadian lawmakers to respond with legislation meeting the requirements of its decision in *Carter.* In keeping with the Court's reasons for rejecting the argument of inter-jurisdictional immunity put forward by the claimants and the government of Quebec (at para 53), new laws governing PAD could be passed by the federal and/or provincial governments in light of their shared jurisdiction over the regulation of health. The Court declined to grant exemptions during the period of suspended validity given that none of the claimants were in need of immediate relief (at para 129).

Commentary

Carter is consistent with other recent decisions of the Supreme Court giving broad scope to section 7 of the *Charter* (see e.g. *Canada (Attorney General) v PHS Community Services Society,* [2011] 3 SCR 134, 2011 SCC 44 and posts on that case here, here and here; *Canada (Attorney General) v Bedford*, [2013] 3 SCR 1101, 2013 SCC 72 and a post on that case here). In that context, *Carter* was not an unexpected decision. While its ultimate conclusion on the constitutionality of the ban on PAD is hugely significant, the Court's reasons do not add much to the existing jurisprudence defining the scope of section 7.

It is therefore unfortunate that the Court did not find it necessary to consider the claim under section 15 of the *Charter* that the ban on PAD had an adverse impact on persons with physical disabilities who were unable to take their lives without physician assistance (see para 93). As Jonnette Watson Hamilton and I have argued, consideration of the equality dimension of the case would have allowed the Supreme Court to clarify the law of adverse effects discrimination in Canada. It may also have allowed the Court to engage more deeply with the competing

arguments of disability rights groups who intervened in *Carter*. Those arguments and the literature supporting them did not get very much attention from the Court – in fact it does not reference any of the arguments of these groups, and only cites one academic article from 1995 (Thomas J. Singleton , "The Principles of Fundamental Justice, Societal Interests and Section 1 of the Charter" (1995), 74 *Can Bar Rev* 446). Given that new legislation for PAD is now in the hands of government, it can be expected that the debates about PAD and its implications for the rights of persons with disabilities will continue in that realm.

An earlier version of this post was published on the Oxford Human Rights Hub blog.

December 18, 2014

The Supreme Court's Other Opportunity to Revisit Adverse Effects Discrimination under the *Charter*: *Taypotat v Taypotat*

By: Jennifer Koshan and Jonnette Watson Hamilton

Case Commented On: *Taypotat v Taypotat*, 2012 FC 1036; rev'd 2013 FCA 192; leave to appeal to SCC granted 2013 CanLII 83791 (SCC)

A few weeks ago we wrote a post on *Carter v Canada (Attorney General)*, 2012 BCSC 886, rev'd 2013 BCCA 435, leave to appeal to SCC granted 2014 CanLII 1206 (SCC), predicting what the Supreme Court might decide on the issue of whether the prohibition against assisted suicide amounts to adverse effects discrimination against people with disabilities, contrary to section 15(1) of the *Charter*. We mentioned that *Carter* is one of two adverse effects cases currently before the Supreme Court. This post will consider the second case, *Taypotat v Taypotat*.

Taypotat concerns a community election code adopted by the Kahkewistahaw First Nation in Saskatchewan to govern elections for the positions of Chief and Band Councillor. The adoption of the code was controversial and took a number of ratification votes, stemming in part from the fact that it restricted eligibility for these elected positions to persons who had at least a Grade 12 education or the equivalent. Although he had previously served as Chief for a total of 27 years, the Kahkewistahaw election code excluded 74 year old Louis Taypotat from standing for election because he did not have a Grade 12 education. He had attended residential school until the age of 14 and had been assessed at a Grade 10 level. His nephew, Sheldon Taypotat, was the only eligible candidate for Chief, and he won the election by acclamation. In an application for judicial review, Louis Taypotat challenged the eligibility provision and the election results under section 15(1) of the *Charter*.

At the Federal Court hearing, Taypotat argued that the election code's education requirement discriminated on the basis of educational attainment, a ground he argued to be analogous to race and age (2012 FC 1036 at para 54). The Federal Court rejected this argument, finding that no evidence had been led to support the inclusion of educational level as an analogous ground, and that "educational level is not beyond an individual's control" (at para 58). Taypotat also argued that the education requirement adversely impacted older band members and residential school survivors. The Federal Court found that requirements based on education relate to "merit and capacities" and were therefore "unlikely to be indicators of discrimination, since they deal with personal attributes rather than characteristics based on association with a group" (at para 49). The Federal Court saw no evidence of adverse effects discrimination on the basis of age or race, and dismissed the claim (at para 60).

