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# "Arbitrary Disadvantage": A Slip of the Pen or Something More?

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**Case commented on:** *McCormick v Fasken Martineau DuMoulin LLP*, 2014 SCC 39

I have written several ABlawg posts on the test for discrimination under human rights legislation (see e.g. here, here and here). The ongoing issue in this series of cases is the extent to which the test for violations of equality rights under section 15 of the *Charter* should influence the approach in the human rights sphere. In the Supreme Court's most recent human rights decision, *McCormick v Fasken Martineau DuMoulin LLP*, 2014 SCC 39 (CanLII), the Court continues to muddy the waters on the appropriate test. Linda McKay Panos has already written about the *McCormick* case and its implications for employment related complaints of discrimination here. As she noted in that post I have a few things to say about the case as well.

First, let me review the tensions when it comes to the test for discrimination. The traditional approach under human rights legislation has been to require the complainant to prove a *prima facie* case of discrimination, after which the burden shifts to the respondent to refute the claim or raise a defence. This approach was established by the Supreme Court in the early 1980s in cases such as *Ontario Human Rights Commission v Etobicoke*,[1982] 1 SCR 202 at 208, and *Ontario Human Rights Commission and O'Malley v Simpsons-Sears*, [1985] 2 SCR 536 at para 28 (*O'Malley)*. Under this approach, what the complainant had to prove was that the conduct of the respondent had the effect of imposing "obligations, penalties, or restrictive conditions not imposed on other members of the community" (*O'Malley* at para 12). When the Supreme Court was first called upon to develop its approach to constitutional equality rights under section 15 of the *Charter*, *O'Malley* provided the Court with guidance, leading to a broad interpretation of *Charter* equality rights (see *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143).

Fast forward to the end of the 1990s, and the Supreme Court's approach to section 15 of the *Charter* underwent a major shift in *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497. In *Law*, the Court focused on the violation of "human dignity" as the measure of discrimination, and whether there was a violation of human dignity was assessed according to several contextual factors, including "[t]he correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others" (*Law* at para 88). In its application, the "correspondence" factor imported considerations of the rationality / arbitrariness of government laws and policies into section 15 determinations, and often made it very difficult to prove claims of discrimination (see Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" (2001) 80 Can Bar Rev 299 at 322 – 328, citing e.g. *Granovsky v Canada (Minister of Employment and Immigration)*, [2000]

1 SCR 703, 2000 SCC 28 and Lovelace v. Ontario, [2000] 1 SCR 950, 2000 SCC 37; see also *Gosselin v. Quebec (Attorney General)*, [2002] 4 SCR 429, 2002 SCC 84).

As a result of the difficulties with *Law*, many complainants turned to human rights legislation for claims of discrimination in government service provision rather than pursuing those claims under the *Charter* (see Claire Mummé, "At the Crossroads in Discrimination Law: How the Human Rights Codes Overtook the *Charter* in Canadian Government Services Cases" (2012) 9 JL & Equality 103 at 105). Human rights tribunals and courts then began to use the *Law* test for discrimination under human rights legislation, especially in government services cases. The rationale for this approach was that governments should not face different tests for discrimination depending on whether the claim was brought under the Charter or human rights legislation (see e.g. *Gwinner v Alberta (Human Resources and Employment)*, 2002 ABQB 685 at para 103, aff'd 2004 ABCA 210; leave to appeal denied, [2004] SCCA No 342. See also *Alberta (Minister of Human Resources and Employment) v Weller*, 2006 ABCA 235, leave to appeal denied [2006] SCCA No 396; *British Columbia Government and Service Employees' Union v British Columbia (Public Service Employee Relations Commission)*, 2002 BCCA 476; *Braithwaite v Ontario (Attorney General)* (2007), 88 OR (3d) 455, 62 CHRR D/315 (Div Ct)).

