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# STATUTORY HUMAN RIGHTS AND SUBSTANTIVE EQUALITY – WHY AND HOW TO AVOID THE INJURY OF THE *LAW* APPROACH

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## Introduction

LEAF is a national, federally incorporated, non-profit advocacy organization founded in April, 1985 to secure equal rights for Canadian women as guaranteed by the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). To this end, LEAF engages in equality rights litigation, research, and public education. Commencing with LEAF's work in the Supreme Court of Canada case of *Andrews v. British Columbia*,[1] LEAF has contributed to the development of equality rights jurisprudence and the meaning of substantive equality in Canada. LEAF has developed and advocated equality rights arguments in contexts where sex inequality is compounded by other prohibited grounds of discrimination such as race, class, aboriginal status, sexual orientation and/or disability.

The National Legal Committee (NLC) of LEAF is concerned by what it sees as a shift away from a substantive equality analysis in recent equality jurisprudence. This shift flows, in the Committee's opinion, from the test set by the Supreme Court of Canada in the case of *Law v. Canada*[2]. That test obscures the meaning of equality and creates unnecessary hurdles for section 15 equality claimants. The problems with the test are apparent in many post-*Law* cases[3]. Recently there has been cause for concern that the *Law* test is being imported into the human rights context. The LEAF NLC identified the need to examine the importation of the *Law* test into human rights jurisprudence, and the displacement of the *prima facie* test for discrimination in the human rights context. In May, 2005 LEAF hosted a national consultation attended by approximately 25 people, all experts in equality rights and human rights practice and theory. The main topic of discussion at this consultation was whether the discrimination test should be the same or different within the *Charter* and human rights contexts and why; and whether the *Law* test for discrimination should be imported into the human rights context or vice versa. The first draft of this paper was used to inform discussion at the consultation; the final draft of this paper has been revised to incorporate the discussion engaged in at the consultation.

## I. Overview of LEAF's Position: The *Law* Test should not be Imported into the Staturory Human Rights Context

This paper is part of LEAF's on-going involvement in the theory and practice of equality rights in law. It is timely for a number of reasons. In the *Charter* context, the interpretation of s. 15 has evolved in ways that are of serious concern to LEAF and other equality-seeking groups. There is a consensus among theorists and practitioners that the *Law* test has moved away from a

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[1] [1989] 1 S.C.R. 892 [*Andrews*].
[2] [1999] 1 S.C.R. 497 [*Law*].
[3] See for example *Gosselin* v. *Quebec (Attorney General)*, [2002] 4 S.C.R. 429 [*Gosselin*]; *Lavoie* v. *Canada*, [2002] 1 S.C.R. [*Lavoie*]; *Granovsky* v. *Canada (Ministry of Employment and Immigration)*, [2000] 1 S.C.R. 703 [*Granovsky*]; *Trociuk* v. *British Columbia (Attorney General)*, [2003] 1 S.C.R. 835 [*Trociuk*]; *Lovelace* v. *Ontario*, [2000] 1 S.C.R. 950 [*Lovelace*]; *Hodge* v. *Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357 [*Hodge*].

substantive approach to equality by imposing legal burdens that are inconsistent with substantive equality and that have narrowed the scope of the legal protection available under s. 15 of the *Charter*. At the same time, there is growing interest in pursuing equality rights claims under human rights statutes and in working to address the enforcement problems associated with statutory human rights. Some parties to proceedings under human rights statutes are now arguing that the *Law* test for discrimination can or must be imported into the statutory human rights context. It is expected that the Supreme Court of Canada will soon be asked to address the question of whether or not the *Law* test can and should be followed under human rights statutes.

This paper focuses on the question of the importation into claims of discrimination under human rights legislation of the test for discrimination that has developed in the *Charter* context.[4] LEAF concludes that there is no support among equality advocates for importing the *Law* approach into the analysis of claims under human rights statutes, given the concerns about how the *Law* analysis undermines a substantive approach to anti-discrimination. LEAF also concludes that there is no legal doctrine that requires the *Law* test to be imported into statutory human rights law. Human rights statutes and s. 15 of the *Charter* share the same general goal, namely, to remedy social inequalities. At the same time, there are significant differences in context, legal principles, legal status and structure between human rights statutes and the Constitution. These differences provide additional reasons for rejecting the importation of the *Law* test in the statutory human rights context. These differences also support the conclusion that it is not necessary to apply the same approach to implementing anti-discrimination rights under human rights statutes and s. 15 of the *Charter*.

It is LEAF's position that only those legal principles that further a substantive approach to equality should govern the interpretation of rights under both human rights statutes and s. 15 of the *Charter*. This paper does not consider whether a different relationship between s. 15 *Charter* principles and statutory human rights principles might be appropriate if the problems with the *Law* approach were addressed and remedied. This question is highly abstract and hypothetical while the *Law* approach remains in place. LEAF generally prefers an approach to legal analysis that is grounded in concrete and specific realities, rather than abstract and hypothetical questions. LEAF believes that it would not be helpful, and could be harmful, to speculate on whether a different approach to s. 15 of the *Charter* could be appropriately imported into statutory human rights enforcement, without knowing what that different approach might be and might entail. From LEAF's perspective, it remains an open question as to whether, in the absence of the development of a more appropriate approach to s.15 analyses, the importation of a s.15 analysis into the human rights context would be helpful.

LEAF also observes that there is a tendency for legal tests to be treated as rigid formulas that are to be mechanically applied. Such tests and rigid analyses often do not help a decision maker to

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[4] Claims of discrimination under human rights legislation and the *Charter* may be decided by adjudicative bodies other than human rights administrative tribunals and courts. In the employment context, for example, human rights issues are often decided by labour arbitrators appointed to hear grievances under collective agreements. The recent Ontario decision importing the *Law* approach into human rights, *Ontario Secondary School Teachers' Federation v. Upper Canada District School Board* (2005), 78 O.R. (3d) 294 (Div.Ct.); application for leave to appeal to the Ontario Court of Appeal dismissed [*Upper Canada*], which is discussed in Part IV.D below, was made in a case first decided by a labour arbitration board in the context of a grievance under a collective agreement.

analyze and understand the complex experiences of discrimination, and therefore should be avoided in favour of a more flexible analytical approach. In this paper, therefore, LEAF uses the term "approach" to discrimination as well as "test" for discrimination, in order to emphasize the importance of maintaining a non-formulaic perspective on substantive equality rights.

## II. Context for a Relationship Between Human Rights Laws and Section 15 of the *Charter*

In *Andrews v. Law Society of British Columbia*[5], its first decision interpreting s. 15 of the *Charter*, the Supreme Court of Canada drew a jurisprudential link between statutory human rights and constitutional equality rights. The purpose for which the Court drew on human rights law in *Andrews* was to guide a substantive approach to interpreting the *Charter*'s equality rights provision. Textual similarities between s. 15 of the *Charter* and statutory human rights provisions support an argument that human rights statues and s. 15 of the *Charter* share the same general goal and objective – that is, to make available legal avenues to seek remedies for social inequalities. At the same time there are differences between human rights statutes and the Constitution that can have implications for how the goal of substantive equality is pursued under these two legal regimes.

This section of the paper discusses how the Supreme Court of Canada drew on human rights principles to inform a substantive approach to equality under s. 15 but also signaled the differences between the two legal regimes.

### A. Conceptual Links: Equality and Discrimination

### 1. Discrimination under Human Rights Statutes

The Canadian statutes that we now call human rights legislation were passed in the 1960s and 1970s. The *Canadian Human Rights Act* applies in the federal jurisdiction, and each province and territory has its own human rights legislation. "Discrimination" is the central legal concept in Canadian human rights statutes.[6] Indeed, these statutes are sometimes referred to as "anti-

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[5] *Supra* note 1. The analytical framework for interpreting s. 15 of the *Charter* is set out in the reasons of McIntyre J. Justice McIntyre dissented from the majority's conclusion that that is not justifiable under s. 1 to make citizenship a requirement for admission to the Bar. However, the majority agreed with his framework for analyzing s. 15. In concurring s. 15 reasons, Justice LaForest clarified that he agreed with McIntyre J.'s reasoning as it applied to the role of discrimination within s. 15, but stated that he also wanted to leave the door open to an interpretation of s. 15 that would extend beyond protection against discrimination through the application of law.

[6] Although discrimination is a focal concept in human rights law, it is not the only concept through which human rights statutes define the conduct they seek to remedy. All human rights statutes create prohibitions against discrimination. However, in some statutes the conduct prohibited is also expressed in more specific terms. For example, British Columbia *Human Rights Code*, R.S.B.C. 1996, c.210, includes a prohibition against the denial of accommodation, services, facilities or tenancy on the basis of prohibited grounds of discrimination [s. 8]; a prohibition against refusal to employ or to continue to employ on the basis of prohibited grounds of discrimination [s. 13]; and a prohibition against exclusion, suspension or expulsion from membership in the case of trade unions, employers associations and professional associations [s. 14]. The Alberta *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c.H-14 includes similar provisions under the heading "Code of Conduct": ss.4-9.

discrimination" legislation. "Equality" is generally not an expressly-stated legal concept in the substantive provisions of most Canadian human rights statutes, the Ontario *Human Rights Code* being one exception.[7] Many Canadian statutes incorporate the Preamble to the *Universal Declaration on Human Rights*, which uses the language of equal rights. However, the concept of equality is generally understood to be linked with the goals of human rights legislation.

Even though there has been anti-discrimination legislation in Canada for over forty years, there is no widely used statutory definition of discrimination and no definition was attempted in s. 15 of the *Charter*. Most Canadian human rights statutes do not include a statutory definition of "discrimination". Where a definition is included, it typically links discrimination with adverse treatment on the basis of prohibited grounds of discrimination. For example, the *Canadian Human Rights Act* defines "discriminatory practices" as practices by which an individual is either excluded from participation or is subject to <u>adverse differentiation</u> on the basis of one or more prohibited grounds of discrimination.[8]

Prior to the Supreme Court of Canada's articulation of a definition of discrimination in *Andrews*, there was also no widely accepted definition of discrimination in human rights jurisprudence. The onus on claimants under human rights statutes has not generally been framed with reference to a definition of discrimination. It has been described instead as an onus to establish a "*prima facie*" case. Once a *prima facie* case has been established, the evidentiary burden shifts to the respondent to seek to establish a defence. Human rights caselaw defines a "*prima facie*" case as "... one which covers the allegations made, and which, if believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent."[9] As the Federal Court of Appeal recently observed, the definition of a *prima facie* case in human rights caselaw does not provide a definition of discrimination:

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[7] In the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19, the legal provisions are structured as rights to equal treatment without discrimination on the basis of prohibited grounds: ss. 1-9.