On appeal, Taypotat's arguments focused on the adverse effects claim based on the grounds of age and Aboriginality-residence. The Federal Court of Appeal noted that in the Supreme Court's most recent equality rights decision at the time, *Quebec v A*, the Court had reaffirmed the application of section 15(1) to laws with discriminatory effects (2013 FCA 192 at para 47, citing

Quebec v A, 2013 SCC 5, [2013] 1 SCR 61 at para 171). It also relied on *Quebec v A* for the point that neutral laws can inadvertently perpetuate stereotypes and disadvantage:

> Laws may be adopted that unintentionally convey a negative social image of certain members of society. Moreover, laws that are apparently neutral because they do not draw obvious distinctions may also treat individuals like second-class citizens whose aspirations are not equally deserving of consideration. (at para 55, citing *Quebec v A* at para 198).

Applying these principles and the test for discrimination from *R v Kapp,* 2008 SCC 41, [2008] 2 SCR 483 and *Withler v Canada (Attorney General),* 2011 SCC 12, [2011] 1 SCR 396, the Federal Court of Appeal found that while the education requirement did not directly engage a protected ground under section 15(1), it resulted in adverse effects discrimination based on the enumerated ground of age and the analogous ground of Aboriginality-residence (at para 45).

The first step of the *Kapp/Withler* test requires analysis of whether the election code created a distinction based on a protected ground. The Court referred to evidence submitted by Taypotat showing a deficit in education levels for on-reserve Aboriginal peoples in Canada, as well as an education gap between older and younger Canadians generally and on First Nations reserves specifically (at para 48, citing John Richards, "Closing the Aboriginal non-Aboriginal Education Gaps," C.D. Howe Institute Backgrounder 116 at 6). In addition, the Court took judicial notice of "readily available census information" from 2006, which provided supporting evidence of these gaps on the basis of age and Aboriginality-residence (at para 49). Support for this approach was found in Justice LeBel's judgment in *Quebec v A*, where he took judicial notice of the proportion of couples living in *de facto* unions by relying on census data (at para 51, citing *Quebec v. A* at paras 125 and 249). Based on this evidence, the Federal Court of Appeal concluded that the election code's education requirement "disenfranchise[d] … a disproportionate number of elders and on-reserve residents" (at para 52). As a result, the election code created a distinction "which has the effect of targeting segments of the membership of the First Nation on the basis of age and of Aboriginality-residence" (at para 56). The requirement of a distinction based on protected grounds was thus made out.

The challenged provision of the election code also satisfied step two of the *Kapp/Withler* test, which considers whether the distinction is discriminatory. The Court found that denial of an opportunity for election to Band Council, a fundamental social and political institution, "substantially affect[ed] the human dignity and self-worth" of persons such as Louis Taypotat, amounting to prejudice (at para 56). The education requirement also perpetuated stereotyping because it did not "correspond to the actual abilities of the disenfranchised to be elected and to occupy public office" (at para 58). The Court found that "[e]lders who may have a wealth of traditional knowledge, wisdom and practical experience, are excluded from public office simply because they have no "formal" (*i.e.* Euro-Canadian) education credentials. Such a practice is founded on a stereotypical view of elders" (at para 60).

Under section 1 of the *Charter*, the Court held that although the education requirement sought to "address the lack of education achievement among aboriginal peoples by encouraging them to complete their secondary education" (at para 60), and thus had a pressing and substantial objective, there was no rational connection between that objective and "the disenfranchisement of a large part of the community from elected public office" (at para 62). The relevant provision of the election code was declared unconstitutional and invalidated, and new elections were ordered without the education requirement (at para 66). Louis Taypotat was re-elected Chief of

the Kahkewistahaw First Nation following this judgment (*Taypotat*, Factum of the Respondent (Supreme Court of Canada), at para 28).

The Federal Court of Appeal decision confirms the point that not all members of a particular group need to be adversely affected in order for adverse effects discrimination to be made out (at paras 52-53). The fact that the claimant — an elder who was a residential school survivor residing on a First Nations reserve — was a member of a group widely acknowledged to be especially vulnerable likely facilitated this finding.