The influence of the *Law* test could be seen even in cases that did not involve government services, however. At the Supreme Court level, Justice Abella's concurring opinion in *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] 1 SCR 161 defined discrimination as "the understanding that a… practice, standard, or requirement cannot disadvantage an individual by attributing *stereotypical or arbitrary* characteristics… The essence of the discrimination is in the *arbitrariness* of its negative impact, that is, the *arbitrariness* of the barriers imposed, whether intentionally or unwittingly" (at para 48, emphasis added). Justice Abella's opinion in *McGill* was referenced by a majority of the Supreme Court in *Honda Canada Inc v Keays*, 2008 SCC 39, [2008] 2 SCR 362, where it found that there was no discrimination at play because "[t]here is *no stereotyping or arbitrariness* here" (at para 71, emphasis added). Lower courts have followed this reliance on stereotyping and arbitrariness in several human rights cases (see e.g. *British Columbia (Public Service Agency) v British Columbia Government and Service Employees' Union*, 2008 BCCA 357, leave to appeal denied [2008] SCCA No 460; *Armstrong v British Columbia (Ministry of Health)*, 2010 BCCA 56); *Ontario (Disability Support Program) v Tranchemontagne*, 2010 ONCA 593; *Wright v College and Association of Registered Nurses of Alberta (Appeals Committee)*, 2012 ABCA 267, leave to appeal denied, 2013 CanLII 15573 (SCC)).

The Supreme Court's approach to section 15 of the *Charter* came to focus on stereotyping and prejudice, while maintaining the relevance of the correspondence factor (and thus considerations of arbitrariness – see *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483). This focus also influenced the test for discrimination in human rights cases, with some cases adding prejudice as an aspect of the test (see e.g. *Tranchemontagne* at para 95).

This was the state of play when the Supreme Court decided *Moore v British Columbia (Education)*, 2012 SCC 61 in late 2012. As I noted in a previous post, Justice Abella, writing for a unanimous Court in *Moore*, declined to explicitly clarify the proper test for discrimination under human rights legislation, yet implied that the traditional *prima facie* approach to discrimination is correct. According to Justice Abella, "to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the

service; and that the protected characteristic was a factor in the adverse impact" (*Moore* at para 33). However, echoing her judgment in *McGill*, Justice Abella referred to arbitrariness at several points in her judgment: "the focus is always on whether the complainant has suffered *arbitrary adverse effects* based on a prohibited ground" (at para 59, emphasis added); "[t]he question in every case is the same: does the practice result in the claimant suffering *arbitrary — or unjustified — barriers* on the basis of his or her membership in a protected group. Where it does, *discrimination will be established*" (at para 60, emphasis added; see also paras 26 and 61).

These references to arbitrariness are problematic in the context of a *prima facie* test for discrimination, as they suggest that government rationales and policy objectives are relevant to whether there is discrimination. Under the traditional approach, the objectives of government (or other respondents such as employers) would only be considered after the burden shifted to the respondent. Yet in *Moore*, Justice Abella suggested that it was appropriate that the government's objectives and goals in delivering educational services should inform the question of whether there was discrimination (at paras 37-39). To the extent that the government's conduct is assessed for discrimination in terms of whether its delivery of a particular service (for example education) comports with its objectives, this is a consideration of arbitrariness.

However, in a number of appellate decisions post-*Moore*, the case has been cited as support for the traditional *prima facie* approach to discrimination without any discussion of the role of arbitrariness or the preceding debate about the appropriate test. For example, in *Telecommunications Workers Union v Telus Communications Inc.*, 2014 ABCA 154, a claim of disability discrimination in the employment context, the Alberta Court of Appeal indicated that the three step test articulated in *Moore* is the proper approach for adverse effects discrimination cases, thus overturning the lower court's ruling that an employer's conduct cannot be found discriminatory unless it had knowledge that the employee had a disability requiring accommodation (at paras 28-29). See also *NWT (WCB) v Mercer*, 2014 NWTCA 1 at para 42, holding that "a claimant seeking to establish *prima facie* discrimination in the provision of services need not establish the purpose behind the allegedly discriminatory conduct" (and see here for more discussion of that decision).

We also have the Supreme Court's latest *Charter* equality rights decision in *Quebec (Attorney General) v A*, 2013 SCC 5 to consider. Writing for the majority on section 15, Justice Abella indicated that prejudice and stereotyping should be seen as simply two indicia of discrimination rather than as crucial factors, and focused more on disadvantage and historical disadvantage in her reasons (at paras 325-8). Justice Abella reverted to the language of "arbitrary disadvantage" at one point in her judgment (at para 331), and Jonnette Watson Hamilton and I queried whether this reference was a "slip of the pen" rather than evidence of intent to retain a focus on arbitrariness in the test for discrimination (Jennifer Koshan and Jonnette Watson Hamilton, "The Continual Reinvention of Section 15 of the *Charter*" (2013) 64 UNB LJ 19 at note 209). However, the language of arbitrary disadvantage is back once again in *McCormick*.