[8] *Canadian Human Rights Act* R.S.C. 1985, c.H-6, s. 39. The Manitoba *Human Rights Code*, C.C.S.M. c.H175, defines discrimination to mean: "(a) <u>differential treatment</u> of an individual on the basis of the individual's actual or presumed membership in or association with some class or group of persons, rather than on the basis of personal merit; or (b) <u>differential treatment</u> of an individual or group on the basis of any characteristic referred to in subsection (2); <u>or differential treatment</u> of an individual or group on the basis of the individual's or group's actual or presumed association with another individual or group whose identity or membership is determined by any characteristic referred to in subsection (2);...[8]. The Quebec *Charter of Human Rights and Freedoms*, R.S.Q. c.C-12, provides that "Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap" and that "Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right." The *Nova Scotia Human Rights Act*, R.S.N.S. 1989, c. 214, provides the following definition: "For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.": s. 4. The definition in the Yukon *Human Rights Act*, R.S.Y 2002, c.116 is the most simple: It is discrimination to treat any individual or group unfavourably on any of the following grounds ...": s. 7.

[9] *Ontario Human Rights Commission and O'Malley v. Simpson Sears Limited*, [1985] 2 S.C.R. 536 at 558 [*O'Malley*].

> "Turning to the meaning of "discrimination" under human rights legislation, McIntyre J. stated in *O'Malley*, above, that the burden of proving discrimination lies on the complainant. The complainant must make out a *prima facie* case, which is one that "covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent" (at page 558). While this passage is widely cited as a definition of discrimination, it is really a rule of evidence and procedure. It does not actually state what discrimination is."[10]

Broadly speaking, a *prima facie* case is established where the claimant can demonstrate disadvantageous treatment related to one or more prohibited grounds of discrimination. For the most part, tribunals interpreting human rights legislation have afforded it a suitably broad and purposeful analysis. Reviewing court decisions have been more problematic, although those cases that have reached the Supreme Court of Canada have also received a broad and purposeful application. The main problem with human rights legislation as a tool to address inequality has been the handling of complaints by human rights commissions, most of which have the power to decide whether or not a case gets a hearing. Nevertheless, not every claim of disadvantageous treatment that reaches a hearing is successful. Some claims are dismissed because the adjudicative body concludes that there is no disadvantageous treatment. Other claims are dismissed because the adjudicative body concludes that the disadvantageous treatment is not connected with a prohibited ground of discrimination.

## 2. Discrimination under Section 15 of the *Charter*

The text of s. 15 of the *Charter* is structured as a right to equality without discrimination:

> **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.

In *Andrews*, the Court canvassed three possible approaches to interpreting s. 15(1). One approach would be to treat each and every distinction as an infringement calling for justification, regardless of whether or not the distinction was connected to a prohibited of discrimination. The Court rejected this approach, saying that it would trivialize the rights guaranteed by s. 15, that it would deprive discrimination of the meaning suggested by the enumerated grounds of discrimination, and that it would require the government to justify legislative distinctions that should not require justification. A second approach would be to interpret discrimination to mean unreasonable or unjustifiable distinctions. The Court rejected this approach because its definition of discrimination was not consistent with the meaning of discrimination in human rights jurisprudence and because questions of reasonableness belong under the s. 1 analysis rather than the s. 15(1) analysis.

[10] *Canada (Human Rights Commission) v. M.N.R. (F.C.)*, [2004] 1 F.C.R. 679 (F.C.A.) at para.13 [*Wignall*].

The third approach, which is the one the Court adopted, was described as the "enumerated and analogous grounds" approach. In this approach, the focus is on whether a distinction constitutes discrimination on the basis of prohibited grounds that are enumerated or are analogous to the enumerated grounds. The Court held that this third approach was most compatible with the meaning of discrimination in human rights jurisprudence and with the purposes of s. 15, and that it properly left questions of justification to s. 1. Justice McIntyre drew on human rights jurisprudence, and in particular the principles established in *O'Malley v. Simpsons Sears* and *Action Travail des Femmes v. C.N.R.*, to articulate a definition of discrimination. He offered the following statement as a distillation of the concept of discrimination developed under human rights statutes:

> "I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed."[11]

This definition of discrimination draws a close connection between distinctions based on "grounds" of discrimination and disadvantage. It recognizes that discrimination is connected with social disadvantage, and applies to both direct and adverse effect forms of discrimination.

## B. Substantive, not Formal, Equality

A key principle underlying the *Andrews* analytical framework is the Court's adoption of a substantive approach to equality rights, and its express rejection of a formalistic approach. The formalistic approach is generally understood to require similar treatment for situations that are similar to one another, and different treatment for situations that are different from one another. The difficulty with the "similarly situated" test is that it concerns itself with nothing beyond formal equality (similar treatment of similar classes), with no examination of the reasoning behind the delineation of the class, and no concern for how inequitable the consequences. A substantive approach to equality looks at the nature and impact of the law (or other impugned action), as well as looking at whether the law applies universally to the persons for whom it is intended.[12]

The rejection of a formalistic approach is linked with the following interconnected principles that the Court drew from human rights jurisprudence:

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[11] *Andrews, supra* note 1 at para.37.

[12] The Court illustrates this point using the examples of the Nuremberg laws of Nazi Germany which applied equally to all Jews; to the separate but equal segregation doctrine which applied "equally" to black and white people and was upheld by the Supreme Court of the United States in *Plessy v. Ferguson*, 163 U.S. 637 (1896); and to the provisions of the *Indian Act*, R.S.C. 1970, c.I-6, making it an offence for aboriginal persons to be intoxicated off the reserve, which applied "equally" to aboriginal persons and were struck down in *R. v. Drybones*, [1970] S.C.R. 272: *Andrews, supra* note 1 at 166.

- A claimant does not need to prove discriminatory intent.
- The focus of the discrimination analysis is on the effect of the differentiation on the claimant(s).
- Not all differences in treatment are violations of equality rights.
- Differences in treatment are sometimes necessary to achieve equality.

These principles seek, at least in part, to shape an understanding of equality rights that is grounded in the historical disadvantage experienced by some groups in relation to other groups. Although most of the prohibited grounds of discrimination are framed as universal, neutral categories, they are recognized as grounds of discrimination in part because of the harms experienced by certain subgroups of these categories, and in part because the categories are connected to social characteristics that have been rendered deeply personal. The idea that equality rights do not apply to all distinctions in treatment is connected with the idea that discrimination in law applies to distinctions affecting the sub-groups that have been historically disadvantaged and affecting social characteristics that have been rendered deeply personal. The idea that differential treatment can be necessary to achieve equality is connected with the idea that equality-promoting distinctions should be protected against claims of discrimination.

In *Andrews*, the Court drew on human rights principles for the explicit purpose of shaping a substantive approach to equality rights.[13] In explaining why it was appropriate for the Court to draw on human rights jurisprudence for guidance on the meaning of discrimination in s. 15, McIntyre J. said:

> "Discrimination as referred to in s. 15 of the Charter must be understood in the context of pre-Charter history. Prior to the enactment of s. 15(1), the Legislatures of the various provinces and the federal Parliament had passed during the previous fifty years what may be generally referred to as Human Rights Acts. With the steady increase in population from the earliest days of European emigration into Canada and with the consequential growth of industry, agriculture and commerce and the vast increase in national wealth which followed, many social problems developed. The contact of the European immigrant with the indigenous population, the steady increase in immigration bringing those of neither French nor British background, and in more recent years the greatly expanded role of women in all forms of industrial, commercial and professional activity led to much inequality and many forms of discrimination. In great part these developments, in the absence of any significant legislative protection for the victims of discrimination, called into being the Human Rights Acts. In 1944, the Racial Discrimination Act, 1944, S.O. 1944, c. 51, was passed, to be followed in 1947 by The Saskatchewan Bill of Rights Act, 1947, S.S. 1947, c. 35, and in 1960 by the Canadian Bill of Rights. Since then every jurisdiction in Canada has

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[13] See also: *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; Martha Jackman and Bruce Porter, "Women's Substantive Equality and the Potential of Social and Economic Rights under the *Canadian Human Rights Act*" in *Women and the Canadian Human Rights Act: A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, 1999) at 56; and *Quebec (Commission des droits de la personne des droits de la jeunesse) v. Montréal (City)*, [2000] 1 S.C.R. 665 at paras 34-35.

> enacted broad-ranging Human Rights Acts which have attacked most of the more common forms of discrimination found in society."[14]

A substantive approach to equality has the potential to remedy social inequalities because it considers material similarities and differences as well as formal similarities and differences, and because it requires changes that transform discriminatory systems and practices.

## C. Differences between Human Rights Statutes and Section 15 of the *Charter*

At the same time as it drew on human rights principles to inform a substantive approach to s. 15, the Supreme Court of Canada in *Andrews* also drew attention to the fact that there are differences between human rights statutes and the *Charter* which may have implications for how the legal protections under each legal system are given effect. As McIntyre J. stated:

> "In general, it may be said that the principles which have been applied under the Human Rights Acts are equally applicable in considering questions of discrimination under s. 15(1). Certain differences arising from the difference between the Charter and the Human Rights Acts must, however, be considered."[15]

Justice McIntyre went on to note a number of differences between human rights statutes and s. 15 of the *Charter* that, in his view, could be significant for the meaning of discrimination under s. 15 of the *Charter*. He did not, however, suggest that the approach to discrimination under human rights law might be altered by the *Charter*. The differences noted by McIntyre J. were:

- Human rights laws apply to private conduct as well as to government conduct, whereas the *Charter* applies only to "discrimination caused by the application or operation of law".[16]
- Human rights laws identify prohibited grounds using closed lists of enumerated grounds, whereas s. 15 of the *Charter* includes both enumerated grounds and an open-ended category of "analogous grounds".
- Under human rights statutes, discrimination is forbidden in absolute terms, and any defences or exceptions to discrimination are also framed in absolute terms, with the result that there is "no middle ground". Under the *Charter*, the prohibition against discrimination is also expressed in absolute terms but s. 1 allows for a reasonable limit on this prohibition, which is more in the nature of a justification than of an exception.

These differences are discussed in more detail below.[17]

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[14] *Andrews, supra* note 1 at para. 36.
[15] *Ibid.* at para. 38.
[16] The scope of the protection afforded by s. 15 against inequalities in "law" may be broader than McIntyre J. contemplated in this statement. However, the significant point is that the *Charter* applies only to "government" or "public" conduct, whereas human rights statutes apply to both private and public actors and actions.
[17] See Part V, *infra*.