The Court of Appeal also appeared unfazed by the holding in *Withler* that adverse effects discrimination will be more difficult for claimants to prove (*Withler* at para 64). However, this was one of the more contentious issues in the hearing of the *Taypotat* appeal before the Supreme Court. The Appellants (Chief Sheldon Taypotat and Council representatives of the Kahkewistahaw First Nation) argued that the evidentiary sources relied upon by the Court of Appeal were too generalized, and did not speak to the particular situation of their community (*Taypotat*, Factum of the Appellants (Supreme Court of Canada), at paras 86, 88). Respondent's counsel was asked several questions about the evidentiary basis for his client's claim by members of the Supreme Court during the oral hearing, and responded that Louis Taypotat had attested to the specific impact of the education requirement on older residents of the Kahkewistahaw First Nation (Webcast of the Taypotat Hearing (2014-10-09)).

Evidentiary issues have undermined several adverse effects cases at the Supreme Court level: see e.g. *Symes v Canada,* [1993] 4 SCR 695; *Thibaudeau v Canada,* [1995] 2 SCR 627; *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia,* 2007 SCC 27, [2007] 2 SCR 391. Nevertheless, the Federal Court of Appeal's acceptance of statistical evidence in *Taypotat* does align with the approach in *Withler,* which discussed the desirability of bringing forward evidence of historical or sociological disadvantage (*Withler* at para 64).

Another argument made by the Appellants at the Supreme Court is that the education requirement goes to the merits of election candidates and is a personal attribute they can attain if they choose (*Taypotat*, Factum of the Appellants at para 69). This point was emphasized in the Appellants' presentation of oral argument, which raised questions from members of the Court about whether choice is still a relevant consideration under section 15(1). This issue arises from the Court's ruling in *Quebec v A*, where a majority indicated that the state's support of freedom of choice (of marital status in that case) was not pertinent until the section 1 analysis (*Quebec v A* at paras 334-338). Questions were also asked by members of the Supreme Court about whether Louis Taypotat's lack of education could actually be attributed to choice. We suggest that choice should not be a relevant consideration in section 15(1) claims, and that it is refuted on the facts of a case involving residential school survivors such as Taypotat in any event.

Several members of the Supreme Court also questioned whether the education requirement reflected "arbitrary disadvantage" based on age. We would argue that, similar to choice, arbitrariness is a consideration relevant under section 1 of the *Charter*, not under section 15(1). Incorporating such questions under section 15(1) presents particular problems for adverse effects discrimination claims because arbitrariness focuses on the purpose rather than effects of the law. Even if a requirement such as educational level is intended to address the merits of election candidates, and is not arbitrary in that sense, it may still disproportionately impact older persons

resident on First Nations reserves in an adverse way. The rationality and justifiability of that impact should be addressed under section 1 of the *Charter*, not section 15(1).

Nor is it appropriate to consider the merit-based purpose of the education requirement under section 15(2) of the *Charter*, as the Appellants urged the Court to do (*Taypotat*, Factum of the Appellants at para 102ff). Section 15(2) allows governments to "save" ameliorative laws and programs that would otherwise be discriminatory under section 15(1) (see *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, [2011] 2 SCR 670, 2011 SCC 37 at para 41). Section 15(2) is not relevant in adverse effects cases because by definition they involve neutral rules rather than benefit programs targeted at disadvantaged groups, which are the proper subject of section 15(2). In any event, section 15(2) should not preclude claims where, even though adopted for an ameliorative purpose, a law has discriminatory adverse effects on a group protected under section 15(1) (see Jonnette Watson Hamilton and Jennifer Koshan, "The Supreme Court of Canada, "Ameliorative Programs, and Disability: Not Getting It" (2013) 25 CJWL 56, available here).

We predicted that the Supreme Court may avoid the section 15(1) argument in *Carter* and decide the case under section 7, but the option of deciding the claim on another *Charter* right is not available in *Taypotat*. The case thus presents an important opportunity for the Court to clarify the law on adverse effects discrimination, and we eagerly await its decision.

This post is based on a paper that is forthcoming in the Review of Constitutional Studies, available on SSRN.