As noted in the McKay Panos post, *McCormick* involves the issue of whether an equity partner in a law firm was covered by the protections against discrimination in employment under British Columbia's *Human Rights Code*, RSBC 1996, c 210. Writing for a unanimous Court, Justice Abella finds that whether someone is in an employment relationship for the purposes of the *Code* should focus on "control exercised by an employer over working conditions and remuneration, and corresponding dependency on the part of a worker … The more the work life of individuals is controlled, the greater their dependency and, consequently, their economic, social and psychological vulnerability in the workplace" (at para 23). In the case at hand, McCormick's role

as an equity partner in a law firm was such that he was "someone in control of, rather than subject to, decisions about workplace conditions. As an equity partner, he was part of the group that controlled the partnership, not a person vulnerable to its control" (at para 39).

Because McCormick was not in an employment relationship with his law firm, the case never reached the stage of addressing whether the partnership's mandatory retirement requirement was discriminatory. Justice Abella's comments about discrimination are thus *obiter*, but in light of her repeated references to arbitrariness in the earlier case law, they are nevertheless of interest. Early on in *McCormick*, Justice Abella states that the purposes of human rights legislation "include the prevention of *arbitrary disadvantage or exclusion* based on enumerated grounds, so that individuals *deemed to be vulnerable* by virtue of a group characteristic can be protected from discrimination" (at para 18, emphasis added). Then, near the end of the judgment, she writes "While this case does not require us to decide the point, the duty of utmost good faith in a partnership may well capture some forms of discrimination among partners that represent *arbitrary disadvantage"* (at para 48).

It is becoming difficult to see these references to arbitrary disadvantage as slips of the pen. But I am wondering if there is a different way to cast Justice Abella's usage of this language that is more in keeping with a substantive approach to discrimination. Given Justice Abella's focus on disadvantage in *Quebec v A* and on vulnerability in *McCormick*, might it be the case that her use of the term arbitrariness is meant to incorporate these notions rather than the rationality of government laws and policies (i.e. the old correspondence factor)? In other words, perhaps arbitrary disadvantage is meant to capture those distinctions that deprive vulnerable and historically disadvantaged individuals and groups from access to social benefits (or impose differential burdens on them) in ways that are arbitrary in light of the overall purpose of human rights legislation in protecting the interests of such groups. This could be contrasted to distinctions drawn in relation to more advantaged individuals, whereby the denial of benefits to or imposition of burdens on them would not be arbitrary in light of the purpose of human rights legislation.

If Justice Abella's references to arbitrariness are focused on the purpose of human rights laws (and section 15 of the *Charter* for that matter) rather than the specific objectives behind the impugned government laws or policies, that would be much more in line with substantive equality principles. It would also be more in line with the traditional *prima facie* test for discrimination, as that test focuses on protected grounds (which generally map to vulnerability and disadvantage), adverse treatment, and the link between the two. However, there may be cases like *McCormick* where the test for discrimination would not be made out if my take on Justice Abella's use of arbitrariness is correct. Assuming that McCormick had passed the employment relationship hurdle, he would have had no difficulty meeting the requirements of the *prima facie* test as stated by Abella J in *Moore*: he had a characteristic protected from discrimination (age); he experienced an adverse impact with respect to employment (termination); and the protected characteristic was a factor in the adverse impact (terminated because of age). But since he was not a vulnerable employee (in spite of his age), this was not an arbitrary disadvantage in light of the purposes of the *Code*. Arbitrary disadvantage may therefore add an extra element to the *prima facie* test for discrimination, even if it is more in keeping with substantive equality principles generally.

I may be grasping at straws here, but Justice Abella does seem committed to a fulsome approach

to human rights and so I am struggling to understand her intentions in this context. I do think it is fair to conclude that her use of the term arbitrariness has caused sufficient confusion that it is incumbent upon the Court to provide some clarification. Otherwise, respondents will continue to argue that their specific policy objectives should play a role in the consideration of whether there is discrimination, and lower courts may continue to accept these sorts of arguments in negating claims of discrimination before they get past the *prima facie* stage.