## III. Critique of the Law Test

The Supreme Court of Canada has never rejected the approach to s. 15 set out in *Andrews*. However, beginning with the decisions in the "trilogy" of *Egan v. Canada,*[18] *Thibaudeau v. Canada*[19] and *Miron v. Trudel*,[20] the Court struggled to enunciate a set of applicable principles that would lend clarity and predictability to the law. The approach set out by the Court in *Law* has attracted widespread criticism for introducing requirements that effectively reinstate a formalistic approach to equality and improperly import s.1 justificatory requirements into the s.15 analysis, and for introducing a "human dignity" standard that is vague, indeterminate, confusing and overly burdensome to s.15 claimants.[21]

The *Law* analysis sets out three questions that must be addressed in order to establish an infringement of s.15. First, is there differential treatment? Second, is the differential treatment based on an enumerated or analogous ground? Third, is the differential treatment discriminatory? The first two questions are not new to the equality analysis, although they have been applied in ways that raise significant problems for equality claimants. The third question, as a separate inquiry, was introduced by the *Law* approach, along with the definition of substantive discrimination as the violation of human dignity.[22]

### A. Differential Treatment and Comparator Group Identification

The approach to s. 15 is premised on a "comparative" analysis of inequality.[23] The Supreme Court of Canada has described the identification of a comparator as "crucial" to an analysis grounded in differential treatment.[24] It has also held that courts are not bound by the claimant's characterization of the appropriate comparator group and have the authority to redefine it where warranted. By substituting its own choice of comparator group, a court can ensure that an equality claimant is not successful. This is what happened for example, in *Granovsky v. Canada*[25] and in *Hodge v. Canada (Minister of Human Resources Development)*.[26] Comparator group analysis has also been used in this way to defeat claims under human rights statutes.[27]

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[18] [1995] 2 S.C.R. 513 [*Egan*].
[19] [1995] 2 S.C.R. 627 [*Thibaudeau*].
[20] [1995] 2 S.C.R. 418 [*Miron*].
[21] See, for example: Bev Baines, "*Law* v. *Canada*: Formatting Equality" (2000) 11 Constitutional Forum 65; Sheilah Martin, "Court Challenges: Law", (Winnipeg: Court Challenges Program, 2002), Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" (2001), 80 Can. Bar Rev. 299, June Ross, "A Flawed Synthesis of the Law" (2000), 11 Constitutional Forum 74; Bruce Ryder, Cidalia Faria and Emily Lawrence, "What's Law Good For? An Empirical Overview of Charter Equality Rights Decisions" (2004), 24 Sup. Ct. Law Rev. (2d) 103 at 118-125.
[22] For a more detailed discussion of the problems posed by the application of *Law* see "*LEAF and the Law Test for Discrimination: An Analysis of the Injury of Law and How to Repair It*" prepared by Fiona Sampson, LEAF Director of Litigation, November, 2004 (available on the LEAF/FAEJ website at www.leaf.ca).
[23] For a critique of a comparative approach to anti-discrimination legal rights, see Andrea Wright, "Formulaic Comparisons: Stopping the *Charter* at the Statutory Human Rights Gate" in Fay Faraday, Margaret Denike and M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law Inc., 2006) 409 [Wright, "Formulaic Comparisons"].
[24] *Granovsky, supra* note 3 at para. 45; *Lovelace, supra* note 3 at para. 62.
[25] In *Granovsky, the* claimant challenged s. 44(2)(b) of the *Canada Pension Plan Act*, R.S.C. 1985, c.C-8, which suspended pension contributions for persons with permanent disabilities but not for persons with temporary disabilities. The claimant took the position that the relevant comparator in his case was a non-disabled person

## B. Enumerated or Analogous Grounds of Discrimination

The paradigm understanding of discrimination under both the *Charter* and statutory human rights involves a distinction that is clearly connected with an enumerated ground of discrimination. As the Court said in *Andrews*: "Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination."[28] Thus, many issues concerning enumerated grounds of discrimination are common to s. 15 of the *Charter* and human rights statutes. These issues include questions about the meaning of categories of discrimination, questions about recognizing multiple and intersectional grounds of discrimination, and questions about how grounds of discrimination are analysed in adverse effect discrimination claims. Under the *Charter*, additional questions arise in relation to the provision for recognizing analogous grounds of discrimination, including how these grounds are to be established and the implications of recognizing analogous grounds of discrimination.[29]

## C. "Substantive Discrimination"

The *Law* approach has complicated the discrimination analysis in two ways. First, it articulated four "contextual" factors that have been interpreted and applied to narrow the scope of the equality rights guarantee. Second, it held that the ultimate question to be addressed is whether the distinction in question violates the claimant's human dignity. Problems associated with each of these aspects are reviewed briefly below.

### 1. The *Law* "Contextual" Factors

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because, the CPP's "eligibility clock" had continued to run as though he were an able-bodied person who had the normal opportunities to continue in his employment". The Court concluded instead that the correct comparator was a person with permanent disabilities. By choosing this comparator, the focus shifted to a hierarchical analysis of the relative disadvantage experienced by persons with acquired disabilities compared to persons with congenital disabilities, and to temporary disabilities as compared with permanent disabilities. See the Court's discussion at paras. 28 and 31 and Fiona Sampson, "*Granovsky v. Canada (Minister of Employment and Immigration)*: Adding Insult to Injury? (2005) 17 C.J.W.L. 71.

[26] In *Hodge, supra* note 3, the claimant challenged the provision in the CPP that required non-married spouses, but not married spouses, to show cohabitation with a contributor at the time of the contributor's death in order to be eligible for survivor's benefits. The claimant took the position that married spouses was the appropriate comparator group. The Court held instead that proper comparator for a "former common law spouse" is a "former married spouse". Since former spouses did not qualify under the relevant provisions for a survivor's pension under the CPP whether they were married or "common law", there was no distinction based on marital status and thus no discrimination.

[27] See, for example, *Ontario Nurses' Assn. v. Orillia Soldiers Memorial Hospital* (1997), 42 .O.R. (3d) 692 (C.A.); M. Lynk, "Accommodating Disabilities in the Canadian Workplace" (1999) 7 *Canadian Journal of Labour and Employment Law* 64; Elizabeth J. McIntyre, Karen Schucher and Fay Faraday, "The Arbitrator as Human Rights Adjudicator: Has *Meiorin* Made a Difference?" (2000-2001) *Labour Arbitration Yearbook* 31-50.

[28] *Andrews, supra* note 1 at para. 37.

[29] For further discussion of these questions see: Dianne Pothier, "*Connecting Grounds of Discrimination to Real Peoples' Real Experiences*" (2001), 13 C.J.W.L. 37; Colleen Sheppard, "Grounds of Discrimination: Towards an Inclusive and Contextual Approach" (2001), 80 Can. Bar Rev. 893; Daphne Gilbert, "Time to Regroup: Rethinking Section 15 of the Charter" (2003) 48 McGill L.J. 627.

The *Law* analysis identified four factors that are designed to help answer the question as to whether the impugned treatment violates the claimant's human dignity. The factors are: 1) the presence of historic disadvantage; 2) the lack of correspondence between the ground of discrimination at issue and the actual needs, capacities and circumstances of the claimant; 3) the absence of a purpose or effect that ameliorates the condition of another more disadvantaged group; and 4) the importance of the interest interfered with by the state. Although the Supreme Court of Canada expressly stated that these factors were not intended to serve as a mandatory or comprehensive list, they have taken on that quality and have been treated as a mechanical checklist. A major problem with this approach is that, rather than providing a framework for a contextual examination, it in fact decontextualizes the analysis. Moreover, by disaggregating the contextual factors, the *Law* approach has made it easier to "define away" the discrimination claim.

The first, second and fourth factors are not necessarily inconsistent with a substantive equality approach. However, these factors can be and have been applied in ways that defeat a substantive equality approach. Bruce Ryder, Cidalia Faria and Emily Lawrence analysed 16 decisions in which *Law* was applied, and concluded that the major problem is created by the second contextual factor. They argue that this factor "replicates the 'relevance' or 'similarly situated' tests that earlier judgments of the Court rejected as an insufficient guide to the interpretation of s. 15."[30] They go on to suggest that this situation reflects the Court's discomfort with the potential breadth of s.15's impact in the area of redistributive social policy. This discomfort is obvious in cases dealing with government benefit programs, such as *Gosselin* v. *Quebec*.[31]

It may also be suggested that the judiciary often demonstrates discomfort with any claim that strays too far from conventional, well-established beliefs. A clear example is the belief affirmed in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*[32] that the infliction of pain on a child is "corrective" and ultimately beneficial.[33] While there have been some s. 15 cases in which the Court has transcended well-established beliefs, such as *M. v. H.*[34] for example, these tend to be cases in which the impugned legislation clearly demonstrates formal as well as substantive inequality. On the whole, it is clear that the Supreme Court is still struggling with the implications of substantive equality under the *Charter*.

In addition, the third factor (absence of ameliorative purpose or effect) appears to alter the burden on the claimant in ways that are not consistent with a substantive equality approach. This factor puts the claimant in the position of having to justify why her or his "human dignity" interests should outweigh the interests addressed by the legislation. It also appears to inappropriately move s. 1 justificatory considerations – where the burden is on the government – into the s. 15 analysis.[35]

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[30] Ryder, Faria and Lawrence, "What's Law Good For?, *supra* note 21 at 118-125.

[31] *Gosselin, supra* note 3.

[32] [2004] 1 S.C.R. 76 [*Canadian Foundation for Children, Youth and the Law*].

[33] *Ibid.* at para 2. Similar reasoning is obviously at play in *Gosselin* - in that case, the belief that severe hardship is necessary to "motivate" young welfare recipients to work.

[34] [1999] 2 S.C.R. 3 [*M. v. H.*].

[35] The consultation participants noted that there is often little balance between the interests of claimant and government, and that by placing this onus on the equality rights claimant the government is almost never made to justify its actions.

### 2. Concerns About the Focus on "Dignity"

The Court has held that a subjective-objective standard is to be used in the assessment of injury to dignity. This standard imports the "need for a claimant to paint a picture of herself as damaged and pitiful".[36] It also has the tendency to import the norms of the majority - which are seen as "objective" - into an analysis of the experience of a member of a subordinated group. The Court's focus on "dignity" has caused serious problems in cases brought by the most disadvantaged equality claimants - those who have been excluded from government programs designed to ameliorate poverty and disability - in spite of personal characteristics that should qualify them for protection or assistance. In these cases, the Court's reliance on the "dignity" test is particularly inimical to the achievement of substantive equality. As Dianne Pothier observes, "[h]uman dignity is a malleable enough concept to mean whatever the judges want it to mean."[37]

Even if a judge wants to invest the concept of dignity with a meaning that is congruent with the most liberal interpretation of s. 15, their own background and lived experiences may limit their understanding of what dignity means to a person whose background and lived experiences are very different. Moreover, the judge may consciously or unconsciously maintain a double standard that conceives of some types of indignity as simply part of life for other people. This is particularly true in cases of indirect/adverse effect discrimination, which by definition involve norms that are unquestioned by the majority. It is also true in cases involving access to government-provided benefits of which the majority has no need, and that when the Court focuses on whether the claimant "feels" that "they are less capable or less worthy of recognition or value", it separates "dignity" from the concrete harms which are the indicia of substantive discrimination.[38] This separation "treats dignity as an abstract emotive feeling, so as to trivialize and improperly individualize the concrete harms of substantive discrimination--subordination, devaluation, disenfranchisement and disempowerment".[39]