The Supreme Court's Other Opportunity to Revisit Adverse Effects Discrimination under the *Charter*: *Taypotat v Taypotat*

Comments:

Brian says:

December 18, 2014 at 4:04 pm

> It will be interesting to see how the aftermath of Taypotat v Taypotat ends up playing out in regards to discrimination attitudes. Thanks for sharing.

January 19, 2015

First Nations Community Election Codes and the *Charter*

By: Jennifer Koshan

Case Commented On: *Orr v Peerless Trout First Nation*, 2015 ABQB 5

In December Jonnette Watson Hamilton and I wrote a post commenting on *Taypotat v Taypotat*, 2012 FC 1036; rev'd 2013 FCA 192; leave to appeal granted 2013 CanLII 83791 (SCC), a case currently before the Supreme Court which involves the constitutionality of a First Nations election code. A similar case arose in Alberta recently. In *Orr v Peerless Trout First Nation*, 2015 ABQB 5, Master L.A. Smart dismissed a claim by a member of the Peerless Trout First Nation alleging that that Nation's Customary Election Regulations were unconstitutional.

Peerless Trout First Nation (PTFN) is described as "a self-governed First Nation in the Treaty 8 Territory of Northern Alberta" (at para 4). Section 74(1) of the *Indian Act*, RSC1951, c 29 empowers the Minister of Indian Affairs and Northern Development to permit a First Nation to develop its own election code for the purposes of electing the Chief and members of Band Council. The PTFN has adopted an election code, the Customary Election Regulations, the relevant provisions of which are as follows:

> 9.3 Electors Eligible for Nomination
>
> (a) All Electors must be 18 years of age or older.
>
> (b) Any Elector convicted of an unpardonable indictable offence or who is charged with an indictable criminal offence at the time of Nomination is not eligible to be Nominated.
>
> (c) Any Elector who is a Plaintiff in a civil action against the PTFN is not eligible to be Nominated.
>
> (d) Electors employed by the PTFN or a PTFN Business Entity are not eligible to be Nominated.

Master Smart noted that *Taypotat* had decided that First Nation election codes are subject to the *Charter* (2013 FCA 192 at paras 34-42). In *Taypotat*, the Federal Court of Appeal considered the application section of the *Charter*, section 32, which provides that the *Charter* applies "(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament…; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province." The Federal Court acknowledged that a First Nation is "clearly a *sui generis* government entity", yet it "exercises government authority within the sphere of federal jurisdiction under the *Indian Act* and other federal legislation" (*Taypotat* at para 36). The Supreme Court had previously held that First Nations elections are subject to the *Charter* (see *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203), and although the *Charter* must be interpreted so as not to "abrogate or derogate

from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada" (see section 25 of the *Charter*), there were no aboriginal or treaty rights at issue in *Taypotat* (at paras 37, 42). For these reasons, the *Charter* was found to apply to the First Nations election code at issue in *Taypotat*. Master Smart did not review these reasons in the specific factual context of the PTFN election code, and simply adopted the holding from *Taypotat* that the *Charter* applied.

Orr's argument was that section 9.3(c) of the Customary Election Regulations – which makes any elector who is a plaintiff in a civil action against the PTFN ineligible to be nominated as a candidate for election – violated several sections of the *Charter*. Master Smart dismissed each of these arguments in turn.

Orr's first argument was that section 9.3(c) of the Customary Election Regulations violated section 2(b) of the *Charter*, which protects freedom of expression. The specifics of this argument were not clear, but Master Smart relied (at para 13) on *Baier v Alberta*, [2007] 2 SCR 673, 2007 SCC 31, which decided that although a prohibition against school employees standing for election as school trustees may have limited access to a platform for expression, it did not violate section 2(b) of the *Charter*. Section 2(b) generally protects against government interference with expression rather than providing a positive right to particular methods or locations for expression, and was therefore not engaged here.

Second, Orr argued that section 9.3(c) of the Customary Election Regulations infringed section 2(d) of the *Charter*, which protects freedom of association. Violations of section 2(d) turn on whether "the state [has] precluded activity because of its associational nature, thereby discouraging the collective pursuit of common goals?" (at para 14, citing *Dunmore v Ontario (Attorney General)*, [2001] 3 SCR 1016, 2001 SCC 94 at para 16). Noting that Orr had not provided the specifics of this argument either, Justice Smart dismissed the claim on the basis that the restriction on eligibility to stand for election did not interfere with Orr's "ability to establish, belong to [or] maintain an association" (at para 16).

Orr's third argument – that section 9.3(c) of the Customary Election Regulations violated section 3 of the *Charter* – was also dismissed. Section 3 protects democratic rights, but has previously been found to apply only to federal and provincial elections (*Haig v Canada*, [1993] 2 SCR 995, 1993 CanLII 58 (SCC)), and not to band council elections (*Crow v Blood Band*, [1996] FCJ No 119 at para 23). A similar dismissal of section 3 *Charter* arguments occurred in *Taypotat* (at paras 27-29).

More attention was devoted to Orr's fourth argument – that section 9.3(c) of the Customary Election Regulations was discriminatory, contrary to section 15(1) of the *Charter* – perhaps because section 15 was also the focus of *Taypotat*. Master Smart noted that the discrimination argument was successful in *Taypotat* on the grounds that the grade 12 education requirement at issue in that case was found to create an adverse impact on the claimant and others based on age and aboriginality-residence. Age is a ground expressly protected under section 15(1) of the *Charter*, and aboriginality-residence qualifies as an analogous ground pursuant to the Supreme Court decision in *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 1999 CanLII 687 (SCC). In Orr's case, however, being a plaintiff in a civil action against the PTFN did not relate to any enumerated grounds protected under section 15(1), nor did it constitute an analogous ground, which includes only personal characteristics that are "immutable

or changeable only at unacceptable cost to personal identity" (*Corbiere* at p219, cited in *Orr* at para 20). Master Smart also found that the restriction on election eligibility in section 9.3(c) of the Customary Election Regulations was not discriminatory – it did not perpetuate any "pre-existing disadvantage, vulnerability, stereotype or prejudice suffered by the Applicant which might support a finding of discrimination" (at para 22).

Finally, Master Smart dismissed Orr's argument that section 9.3(c) of the Customary Election Regulations infringed the protection of aboriginal and treaty rights under section 35 of the *Constitution Act, 1982,* noting that the argument was without basis (at para 24).

We argued in our post on *Taypotat* that there are some strong arguments that the community election code at issue in that case does infringe section 15(1) of the *Charter*. Even if the Supreme Court upholds the Federal Court of Appeal decision in *Taypotat*, however, the arguments made by Orr under section 15(1) are weak in light of the requirement of proving a distinction based on a protected ground that results in discrimination. Orr's other constitutional arguments were similarly weak, and Master Smart's decision to dismiss the claim was a sound one.

First Nations Community Election Codes and the *Charter*

Comments:

Commentator says:

January 22, 2015 at 8:44 pm

> But whether the election regulations are ultra vires on either administrative law grounds or based on s. 96 of the Constitution Act, 1867.
>
> In this case, a member of the band is asked to choose between her right to sue if her rights are violated or her economic interests harmed by the band, on the one hand, and her right to stand for election on the other.
>
> In Trial Lawyers Association of British Columbia v. British Columbia (Attorney General), 2014 SCC 59, the majority held that the Constitution as a whole, does not give the provinces the power to administer justice in a way that denies the right of Canadians to access courts of superior jurisdiction. Any attempt to do so will run afoul of the constitutional protection for the superior courts found in s. 96 of the Constitution Act, 1867. Cromwell J. concurring held that on administrative law grounds, there is a common law right of reasonable access to civil justice that may only be abrogated by clear statutory language.
>
> While the right to stand for office under the Indian Act is not protected by the Charter, it is a right inherent in membership and it is hard to see why it should be forfeited any time the member and her community come into conflict and that dispute goes before the courts.

Jennifer Koshan says:

January 26, 2015 at 6:04 pm

> Thanks for this comment. My post focused on the Charter arguments in this case, but it should be noted that Mr Orr also argued that s9(3)(c) was ultra vires to the extent it prevented legal action against the PTFN council. The court found that the authorities relied on for this argument "do not support the suggestion that there is a fundamental right to bring legal action against governments under or arising from the Canadian Constitution or Charter." The Trial Lawyers Association decision was not cited, and it may well be that it would have made a difference to the outcome.

Commentator says:

January 26, 2015 at 7:47 pm

> A pure administrative law argument would have had to be made before the Federal Court — only a constitutional issue could give the Court of Queen's Bench jurisdiction, since a band council is a federal board.