## D. Supreme Court of Canada Response to Critique of the Law Approach

To date, the only acknowledgement of the doctrinal problems with the *Law* test (as opposed to its application to the facts) by a member of the Supreme Court of Canada is found in the partial dissent of Binnie J. in *Canadian Foundation for Children, Youth and the Law.*[40] On the question of dignity, Binnie J. wrote: "The "dignity" requirement, which gathered full force in this Court's judgment in *Law* [citation omitted], provides a useful and important insight into the purpose of s. 15(1), but it should not become an unpredictable side-wind powerful enough to single-handedly blow away the protection that the *Criminal Code* would otherwise provide.[41] On the question of

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[36] Fiona Sampson, "LEAF and the *Law* Test for Discrimination: An Analysis of the Injury of *Law* and How to Repair It", *supra* note 22 at 8.
[37] Pothier, Dianne. "Connecting Grounds of Discrimination to Real People's Real Experiences", *supra* note 29 56.
[38] Factum of the Intervener LEAF in the *NAPE* case at para. 23, published in Faraday et al., eds., *Making Equality Real, supra* note 21 at 477. See also Factum of the Intervener LEAF in the *Auton* case at paras. 49-50, published in Faraday et al., eds., *Making Equality Real, supra* note 21 at 510.
[39] *Ibid.*
[40] *Canadian Foundation for Children, Youth and the Law, supra* note 32, at paras. 97-98, *per* Binnie J. dissenting.
[41] *Ibid.* at para. 72.

the second "contextual factor" - the alleged correspondence between the actual needs and circumstances – Binnie J. wrote:

> "Care must be taken, however, to ensure that the "correspondence" factor is kept to its original purpose as a marker for discrimination and not allowed to become a sort of Trojan horse to bring into s. 15(1) matters that are more properly regarded as "reasonable limits . . . demonstrably justified in a free and democratic society" (s. 1).
>
> In particular, there is a danger that the "correspondence" factor will revive the "relevance" debate of the 1990s in which it was contended by some members of the Court that a s. 15(1) rights claimant could be defeated if it were shown that the ground of complaint was "relevant" to achievement of a legitimate legislative objective..."

There has not yet been any further indication that the Supreme Court of Canada is prepared to address the concerns about the *Law* approach. In fact, LEAF and other equality-seeking interveners have recently been refused leave to intervene in cases involving s. 15 issues, making it impossible to raise these concerns directly with the Court.[42]

## IV. Current Jurisprudence Considering Application of the Law test to Human Rights Legislation

It was not until respondents to human rights claims noticed the advantages that application of the *Law* test might offer that human rights decisions began to discuss whether principles developed in the context of s. 15 of the *Charter* should be applied to the interpretation and application of human rights statutes. To date a number of statutory tribunals created under human rights legislation and a number of appellate courts have ruled on this question, with varying results. The Supreme Court of Canada has not yet decided a case in which it was required to rule on the question of whether the *Law* analysis should be used to define the protection of human rights legislation.[43] Therefore, there has been no opportunity to address the Court on the problems with applying the narrow *Law* analysis to legislation that already contains precise and specific limitations and defences, and to well-established jurisprudence interpreting these provisions.

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[42] Melina Buckley and Fiona Sampson, "LEAF and the Supreme Court Appeal of Bill 29", Canadian Journal of Women and the Law, forthcoming.

[43] In the human rights cases that the Supreme Court of Canada has decided since *Law*, there has been no suggestion that the analysis of discrimination under human rights should conform to the Law test. Indeed, as Leslie Reaume observes, the Court in *Meiorin* affirmed a finding of discrimination that was based on the human rights *prima facie* case of discrimination approach. See Leslie Reaume, "Postcards from *O'Malley*: Reinvigorating Statutory Human Rights Jurisprudence in the Age of the *Charter*" in Faraday et al., *Making Equality Rights Real* 373 at 387 [Reaume, "Postcards from *O'Malley*"].

The next three sections of this paper review significant tribunal and appellate decisions that have considered whether or not the *Law* approach must or should be imported into the statutory human rights context.[44]

## A. Decisions Which have Rejected the Importation of *Law* into the Statutory Human Rights Context

### *Wignall* (Federal Court of Appeal)[45]

The *Wignall* case involved a claimant who is deaf and was a university student when he brought his complaint. The claimant received a grant of $3000.00, which he turned over to the university to off set the cost of interpretation services. He challenged a Ministry of National Revenue requirement that the bursary be reported as income, which caused him to lose the benefit of a $25.00 tax credit from the province he was living in at the time. The financial loss could be much greater for other disabled students depending on the other kinds of financial support that they received. The Canadian Human Rights Tribunal held that the claimant failed to establish a *prima facie* case because he did not satisfy the first broad inquiry in *Law*, namely, he did not establish that the actions of the respondent drew a formal distinction between himself and others on the basis of one or more personal characteristics.[46]

On judicial review, the Federal Court of Appeal held that the Tribunal erred in requiring the claimant to meet the requirements set out in *Law*. The Court noted that the Supreme Court of Canada's decisions in *Meiorin*[47] and *Grismer*[48] dealing with statutory human rights did not indicate any desire to incorporate the approach developed under s. 15 of the *Charter*. The Court also noted that:

> "In fact, decision-makers under human rights statutes do not generally invoke any elaborate definition of discrimination. They accept that complainants merely have to show that they have been treated differentially on the basis of a prohibited ground of discrimination."[49]

The Court agreed with the tribunals which concluded that the *Law* analysis should be confined to its constitutional setting, citing *Barrett v. Cominco Ltd.*,[50] *Nixon v. Vancouver Rape Relief Society (No. 2)* (2002),[51] and *Dame v. South Fraser Health Region.*[52] The Court held that in

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[44] For a discussion of cases in which principles from the *Law* test have been used to inform specific aspects of an analysis in statutory human rights cases, for example assessment of damages, see Leslie Reaume, "Postcards from *O'Malley*", *ibid.* at 382-383.

[45] *Wignall*, *supra* note 10.

[46] Essentially, Mr. Wignall's case failed because he was treated the same as every other student by the requirement to include his grant in income. By concluding that the adverse financial consequences arose out of his receipt of a bursary, the Tribunal rendered the connection with Mr. Wignall's disability completely invisible.

[47] *British Columbia (Public Service Employee Relations Commission v. BCGSEU,* [1999] 3 S.C.R. 3 [*Meiorin*].

[48] *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights,* [1999] 3 S.C.R. 868 [*Grismer*].

[49] *Wignall*, *supra* note 10 at para. 15.

[50] (2001), 41 C.H.R.R. D/367 [*Barrett*].

[51] (2002) 42 C.H.R.R. D/20; rev'd [2005] B.C.J. No. 2059 (B.C.C.A.), aff'g [2004] B.C.J. No. 2059 (B.C.S.C.); application for leave to appeal dismissed [2007] S.C.C.A. No. 365.

order for the complainant to meet their burden to establish a *prima facie* case, they only need to ". . .establish that they have been subjected to adverse treatment on a prohibited ground for which the respondent is responsible. They need not meet all of the requirements set out in the Law case."[53] However, this ostensibly lightened burden did not assist Mr. Wignall on the merits of the complaint, since the Court upheld the Tribunal's conclusion that the Ministry of National Revenue's requirement did not offend the Act.

### *Barrett v. Cominco* (British Columbia Human Rights Tribunal)[54]

The *Barrett* case involved a claim on behalf of two groups of employees affected by severance package provisions in a collective agreement. Under the severance package, lesser benefits were provided to employees who were less than 46 years old and to employees who were 55 years old and had more than 20 years of service. The employees argued that it was discriminatory to draw distinctions based on age alone, without taking any other characteristics into consideration. The respondent employer and union argued that the *Law* test should be followed, and that the claimants had failed to show that the distinction infringed their human dignity. The British Columbia Human Rights Tribunal agreed that the analysis of discrimination should be substantive, but rejected the argument that *Law* required the importation of requirement to establish a violation of human dignity under human rights legislation.

The Tribunal gave the following reasons for rejecting importation of *Law*:

1. The Supreme Court of Canada did not state in *Law* that the s. 15(1) analysis was applicable to cases brought under human rights legislation. Its analysis of discrimination was focused solely on s. 15(1) of the *Charter*.

2. In the cases decided after *Law*, including *Meiorin* and *Grismer*, the Court has not imported the *Law* approach to discrimination into statutory human rights

3. It is important to consider differences between human rights statutes and the *Charter* when analyzing the evidentiary burden under human rights legislation. The Tribunal pointed to the fact that the *Charter* deals exclusively with state action and human rights statutes have broader application. The Tribunal also pointed to the specific defences in the British Columbia legislation, in particular the defence for age discrimination that is based on a seniority system or relates to a *bona fide* retirement, superannuation or pension plan, and the *bona fide* occupational requirement defence.[55]

The Tribunal concluded that the discrimination analysis should focus on whether there is a distinction based on a prohibited ground that results in a disadvantage to the complainant. On

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[52] (2002), 43 C.H.R.R. D/251 [*South Fraser Health Region*].

[53] *Wignall*, *supra* note 10 at paras. 12-16.

[54] *Supra* note 51.

[55] The Tribunal noted that if these defences can be established under the human right's statute then there is no discrimination. Under the *Charter*, by contrast, respondents are required to justify discriminatory distinctions under s. 1. The Tribunal stated that "This is a difference not only in form, but in substance". For example, the Tribunal explained, an age-based distinction in a pension plan might not be discriminatory under s. 15(1) of the *Charter*, whereas under human rights law the distinction might be discriminatory but exempted by the statutory defences.

the merits of the claims, the Tribunal decided that there was discrimination against the employees who were less than 46 years of age, but that this discrimination was excused because the age distinction was related to a *bona fide* scheme based on seniority and to the operation of a *bona fide* pension plan. With respect to the employees who were 55 years old with more than 20 years of service, the Tribunal concluded when the impact of the terms of the agreements were looked at as a whole, there was no adverse effect on this group of employees.

### *Dame v. South Fraser Health Region* (British Columbia Human Rights Tribunal)[56]

The claimant in the *Dame v. South Fraser Health Region* case was a gay man who suffered from fibromyalgia and bi-polar disorder, and was disabled from gainful employment. His human rights claim was that his entry into a therapy group was adversely affected because of his sexual orientation. The Respondent argued that the Tribunal should follow the *Law* test for discrimination and argued that the claimant had not shown an injury to his dignity. The Tribunal rejected this argument, following the reasoning of the adjudicators in *Barrett* and *Nixon*. The Tribunal also specifically rejected the Respondent's argument that *Meiorin* supported importation of the injury to dignity test. In response to this argument, the Tribunal noted that the Supreme Court of Canada did not address the question of whether the distinction affected the complainants' dignity interests in *Meiorin* or *Grismer*. Thus, the Tribunal concluded that it is not appropriate to adopt the *Law* analysis in addressing the *prima facie* case of discrimination in the human rights context. On the merits of the claim, the Tribunal found that the group leader's handling of the claimant's entry into the therapy group did not constitute adverse treatment because of sexual orientation and, therefore, dismissed the complaint.