May 29, 2015

The Supreme Court's Latest Equality Rights Decision: An Emphasis on Arbitrariness

By: Jennifer Koshan and Jonnette Watson Hamilton

Case Commented On: *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 (CanLII)

The Supreme Court released its decision in *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 yesterday. We commented on the Federal Court of Appeal decision in the case here. *Taypotat* was one of two appeals concerning adverse effects discrimination under section 15(1) of the *Charter* heard by the Supreme Court in October 2014, the other being *Carter v Canada (Attorney General)*, 2015 SCC 5. The Supreme Court declined to rule on the section 15(1) issue in *Carter* (see here; see also the Court's decision not to address section 15 in last week's ruling in *R v Kokopenace*, 2015 SCC 28 (CanLII), a case involving the representativeness of juries for Aboriginal accused persons). However, the Court did not have the option of avoiding section 15 in *Taypotat*. In a unanimous judgment written by Justice Abella, the Court held that the adverse effects claim in *Taypotat* was not established by the evidence.

The *Taypotat* case involved a community election code adopted by the Kahkewistahaw First Nation in Saskatchewan to govern elections for the positions of Chief and Band Councillor. The code restricted eligibility for these positions to persons who had at least a Grade 12 education or the equivalent. Louis Taypotat had previously served as Chief for a total of 27 years, but the new Kahkewistahaw election code excluded him from standing for election because he did not have a Grade 12 education. Currently 76 years old, Taypotat attended residential school until the age of 14 and was assessed at a Grade 10 level. He also holds an honorary diploma from the Saskatchewan Indian Institute of Technology recognizing his service to the community. In an application for judicial review, Taypotat challenged the eligibility provision under section 15(1) of the *Charter*. He was unsuccessful at the Federal Court level (2012 FC 1036), but the Federal Court of Appeal allowed his appeal (2013 FCA 192).

Commenting on the decisions of the courts below, Justice Abella focuses on the first step of the test for discrimination under section 15(1) of the *Charter*, whether the law or policy draws a distinction based on an enumerated or analogous ground. She notes that in his initial judicial review application, Taypotat argued that the Grade 12 educational requirement violated section 15(1) because "educational attainment is analogous to race and age" (at para 10). On appeal, he re-framed his challenge to focus on "residential school survivors without a Grade 12 education" as an analogous group under section 15(1) (at para 12). Justice Abella has this to say about the Federal Court of Appeal decision (at para 13, emphasis added):

> It did not deal explicitly with the argument that residential school survivors without a Grade 12 education constituted an analogous group for the purposes of s. 15, but concluded instead, *even though it was not pleaded*, that the education requirement had a discriminatory impact on the basis of age. In addition, *without anyone having raised* the

> issue, it found the education requirement discriminated on the basis of "residence on a reserve".

After identifying this procedural problem, she then summarizes the Court's holding at para 14 (emphasis added):

> While facially neutral qualifications like education requirements *may well be a proxy for, or mask, a discriminatory impact*, this case falls not on the existence of the requirement, but on the absence of any evidence linking the requirement to a disparate impact on members of an enumerated or analogous group.

The Court's approach to the test for discrimination, and its treatment of the evidence in the case, are noteworthy in several respects.

To begin with the passage above, Justice Abella correctly identifies this case as one of adverse effects discrimination. However, her statement that "education requirements *may well be a proxy for, or mask, a discriminatory impact*" is misleading — adverse effects cases are ones where it is the discriminatory *intent* that is masked, which is why the focus must be on the effects or impact of the law on the individual or group concerned.

Justice Abella goes on to note (at para 16) that the Court's most recent articulation of the approach to discrimination was "clarified" in *Quebec (Attorney General) v A*, [2013] 1 SCR 61 (an interesting characterization given the Court's 5:4 split in that case, with four sets of reasons). Justice Abella refers to her reasons for the majority on the section 15(1) issue in *Quebec v A* for the point that the equality section requires a "flexible and contextual inquiry into whether a distinction has the effect of *perpetuating arbitrary disadvantage* on the claimant because of his or her membership in an enumerated or analogous group" (at para 331, emphasis added). Her judgment in *Taypotat* goes on to use the term "arbitrary" an additional five times. Arbitrary is used as a modifier of the term "disadvantage", as well as a synonym for "discriminatory" (see e.g. para 20, where Justice Abella refers to "arbitrary — or discriminatory — disadvantage.").

We have been critical of the Court's use of the term "arbitrary disadvantage" in section 15 cases (see here and here), as well as in its human rights jurisprudence (see here), where the test for discrimination has been influenced by the Court's approach under the *Charter*. A consideration of arbitrariness in discrimination claims is problematic, as it focuses on the *purpose* of the government's action rather than its *effects*. This is a particular problem in adverse effects discrimination cases, because the neutral laws and policies that are the subject of these claims can only be assessed as discriminatory in light of their *effects*.

A focus on arbitrariness also improperly imports section 1 *Charter* considerations into section 15(1), shifting the burden to the claimant to disprove the arbitrariness of government action rather than requiring the government to prove the rationality of its action. This has been an issue since at least the Court's decision in *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, where the "correspondence factor" necessitated consideration of whether the law corresponded with the claimant's actual needs, capacities and circumstances, essentially a consideration of arbitrariness. While the Court does not refer to its earlier decision in *Law v Canada* in *Taypotat*, it does use the language of the correspondence factor at para 20, asking "whether the impugned law *fails to respond to the actual capacities and needs* of the members of the group" (emphasis added).

Interestingly, in *Quebec v A* Justice Abella only used the term "arbitrary" once, and we queried whether that was a slip of the pen in light of her decision's broad focus on discrimination as the perpetuation of disadvantage (see here). But *Taypotat* suggests that her usage of the term was quite intentional, and that the Court continues to view discrimination as requiring proof of arbitrariness (see also Justice Abella's post- *Quebec v A* decision in *McCormick v Fasken Martineau DuMoulin LLP*, 2014 SCC 39 (CanLII), a human rights case where she uses the language of arbitrary discrimination).

At other points in her judgment, Justice Abella articulates the approach to discrimination more broadly, without reference to arbitrariness:

> [Substantive equality] is an approach which recognizes that *persistent systemic disadvantages* have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that *perpetuates those disadvantages* (at para 17, emphasis added).

And:

> The s. 15(1) analysis is accordingly concerned with the *social and economic context* in which a claim of inequality arises, and with the *effects* of the challenged law or action on the claimant group: *Quebec v A*, at para. 331 (at para 18, emphasis added).

These statements of the approach to discrimination, with their broad focus on context, systemic disadvantage and the effects of government actions, are more in keeping with a substantive approach to equality. They also make it clear that the Court's references to disadvantage are actually to *historic disadvantage*, with discrimination requiring proof of the law's *perpetuation* of that historic disadvantage for the group in question.

This is confirmed by Justice Abella's statement that the focus of step 2 of the test for a violation of section 15(1) — which is whether the distinction based on a protected ground at step 1 of the test results in discrimination — should be on whether the law "imposes burdens or denies a benefit in a manner that has the effect *of reinforcing, perpetuating or exacerbating their disadvantage*" (at para 20, emphasis added).

Justice Abella's articulation of step 2 of the test for discrimination in *Taypotat* is also notable because there is no reference to "prejudice or stereotyping" here or elsewhere in the judgment. Prejudice and stereotyping were the focus of step 2 of the test prior to *Quebec v A* (see *R v Kapp*, [2008] 2 SCR 483, 2008 SCC 41 (CanLII); *Withler v Canada (Attorney General)*, [2011] 1 SCR 396, 2011 SCC 12 (CanLII)), as well as in the dissenting reasons under section 15(1) in *Quebec v A*.

Another significant aspect of the *Taypotat* judgment is Justice Abella's statement of the sort of evidence that will be required to prove an adverse effects discrimination claim (at para 33, emphasis added):

> … statistical evidence is [not] invariably required to establish that a facially neutral law infringes s. 15. *In some cases, the disparate impact on an enumerated or analogous group will be apparent and immediate*. The evidence in this case, however, does not point to any such link between the education requirement and a disparate impact on the basis of an enumerated or analogous ground.