### *Vancouver Rape Relief Society v. Nixon* (British Columbia Court of Appeal)[57]

In the British Columbia Court of Appeal's decision in *Vancouver Rape Relief Society v. Nixon*, the Court left open the question of whether or not *Law* must be followed in the interpretation of statutory human rights provisions. The British Columbia Human Rights Tribunal ruled that Vancouver Rape Relief and Women's Shelter discriminated against Kimberly Nixon, a male-to-female transsexual, by refusing to accept her as a volunteer. The British Columbia Supreme Court overturned the Tribunal decision for two reasons: (1) because Rape Relief was protected by s. 41 of the British Columbia *Human Rights Code*, which exempts a "program or activity that has as its objective the amelioration of conditions of disadvantaged individuals or groups"; and (2) because the refusal to accept Kimberly Nixon as a volunteer did not constitute discrimination, applying *Law* to reach this conclusion. In the B.C. Supreme Court's view, the Tribunal erred by failing to apply the test in *Law* to the human rights legislation. The B.C. Court of Appeal subsequently held that the Supreme Court erred in failing to find a *prima facie* infringement of the *Code*, but also upheld the lower court's conclusion that the s. 41 defence applied. The Court of Appeal sidestepped the question of whether the *Law* analysis should be imported, because Nixon's claim was brought under provisions in the B.C. statute which prohibit the denial of a

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[56] *Supra*, note 53.
[57] *Supra* note 52.

service and the refusal to employ based on a prohibited ground of discrimination. These prohibitions are deemed to be "discrimination" under the B.C. statute, but are separate from the more general prohibitions against discrimination in the provision of services and in employment. Thus, a *prima facie* breach of these statutory provisions could be found without having to determine whether or not "discrimination" occurred.

The Court also left open the larger question of whether or not the *Law* approach must be applied in defining the approach to discrimination. Saunders J.A. speculated that there was no reason to assume that *Law* should apply: "The broad application of the Law framework in a case without that governmental overtone is not obvious to me, particularly in light of Meiorin, Grismer and Oak Bay, and considering the issues otherwise referred to in the Tribunal's decision. However, that is an issue that must wait for its own case." In concurring reasons, Finch C.J.B.C. left open the question of whether *Law* applies to determining whether discrimination has occurred, as well as the question as to whether the Court made the wrong decision in *Reaney* (discussed below).

## B. Qualified and Limited Importation of *Law*

### *Gwinner* (Alberta Q.B., upheld C.A.)[58]

In *Gwinner v. Alberta (Minister of Human Resources and Employment)*, Greckol J. of the Alberta Court of Queen's Bench held that *Law* can be applicable in circumstances where the challenge is to financial benefits provided by the government. The Alberta Court of Appeal approved this decision without comment. *Gwinner* involved a challenge under Alberta's *Human Rights, Citizenship and Multiculturalism Act*[59] to a provision in the *Widows' Pension Act*[60] that made pensions available to persons who were married at the date of their spouse's death but not to persons who were divorced or separated at the date of their former spouse's death. The Human Rights Panel ruled that the exclusion was "reasonable and justifiable" pursuant to the defence in s. 11.1 of the Alberta human rights statute.[61] On appeal from this decision, Greckol J. held that the *Widows' Pension Act* discriminated on the ground of marital status, applying the *Law* test to reach this conclusion.

In reasoning that the *Law* approach could be followed in the type of case involved in *Gwinner*, Greckol J. wrote:

> ". . . since there is a strong legal history of interchange between Charter and human rights discrimination analyses, it will be appropriate in some human rights cases to apply the entire Law analysis, bearing in mind that flexibility should be

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[58] [2002], A.J. No. 1045, aff'd [2004] A.J. No. 788, application for leave to appeal to the Supreme Court of Canada dismissed (Alta. C.A., May 10, 2004) (30449) [*Gwinner*].
[59] R.S.A. 1980, c. H-11.7 (now R.S.A. 2000, c. H-14).
[60] S.A. 1983, c. W-7.5 (now R.S.A. 2000, c. W.-7).
[61] Now s. 11. The provision reads: "A contravention of this Act shall be deemed not to have occurred if the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances." Greckol J. noted that s. 1.1 of the Alberta *Human Rights, Citizenships and Multiculturalism Act* is similar in wording to s.1 of the *Charter*, and referred to the Supreme Court of Canada's decision in *Dickason* where the Court held that because of the similarity in wording this defence provision "warrants *Charter*-style analysis as it uses similar justificatory language to that employed in s. 1."

> maintained. The Law analysis proposed by Iacobucci J. was developed in the context of a Charter s. 15(1) equality challenge to legislation which set up a government program of financial support that was alleged to discriminate in purpose or effect. . . . The Law analysis is particularly applicable in this case, where there is a human rights equality challenge to legislation which sets up a government program of financial support that is alleged to be discriminatory."[62]

At the same time, Greckol J. expressed strong reservations about the appropriateness of more generally incorporating *Law* in the statutory human rights context,[63] stating that in "many, if not most, cases" it is not appropriate to apply the *Law* test. She cautioned that "[I]n many, if not most, cases under human rights legislation, the elaborate third step scrutiny to determine if the dignity interest of the claimant is truly engaged, will neither be necessary nor appropriate",[64] and gave three reasons for this caution: (1) distinctions based on enumerated grounds will rarely be found non-discriminatory; (2) the dignity analysis was not applied in three of the Supreme Court of Canada's important human rights decisions, *Meiorin, Grismer,* and *City of Montreal*; and (3) many human rights tribunals have resisted application of *Law*'s elaborate approach to step three of the equality analysis, including a requirement that the claimant establish a violation of human dignity as an element of a *prima facie* case under human rights legislation.[65]

In relation to the third reason, Greckol J. observed that the root of this resistance may lie in the nature of the human rights process, where initial determinations about the validity of complaints are made in the first instance by officers who perform a gatekeeper role in an administrative system "designed as a street-wise avenue for everyday challenges to discriminatory conduct".[66] She observed that "This process may not be designed to consider the legal labyrinth that step three of the s. 15(1) Charter analysis has become."[67] She also noted possible concerns that meritorious complaints could be dismissed in a cursory fashion because the conduct is thought not to offend dignity, instead of after a full consideration of the justificatory response.[68] She pointed out that while McIntyre J. in *Andrews*[69] had drawn upon human rights law to arrive at a definition of discrimination for the purpose of s. 15, he had also noted some significant differences between human rights statutes and the *Charter*.

### *Mis* (Alberta Q.B.)[70]

The Alberta Court of Queen's Bench subsequently relied on *Gwinner* in *Mis v. Alberta (Human Rights and Citizenship Comm.)* to hold that the *Law* analysis should be applied to Alberta's human rights legislation because the *Charter* and human rights legislation "have a common

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[62] *Gwinner, supra* note 59 at para. 103.
[63] It appears that the appellant (the Crown) did not contest the application of the *Law* test.
[64] *Gwinner, supra* note 59 at para 104
[65] She cited *Barrett, supra* note 51, *Nixon, supra* note 52, *South Fraser Health Region, supra* note 53 and *Wignall, supra* note 10.
[66] *Gwinner, supra* note 59 at para. 105.
[67] *Ibid.*
[68] *Ibid.* at paras 104-105.
[69] *Andrews, supra* note 1.
[70] *Mis v. Alberta (Human Rights and Citizenship Comm.)* (2002), 48 C.H.R.R. D/360 (Alta.Q.B.).

intent".[71] At the same time, Lee J. also agreed with Greckol J. in *Gwinner* that "it is not appropriate to apply the Law analysis in all cases", but that "it is appropriate here where there is a human rights equality challenge to legislation which sets up a government program of financial support".[72] The complaint involved a pension plan that reduced a man's benefits when his wife became a beneficiary under the spousal program, even though a similarly situated female employee's benefits would not be reduced when her husband became a beneficiary.

The Chief Commissioner dismissed the complaint on the grounds that: (1) s. 7(2) of the Act permitted discrimination in pension plans based on age and marital status; (2) the analysis set out in *Law* applied and there was no evidence to show that the pension plan harmed Mr. Mis' dignity; and (3) all group pension plans have inherent discriminatory features based on sex because women live longer than men, and there was no evidence that less discriminatory alternatives existed. The Court held that the Chief Commissioner's decision was unreasonable and returned the matter to the Chief Commissioner with the direction that the complaint be advanced to hearing.

## C. Decisions in Which *Law* has been More Generally Imported

### *Saskatchewan (Department of Finance)* (Saskatchewan Court of Appeal)[73]

In *Saskatchewan (Department of Finance)*, the Saskatchewan Court of Appeal stated, without further discussion, that the *Law* test is to be applied to determine whether there is discrimination. Article III(6)(e) of the Saskatchewan government's Disability Income Plan excluded coverage for a disability caused or contributed to by chronic alcoholism unless the employee was under "active treatment for rehabilitation under the supervision of a physician and with the approval of his participating employer"[74]. The Court confirmed the decision of the board of inquiry, upheld by the Court of Queens' Bench, that the compulsory Disability Income Plan operated for public employees by the Government of Saskatchewan discriminated on the basis of a disability, namely, addiction to alcohol. The Saskatchewan Court of Appeal also confirmed the remedy ordered by the Human Rights Board of Inquiry; which was essentially a "cease and desist" order pursuant to s. 31(7) of the Saskatchewan *Human Rights Code*.[75]

### *Reaney* (British Columbia Court of Appeal) [76]

In *Reaney*, the British Columbia Court of Appeal stated that the *Law* analysis must govern the interpretation of the British Columbia *Human Rights Code*. However, the Court did not set out

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[71] *Ibid.* at para 70. The court also seemed to find support for the application of the *Law* test in the *Meiorin* decision, although Lee J. noted that the quotation relied upon is part of a discussion in a different context.

72 *Ibid.* at para 72.

[73] *Saskatchewan (Department of Finance) v. Saskatchewan (Human Rights Commission)*, [2004] S.J. No. 637 (Sask.C.A.).

74 *Ibid.* at para. 4.

[75] S.S. 1979, c. S-24.1

76 *British Columbia Ministry and Service Employees' Union v. British Columbia (Public Service Employee Relations Commission)*, [2002] B.J.C. No. 1911. The British Columbia Supreme Court relied on *Reaney* for its holding in *Nixon* that it had to apply *Law*.

the *Law* analytical framework or actually discuss its application to the case before it, nor is there is any indication as to whether the application of *Law* to human rights legislation had been contested.

This case involved a collective agreement provision that provided fewer benefits for adoption leave than for parental leave for a biological child. Relying on the Ontario Court of Appeal decision in *Schafer v. Attorney General of Canada*[77], in which the same issue was addressed under s. 15(1) of the *Charter*, the B.C. Court of Appeal ruled against Ms. Reaney. The limited analysis of *Law* in *Reaney* may reflect the fact that the *Schaffer* analysis was most directly applicable and *Schafer* pre-dates *Law*.[78]

### *Hutchinson* (British Columbia Superior Court)[79]

In *British Columbia v. Hutchinson*, the British Columbia Superior Court held, without further reasoning, that it was "bound by" *Reany* and "obliged to apply the Law analytical framework".[80] In making this statement, the Court shared the view of Edwards J. in the Superior Court decision in *Nixon*; the B.C. Court of Appeal's decision in *Nixon* had not yet been released. The Court upheld a decision in which the B.C. Human Rights Tribunal essentially applied the *Law* test, after ruling that it need not do so. The Tribunal relied in part on the B.C. Court of Appeal decision in *Health Sciences Association v. Campbell River and North Island Transition Society*,[81] where the B.C. Court of Appeal set out the *prima facie* case analysis for a complaint of discrimination under provincial human rights law with no reference to the *Law* analytical framework.[82] The Tribunal's approach was clearly influenced by the current uncertainty in British Columbia about whether *Law* is applicable to the province's human rights legislation. This may explain why the *Hutchinson* decision is a cautious one, with references to "the *Law* analysis" throughout.

On the merits, the Tribunal held that a Ministry of Health policy that prohibited the hiring of family members by adults with disabilities who qualified for and received Ministry funding to cover the cost of long-term, in-home, care services discriminated on the basis of disability and family status. It ordered the Ministry to develop criteria to allow for exceptions under policy 8.H in relation to Choices in Supports for Independent Living on a case-by-case basis. It also ordered specific remedies for Ms. Hutchinson pending the revision of the policy. The Superior Court upheld the decision on the merits, ruling that the Tribunal had properly applied the *Law* framework to the discrimination analysis.

### *Upper Canada District School Board* (Ontario Divisional Court)[83]

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77 (1997), 149 D.L.R. (4th) 705 [*Schafer*].

[78] As noted above, the B.C. Court of .Appeal in its decision in *Nixon* questioned whether *Reaney* might have been decided *per incuriam*..

[79] [2005] B.C.J. No. 2270, *aff'g* [2004] B.C.H.R.T.D. No. 55 [*Hutchinson*].

[80] *Ibid.* at para. 104.

[81] (2004] B.C.J. No. 922 (B.C.C.A.).

[82] In *Oak Bay Marina Ltd. v. British Columbia (Human Rights Tribunal)*, [2002] B.C.J. 2029, the B.C. Court of Appeal similarly decided a case involving discrimination under B.C.'s *Human Rights Code* without considering the *Law* test or mentioning *Reaney*.

[83] *Supra* note 4.

The most recent decision to date is the decision of the Ontario Divisional Court in *Ontario Secondary School Teachers' Federation v. Upper Canada District School Board*, dismissing an application for judicial review of an arbitration award under a collective agreement.[84] Under the collective agreement, supplemental unemployment benefits were available during parental leave to adoptive parents but not to biological parents. The arbitration board ruled that this provision did not infringe either Ontario's *Human Rights Code* or s. 15(1) of the *Charter*. The majority of the arbitration board held that the *Law* test is to be applied in determining whether there has been discrimination within the meaning of the *Code*.

In upholding the arbitration board's approach on judicial review, the Divisional Court noted the history of "cross-fertilization between human rights legislation and s. 15 of the Charter".[85] Justice Swinton, writing for the Court, approved the reasoning of Justice Greckol of the Alberta Court of Queen's Bench in *Gwinner* and stated that in her view the Supreme Court of Canada had essentially applied the *Law* test in *Brooks*, *Gibbs* and *Meiorin*.[86] The Court held the "program" was not discriminatory because it had an ameliorative purpose, emphasizing that the evidence before the arbitration board established that adoptive parents have special needs that biological parents do not have.[87] The Court did not balance this ameliorative purpose against the effect of the program, nor did it discuss whether the respondent school board or the arbitration board should have considered the possibility of less discriminatory ways to meet the proven needs.

## V. Revisiting the Relationship Between Human Rights Statutes and s. 15 of the Charter: Specific Reasons not to Import Law into the Human Rights Context

The issue of whether or not to import the *Law* approach to discrimination into statutory human rights law creates an appropriate juncture to revisit the relationship between the equality/anti-discrimination legal guarantees afforded by human rights statutes and by s. 15 of the *Charter*. *Andrews* set a course for s. 15 with reference to human rights principles in order to define a substantive approach to *Charter* equality rights. At the same time, the Court flagged the potential for divergence in the future given structural differences between human rights statutes and the *Charter*.

In broad terms, it can be said that human rights statutes and s. 15 of the *Charter* are both concerned with the harms of discrimination. McIntyre J. expressed this idea in *Andrews* when he wrote:

> "The Court in the case at bar must address the issue of discrimination as the term is used in s. 15(1) of the Charter. In general, it may be said that the principles which have been applied under the Human Rights Acts are equally applicable in considering questions of discrimination under s. 15(1). Certain differences arising

[84] *Upper Canada District School Board and O.S.S.T.F., District 26* (2004), 126 L.A.C. (4th) 158).
[85] *Upper Canada, supra* note 1 at para 24.
[86] *Ibid.* at para 27.
[87] *Ibid.* at paras. 28, 30.

> from the difference between the Charter and the Human Rights Acts must, however, be considered…".[88]

In *Meiorin*, in the context of analyzing the reasons for establishing a unified approach to the defences for direct and adverse effect discrimination, the Court similarly observed that human rights statutes and s. 15 of the *Charter* are generally directed to the same problem:

> "Where s. 15(1) of the Charter is concerned, therefore, this Court has recognized that the negative effect on the individual complainant's dignity does not substantially vary depending on whether the discrimination is overt or covert. Where it is possible to make a Charter claim in the course of an employment relationship, the employer cannot dictate the nature of what it must prove in justification simply by altering the method of discrimination. I see little reason for adopting a different approach when the claim is brought under human rights legislation which, while it may have a different legal orientation, is aimed at the same general wrong as s. 15(1) of the Charter"[89]

In both of these passages, the Court recognized that human rights statutes and s. 15 of the *Charter* provide legal avenues for responding to discrimination. However, the Court was not looking at the question of whether the same test for discrimination must be applied in both contexts.[90]

The arguments for importing the *Law* test into statutory human rights tend to reflect a broad-brush approach to consistency, relying on the general similarity between the overall goals of s. 15 of the *Charter* and statutory human rights. There is a superficial attractiveness to these arguments. However, they are based on an abstract approach to consistency that LEAF believes is entirely unsuited to promoting substantive equality. Put another way, the arguments for consistency do not claim that the *Law* approach should be imported because it goes further toward remedying discrimination and inequality than the current human rights approach. The arguments for consistency claim only that consistency is appropriate because statutory human rights and s. 15 of the *Charter* share similar goals. By contrast, when the Supreme Court of Canada in *Andrews* drew on human rights principles to inform its approach to s. 15, it examined concrete principles and demonstrated how these concrete principles were designed to ground a substantive approach to inequality.[91]

It is LEAF's position that the question of whether or not the *Law* approach should be imported into statutory human rights should not be framed as an abstract question of consistency between statutory human rights and s. 15 of the *Charter*. The question should be framed in concrete terms and should be analysed by looking at the nature of the *Law* approach, the impact of the *Law* approach in the *Charter* context and the potential impact of importing this approach into the

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[88] *Andrews, supra* note 1 at para. 38.
[89] *Meiorin, supra* note 48 at para. 48.
[90] As Leslie Reaume notes in "Postcards from *O'Malley*", ". . . the purpose of the analysis in *Meiorin* was not to harmonize statutory human rights legislation with the *Charter*, but to evolve statutory human rights law in a manner which was more consistent with the purpose of contemporary human rights legislation.": *supra* note 44 at 387.
[91] See discussion at Part II, *supra*.

statutory human rights context. This paper has already reviewed the concerns that have been raised with the nature of the *Law* approach and with its application in the *Charter* context. In LEAF's view, these concerns should provide sufficient reason to reject importation of *Law* into statutory human rights. The section of the paper that follows takes a closer look at the differences between statutory human rights and s. 15 of the *Charter*. It examines particular aspects of statutory human rights that make the *Law* approach even more inappropriate in this context and that justify maintaining a different approach to discrimination in this context. This analysis does not preclude the potential for statutory human rights analysis to draw on s. 15 *Charter* principles, if and when those principles promote a substantive approach to discrimination and inequality.[92]

The discussion that follows is informed by two questions that might reasonably be expected to arise when the question of importation is being addressed:

- As a matter of legal principle, must the *Law* test be followed in the implementation of anti-discrimination/equality rights under human rights statutes and s. 15 of the *Charter*?

- Even if the same approach is not required as a matter of legal principle, is it preferable for policy or practical reasons to import the *Law* approach into the human rights context?

LEAF concludes that the answer to both of these questions is "no". It is not necessary as a matter of legal principle to follow the *Law* approach to interpreting discrimination under human rights statutes. It is also not preferable, either as a matter of policy or practice, to import the *Law* test into the statutory human rights context. There are many concrete and important differences between the legal status, the role, the scope and the enforcement of statutory human rights and the *Charter*, which can justify different approaches to discrimination in each context. The analyses supporting these conclusions are set out in the sections below.

## A. Access to Human Rights Justice

Human rights statutes were passed to provide a legal avenue to remedy social inequalities. The enforcement models for these statutes have been for the most part driven by complainants coming forward and asserting claims. In principle, these models were designed to provide a streamlined process for resolving human rights claims. The evidentiary onus on the claimant to

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[92] See also Leslie Reaume's discussion in "Postcards from *O'Malley*", *supra* note 44. Reaume argues that because of the differences between statutory human rights and constitutional equality rights mean, there is no "one-size fits all" approach to discrimination appropriate for both legal contexts: "The differences between the context in which statutory instruments and the *Charter* have evolved, combined with the nature of the claims and relationships at stake in those arenas, is what makes the application of different interpretive frameworks appropriate. There is no 'one size fits all' analysis which would capture the complexities of these important but distinctive equality rights instruments.": at 385. She similarly argues that *Charter* principles can have a role in statutory human rights when they can benefit the interpretation of those rights: "Simply put, borrowing from the *Charter* context to the statutory context is appropriate so long as the exercise enriches the substantive equality analysis, is consistent with the limits of statutory interpretation and advances the purpose and quasi-constitutional status of the enabling statute.": at 375.

show a *prima facie* case of discrimination also reflects the desire to facilitate access to justice for human rights claims. The *prima facie* case test is intended to place a relatively straightforward onus on the human rights claimant. In practice, however there have been many problems with human rights enforcement and the systems have failed to provide meaningful access to human rights justice. In many jurisdictions human rights claims are submitted to human rights commissions, which have the authority to investigate the claim and try to facilitate a resolution of the claim. If the claim cannot be resolved, the commission then has the power to decide whether or not it will go forward to a hearing before an adjudicative tribunal.[93] Reviews of the federal and provincial systems consistently conclude that the enforcement systems need to be improved or changed in order to fulfill their commitment to make the statutory human rights legal process work quickly and effectively.[94] One of the options often proposed as a solution is increased access to provide human rights claimants with direct access to a hearing before an adjudicative tribunal. While it is too early to predict whether this model will eventually become the norm, it has been adopted in Ontario and British Columbia.[95]

If the purpose of providing greater access to adjudicative processes under human rights statutes is to facilitate greater access to justice, this purpose will be defeated if the requirements imposed on the human rights claimant are made more complicated and burdensome. There can be no dispute that the *Law* approach to discrimination imposes additional hurdles for the human rights claimant. In an enforcement model where the claimant is required to proceed directly to a human rights tribunal, requiring the claimant to present a case that follows the *Law* approach will directly impose significant burdens on the claimant and would effectively read new defences into human rights statutes if the claimant is found not to meet the additional burdens of the *Law* test. The "legal labyrinth" of *Law* is inappropriately burdensome in a system designed to provide streamlined access to justice for the victims of discrimination.[96] This may be yet another reason why none of the Supreme Court of Canada's human rights decisions made after *Law* suggest that establishing a violation of human dignity should be required in the statutory context. The *Law* approach is also poorly suited to an enforcement model in which the human rights commission has carriage of the complaint. Requiring the commission to conduct an investigation that follows

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[93] If the Commission decides to take a case to hearing, it presents what it considers to be the public interest position. Although the Commission's position is grounded in the complaint, the Commission and the complainant may not always have the same analysis of the claim. The claimant is usually recognized as a separate party to the proceeding and is permitted to have separate legal representation if they want it and can afford it. In rare cases, a commission that has statutory carriage of the complaint may withdraw from a proceeding after it has been referred to a tribunal, leaving the complainant to advance their case on their own.