The Court acknowledges that "education requirements for employment could, in certain circumstances, be shown to have a discriminatory impact" (at para 23), citing *Griggs v Duke Power Company*, 401 US 424 (1971), where the United States Supreme Court found that an employer's requirement that employees have a high school diploma disproportionately excluded African Americans from positions in a power plant. Justice Abella notes the USSC's metaphor that when employment requirements "are unrelated to measuring job capability [they] can operate as "built-in headwinds" for minority groups, and will therefore be discriminatory" (at para 21, quoting *Griggs* at 432).

The Court's reference to *Griggs* is problematic, as U.S. discrimination law — especially in the context of private actors such as employers — is notorious for requiring either proof of intentional discrimination or statistical proof of disparate impact discrimination, putting a heavy burden on claimants in both kinds of cases. It is telling that the Court felt the need to turn to American law to offer an example of a successful adverse impact claim, as there is a scarcity of such claims in Canada (see here and our discussion below).

As for the evidence in *Taypotat*, the problem, according to Justice Abella, was that there was "virtually no evidence about the relationship between age, residency on a reserve, and education levels in the Kahkewistahaw First Nation to demonstrate the operation of such a "headwind"" (at para 24). The Court was not prepared to accept the statistical evidence relied on by the Federal Court of Appeal, which was not specific to the Kahkewistahaw First Nation, and, in the Court's view, did not establish sufficient discriminatory impact of the education requirement on the basis of residence on a reserve or age. Although it indicates that all the claimant must prove is a *prima facie* breach (at para 34), which is language usually reserved for the human rights context rather than the *Charter*, the Court does not acknowledge the burden on the claimant of proving the adverse effects of an education requirement within his own small community of 2,000 people. This would presumably require a sociological study of some kind, or evidence of the adverse impact of similar requirements in other First Nations communities. The Court seems to have been influenced by the fact that Taypotat was Chief while the consultations for the education requirement were being debated in the community (see paras 2, 5, and 7), leading the Court to express concerns about "put[ting] the Kahkewistahaw First Nation to the burden of justifying a breach of s. 15" (at para 34).

The Court also declined to consider whether the education requirement discriminated against "older community members who live on a reserve", noting that Taypotat had not framed his claim based on that intersection between grounds initially, and there was therefore no evidence on it (at para 33). Moreover, despite the Court's emphasis on systemic discrimination and context, the residential school setting of Taypotat's education and its connection to his age was not addressed, except for the point that this argument had not been raised by the claimant in the first instance (see paras 12-13). The Court thus missed an important opportunity to comment on the intersection amongst several grounds of discrimination, an underdeveloped area in the Court's jurisprudence. This is a particularly significant omission for Aboriginal equality claimants, whose claims often engage multiple, intersecting grounds of discrimination.

Taypotat is only the ninth adverse effects discrimination decision under the *Charter* from the Supreme Court in the last 30 years, and the number of successful adverse effects claims still stands at only two (see *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, 1997 CanLII 327 (SCC); *Vriend v Alberta*, [1998] 1 SCR 493, 1998 CanLII 816 (SCC)). In our review

of the Court's adverse effects discrimination case law (here), we identified a number of problems arising in this type of case: more burdensome evidentiary and causation requirements and assumptions about choice, the reliance on comparative analysis, acceptance of government arguments based on the "neutrality" of policy choices, the narrow focus on discrimination as prejudice and stereotyping, and the failure to "see" adverse effects discrimination, often as a result of the size or relative vulnerability of the group or sub-group making the claim.

The Court's decision in *Taypotat* only deals with some of these issues of concern. First, and as noted above, the Court states that statistical evidence will not always be required to establish that a facially neutral law violates section 15(1), although its absence was fatal in this case. Second, the Court seems to reference causation when it states that "The evidence before us … does not rise to the level of *demonstrating any relationship* between age, residence on a reserve, and education among members of the Kahkewistahaw First Nation, let alone that arbitrary disadvantage results from the impugned provisions" (at para 34, emphasis added). This passage suggests that claimants will continue to be held to fairly onerous causation requirements in adverse effects discrimination cases, hinting at the need for a direct link between the law and the disadvantage and a dominant role for the law in causing the disadvantage. A third problem — the Court's previous reliance on prejudice and stereotyping as the primary harms of discrimination, which are difficult to prove in adverse effects cases — may be alleviated somewhat by the Court's current focus on the perpetuation of historical disadvantage. Nevertheless, Justice Abella's multiple references to "arbitrary disadvantage" continue to concern us for the reasons stated above.