[94] For information about difficulties with the enforcement see, for example: *Achieving Equality: A Report on Human Rights Reform* (1992, Ontario); *B.C. Human Rights Review, Report on Human Rights in British Columbia* (1994); *Renewing the Vision - Human Rights in Saskatchewan* (1996); *Promoting Equality: A New Vision* (2000, Federal), *Administrative Design and the Human Rights Process in Ontario: Can We Do this Better? Conference at the Faculty of Law University of Toronto*, January 14, 2005, http://www.law.utoronto.ca/faculty_content.asp?itemPath=1/13/1/0/0&contentId=998.

[95] In British Columbia, the human rights commission was completely abolished in 2003, over the protest of human rights advocates. The province moved to a system in which complaints are filed directly with the British Columbia Human Rights Tribunal. See Philip Bryden and William Black, "Mediation as a Tool for Resolving Human Rights Disputes: An Evaluation of the B.C. Human Rights Commission Early Mediation Project" (2004) 37 U.B.C.L.Rev. 73.

[96] The "legal labyrinth" descriptor is Greckol J.'s language in *Gwinner*, *supra* note 68. See also Reaume, "Postcards from *O'Malley*", *supra* note 44 at 382-385, 400.

the *Law* approach will further complicate the process instead of helping to make the process work better.

Furthermore, by enacting human rights codes, legislatures have implicitly (or explicitly in preambles) stated that human dignity is always implicated by discrimination in the realms of employment, housing, access to services, contract etc. There is, therefore, no need to develop a general "human dignity" limiting principle.

## B. Statutory Human Rights and Constitutional Equality Rights Have Different Legal Status and Different Functions

Human rights statutes and s. 15 of the *Charter* share the same general goal of remedying discrimination in society. However, there are significant differences in how they are structured to achieve this goal, and how they function to achieve this goal.

### 1. Human Rights have Different Coverage than *Charter*-Based Equality Rights

Human rights statutes have a different scope than s. 15 of the *Charter* because they apply to both private and public actors. Even through human rights laws generally apply to specific areas of activity within society, the areas they cover are broadly defined and are fundamental aspects of human life. At a minimum, the areas covered by human rights statutes generally include employment, housing, access to services, contract and membership in unions and other employment-related associations. Section 15 of the *Charter* applies to denials of the right to equality in relation to "law". Even when "law" is broadly interpreted, s. 15 will not have the same scope as human rights statutes.

It has been suggested that one way to address this issue would be to have different approaches to discrimination under human rights statutes for private and public actors. Thus, it has been suggested that the *Law* approach could be followed in cases involving human rights claims against government but not in cases against private actors. At first glance, and at a superficial level, this option may seem plausible, since it would address any concern that the government should meet consistent approaches to discrimination claims against it, whether they are brought under a human rights statute or under the *Charter*. However, there is no statutory basis in human rights legislation for this approach. Human rights statutes draw no distinctions between private and public actors – they are equally subject to the requirements of the legislation. Moreover, the effect of such an approach would be to deny to human rights claimants the benefit of a more substantive approach to discrimination in human rights claims against public actors.

It is not unusual for legal concepts to have different meanings and applications in different contexts, with the result that the same social actor might face different responsibilities and obligations under different legal regimes. For example, an entity might be considered an employer under pay equity legislation but not under labour relations legislation. There is no legal principle that requires the same test for discrimination to be applied under human rights statutes and the *Charter*. There is also no legal principle that requires the outcome of a discrimination claim to be the same under human rights statutes and the *Charter*. For the public respondent, there may be practical advantages of having the *Law* approach apply in the statutory

human rights context. However, these advantages to respondents are created by the disadvantages to the human rights claimant – namely, a narrower and more formalistic approach to discrimination that imposes more burdens on the claimant. These disadvantages for the claimant are contrary to pursuing a substantive approach to equality under human rights law – the very purpose for which the Supreme Court of Canada turned to human rights law to inform a substantive approach to equality under s. 15 of the *Charter*.

## 2. Statutory Human Rights have Different Legal Status from *Charter* Equality Rights

### a. A Statute is Different from the Constitution

The courts describe human rights statutes as "quasi-constitutional" legislation. They have been accorded this status because their subject matter is considered fundamental and because they are generally accorded primacy over other statutes. Where other legislation and human rights legislation conflict, the courts have ruled that human rights legislation prevails, even where the human rights legislation has no specific paramountcy clause. At the same time, human rights statutes remain statutes; even through they have special status, it is not constitutional in status. By definition, Canadian human rights legislation is the product of democratically elected legislatures and Parliament. Perhaps most importantly, the existence of long-established human rights legislation, which is applicable to government as well as to the private sector, is evidence of the will of the Canadian people, expressed through their democratically elected governments, to accept the consequences of substantive equality.

Human rights statutes can be relatively easily amended by the legislatures that passed them. Thus an adjudicator construing human rights legislation need not be as wary of interfering with legislative supremacy as the courts have been with the *Charter*. If *Charter* rulings are considered seriously problematic by the affected legislature, solutions involve legally or politically burdensome strategies such as invocation of the notwithstanding clause or crafting legislative amendments that will better meet the not-always clear requirements of s.1.

As a statutory instrument, human rights legislation is also subject to fairly well-defined rules of statutory construction shaped by both common law and provincial and federal *Interpretation Acts*.[97] For example, the Supreme Court has been willing to take an expansive approach to the construction of human rights statutes where to do so would further the purpose of the legislation, but has refused to do so in order to limit the impact of the legislation.[98] <u>The application of *Law*</u>

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[97] The rule that legislation is to be interpreted purposively and in a "fair, large and liberal" manner has been frequently invoked; see *O'Malley v Simpsons-Sears Ltd, supra* note 9; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, *Brossard (Ville) v. Quebec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279[*Brossard (Ville)*]; *Battlefords and District Co-operative Ltd. v Gibbs*, [1996] 3 S.C.R. 566; *Central Alberta Dairy Pool v Human Rights Commission (Alta)*, [1990] S.C.J. 80; *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970

[98] An example can be seen in the response to a suggestion that a defence be "read in" to a human rights Act, by the majority in *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353:

Some concluding remarks are in order. An important feature of the Act at the time of Berg's complaint was its absolute prohibition of discrimination. That is, there was no provision allowing a defence where the denial of a service or facility was based on prohibited grounds of discrimination, yet could be justified with reference to competing interests, such as safety. I believe that the School and its representatives acted in good faith, and thought that there were good reasons for acting as they did. Dr. Rodgers might reasonably have had concerns about giving

would be a departure from established human rights jurisprudence, would restrict the application and development of human rights jurisprudence, would needlessly complicate the construction of the statutes, and would introduce considerable uncertainty into well-developed law.

### b. There are Different Approaches to Enforcement under Human Rights Statutes and the *Charter*

Human rights statutes and s. 15 of the *Charter* also have different orientations in terms of their enforcement. Under human rights statutes, the primary decision-makers are intended to be administrative tribunals with expertise in human rights. Under s. 15 of the *Charter*, the primary decision-makers are intended to be courts and the judiciary. These categories are not mutually exclusive, inasmuch as decisions of human rights tribunals are subject to review and appeal to the courts, and human rights tribunals may have the jurisdiction to deal with issues under the *Charter*.[99] However, the broad intention is that human rights tribunals are the experts in the area of statutory human rights and the courts are the experts on the *Charter*. In addition, while some human rights statutes give a human rights tribunal the power to make an order, similar to those available under s. 52 of the *Charter*, that an entity cease to apply a provision under another statute,[100] human rights legislation does not empower a court or tribunal to declare a statute inoperative.[101]

There are also procedural differences between how legal claims are processed under human rights statutes and the *Charter*. Legal claims under statutory human rights are typically addressed through administrative tribunal processes. These administrative tribunals include human rights commissions and tribunals, as well as other tribunals such as labour arbitration tribunals and committees of self-regulating professions. In the employment context, human rights issues often arise in the context of grievances under collective agreements that may be referred to arbitration for resolution. Human rights issues can also arise in the context of proceedings before disciplinary and fitness to practice committees dealing with health care professionals, teachers and other self-governing professions. *Charter* rights, on the other hand, are typically raised by way of complex actions or applications in the courts. Proceedings before administrative tribunals are generally less formal and more flexible than proceedings in court.

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Berg a key not because of her mental disability itself, but because of the safety issues raised by the incident. Similarly, faculty members might have denied the rating sheet because they felt they could not give Berg a useful or positive recommendation. Under the amended s. 3, these issues would, no doubt, have been the focus of the evidence and argument before the member designate, instead of the issue on these appeals.
However, the absence of a defence provision in the Act as it stood at the time of Berg's complaint should not lead us, as I think it did the Court of Appeal in this case, to interpret s. 3 in an overly restrictive fashion. The Act must be allowed its full scope of application, and its particular operation in situations such as this, if undesirable, is a matter for legislative attention. The recent amendments to the Act show that such responses are always possible.

[99] See, for example, *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, overruling *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854.

[100] This power arises from paramountcy clauses included in a number of human rights statutes. Examples can be seen in s. 47(2) of the Ontario Human Rights Code, and in s. 1(1) of Alberta's *Human Rights, Citizenship and Multiculturalism Act, supra* note 6 discussed in *Gwinner, supra* note 58. For decisions that applied paramountcy provisions, see *O'Neill and Coles v. Ministry of Transportation* (1994), 27 C.H.R.R. D/405, *Re Schewchuck and Ricard* (1986), 28 D.L.R. (4th) at 439 (B.C.C.A.) and *Canada v. Druken* (1988), 9 C.H.R.R. D/5339 (Fed C.A.).

[101] Where a human right statute includes a primary clause, however, this would authorize the tribunal or court to override the effect of any statutory provision found to be in violation of the human rights statute.

Administrative tribunals generally have broad powers to control their own processes and are generally not bound to follow strict rules of evidence. These simpler and more flexible proceedings are generally intended to facilitate access to processing claims under human rights statutes. The wide-ranging and formulaic demands of the *Law* approach are incompatible with an easier and more flexible analysis of discrimination, which is better suited to facilitate the goals of human rights statutes.

### 3. Human Rights Statutes have Closed Lists and s. 15 of the *Charter* has an Open List of Grounds of Discrimination

Canadian human rights statutes specifically designate a closed list of grounds upon which discrimination is forbidden. They also sometimes include specific definitions for some of the prohibited grounds. These lists are not permanent; they can be and have been legislatively amended. Courts will also sometimes rule that a prohibited ground should be read into a human rights statutes, as was done with the ground of sexual orientation in *Haig v. Canada*[102] and *Vriend v. Canada.* This structure is different, however, from s. 15(1) of the *Charter*, which includes both an enumerated list of grounds and empowers the courts to recognize grounds "analogous" to the enumerated grounds. The provision for analogous grounds alters the nature of the protection against discrimination afforded by s. 15 of the *Charter* by creating the opportunity for claimants to seek recognition for different types of discrimination than are covered by human rights statutes.[103]

### 4. Defences and Justifications under Human Rights Statutes and the *Charter*

Human rights legislation contains clearly available, specific defences tailored to its areas of application. There are parallels between the limiting provisions in human rights statutes and the *Charter*, just as there are parallels between the goal of human rights legislation and s. 15(1) of the *Charter* and between the legal concepts through which this goal is defined. However, there are also important differences between the respective limiting provisions of human rights statutes and the *Charter*. Differences between these provisions are relevant to the analysis of whether the *Law* approach to discrimination can and should be imported into the statutory human rights context. These differences provide further support for the conclusion that it is neither necessary nor desirable to import the *Law* approach to discrimination into the human rights context.[104]

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[102] *Haig v. Canada* (1992), 9 O.R. (2d) 495 (C.A.).

[103] Donna Greschner and Mark Prescott argue that the analogous ground approach is substantially different from the closed grounds approach. McIntyre J. in *Andrews* expressed the view that this difference between human rights statutes and s. 15(1) of the *Charter* was a significant difference, in his view more significant than the fact that the *Charter* applies only to public action and human rights statutes apply to private as well as public action.

[104] A further question may arise about whether the approach to limiting provisions under the *Charter* would also need to be imported into the statutory human rights context if the *Law* approach were imported. Since LEAF concludes that the *Law* approach should not be imported, this paper does not address the hypothetical question of whether the *Charter*'s approach to limiting provisions would also have to be imported.

### a. Different Legal Approaches to Human Rights Statutory Defences and s. 1 of the *Charter*

It is well established in human rights jurisprudence that the statutory defences are to be construed narrowly, as befits exceptions to remedial legislation.[105] The narrow approach to human rights defences is specifically distinguished from the broad, liberal and purposive approach that is applied to interpreting the rights-conferring provisions.[106] In *Andrews*, McIntyre J. wrote that there is a distinction between the legal function of statutory defences in human rights legislation and s. 1 of the *Charter*. He described the limitations in human rights statutes as "specific exceptions to the substantive rights" and said that the effect of these provisions is to "excuse" the discrimination or to "completely remov[e] the conduct complained of from the reach of the Act." The effect of s. 1 of the *Charter*, on the other hand, he said is to allow for a "reasonable limitation on the operation of section 15(1)". One difference between human rights statutes and the *Charter*, then, is that human rights statutes contain several limiting provisions that provide specific exceptions for specific rights, whereas s. 1 is a general limiting provision that applies to all *Charter* rights, including s. 15(1).[107]

A second difference suggested by McIntyre's analysis is that the effect of applying a statutory defence under human rights legislation is to void any judgment of discrimination, whereas the effect of applying s. 1 of the *Charter* is to not to void the judgment of discrimination but to permit the discrimination to continue for other justifiable reasons. For McIntyre J. in *Andrews*, these differences between statutory defences in human rights legislation and the s. 1 justificatory provision of the *Charter* had implications for the approach to discrimination under s. 15(1):

> "Where discrimination is forbidden in the Human Rights Acts it is done in absolute terms, and where a defence or exception is allowed it, too, speaks in absolute terms and the discrimination is excused. There is, in this sense, no middle ground. In the Charter, however, while s. 15(1), subject always to subs. (2), expresses its prohibition of discrimination in absolute terms, s. 1 makes allowance for a reasonable limit upon the operation of s. 15(1). A different approach under s. 15(1) is therefore required."[108]

Differences between the limiting provisions in human rights statutes and the *Charter* again point to an overall difference between implementation of the broad goal of substantive equality under

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[105] R. Sullivan, ed., *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994) gives the following summary at 369-370: "In keeping with the current emphasis on purposive analysis, modern courts are particularly concerned that exceptions and exemptions be interpreted in light of their underlying rationale and not be used to undermine the broad purpose of the legislation. In the words of LaForest J. in *Air Canada v. British Columbia*, an exception "should not be construed more widely than is necessary to fulfil the values which support it." [(1989), 59 D.L.R. (4th) 161 (S.C.C.) at 197]. Pierre-André Côté, in *The Interpretation of Legislation in Canada*, 2d ed. quoted Justice Gonthier in *Quebec (Urban Community) v. Notre Dame de Bon Secours* [1994] 3 S.C.R. 3 at 18, who wrote that "when the legislature makes a rule and lists certain exceptions, [they]...must be regarded as exhaustive and so strictly construed" (Cowansville, Qc.: Yvon Blais, 1991) [Côté] at 502. See also Reaume, "Postcards from *O'Malley*", *supra* note 44 at 378.

[106] See Reaume, "Postcards from "*O'Malley*", *ibid.*

[107] The Alberta *Human Rights, Citizenship and Multiculturalism Act* is the one human rights statute that has a general defence provision similar to s. 1 of the *Charter*: text quoted *supra*, note 62.

[108] *Andrews*, *supra* note 1 at para. 39.

human rights statutes and s. 15(1) of the *Charter*. These differences in implementation support a conclusion that there is no legal requirement to import the *Law* approach into the statutory human rights context. Canadian human rights statutes typically contain some version of the following three limiting, or potentially limiting, provisions: (1) a "reasonable and *bona fide*" defence, (2) a special programme defence, and (3) an exception for charitable and philanthropic organizations. These three types of defence are discussed below, and contrasted with *Charter* provisions that may be compared with them.

### b. The "reasonable and *bona fide*" defence

All Canadian human rights statutes have some form of "reasonable and *bona fide*" ("*bfor*") defence, the wording and applicability of which varies from statute to statute. The case law dealing with this type of defence has evolved largely through cases dealing with employment and discrimination on the grounds of sex, religion/creed and disability. The principles are certainly portable between areas and grounds of discrimination, but in cases involving areas such as services, contracts and residential or business accommodation, some logical adjustments may be needed.

There is a general similarity between *bfor* provisions in human rights statutes and s. 1 of the *Charter*, inasmuch as both provisions are structured around the legal concept of reasonableness. However, "reasonableness" under *bfor* provisions is interpreted through the analytical framework of "undue hardship", whereas reasonableness under s. 1 of the *Charter* is interpreted through the analytical framework of "proportionality". In the *Meiorin* decision, the Supreme Court of Canada articulated a uniform, "three-step test for determining whether a *prima facie* discriminatory standard is a BFOR" (*bona fide* occupational requirement).[109] Under this approach, in order to establish "reasonableness" the respondent must show: (1) that the requirement is reasonably necessary to the operation of the activity or organization, (2) that there is a rational, objective basis for the requirement, and (3) that there is no reasonable alternative.[110] If a requirement is not reasonably necessary to the respondent's activities, it cannot be maintained as a requirement; further inquiry as to whether the requirement is *bona fide* or as to accommodation, is unnecessary.[111] In addition, the respondent must establish that the needs of an affected group or individual cannot be accommodated without undue hardship in order to establish that there is not reasonable alternative to the requirement.[112] The proportionality test under s. 1 of the *Charter*, by contrast, is a four-step test under which the respondent must show:

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[109] *Meiorin, supra* note 48 at para 54.

[110] The Supreme Court of Canada jurisprudence on the "reasonable" test includes *Ontario (Human Rights Commission) v. Borough of Etobicoke*, [1982] 1 S.C.R. 202 at 208-209; *Caldwell v. Stuart*, [1984] 2 S.C.R. 603 at 622-23; *Brossard (Ville), supra* note 96; *Central Alberta Dairy Pool, supra* note 96; and *Renaud, supra* note 96. See also *Toronto Dominion Bank v Canada (Human Rights Comm.)* (1998), 32 C.H.R.R. D/261 (Fed. C.A.) and *Entrop v. Imperial Oil Limited* (2000), 50 O.R. (3d) 18 (C.A.)

[111] See *Etobicoke, supra* note 108 at 207-08; *O'Malley, supra* note 9 at 555; *Saskatchewan (Human Rights Commission) v. Saskatoon (City)*, [1989] 2 S.C.R. 1297at 1308-1310; *Central Alberta Dairy Pool, supra* note 96 at 506; *Large v. Stratford (City)*, [1995] 3 S.C.R. 733 at para. 33; and *Meiorin, supra* note 48 at paras 20-21.

[112] This is clear in the wording of legislation such as the federal *Act* and the Ontario *Code*, and in jurisprudence from other jurisdictions in which the legal test is not as clearly spelled out. See for example *Grismer, supra* note 48 at para 32: "In order to prove that its standard is "reasonably necessary", the defendant always bears the burden of demonstrating that the standard incorporates every possible accommodation to the point of undue hardship, whether that hardship takes the form of impossibility, serious risk or excessive cost."

(1) that the government action giving rise to the rights infringement serves a pressing and substantial objective, and (2) the infringement is proportional to the government's objective, which requires the respondent to demonstrate: (a) that that there is a rational connection between the objective and the infringing conduct by which the objective is implemented, (b) that the infringement causes minimal impairment of the right(s), and (c) that the negative effects of the infringement are in proportion to the ameliorative effects of the infringing conduct.

Differences between the "undue hardship" standard under human rights statutes and the proportionality approach "reasonable limits" under the *Charter* provide further justification for not requiring importation of the *Law* test for discrimination. Equality rights advocates argue that the s. 1 justificatory standard is stringent and should be especially stringent in the context of a s. 15 infringement. Nevertheless, "undue hardship" is arguably a more stringent legal standard than "proportionality" - especially when undue hardship requires a respondent to demonstrate that alternatives to the discrimination are "impossible". It is also arguable that the *bfor* analysis under human rights statutes maintains a more clear separation between the discrimination analysis and the analysis of the respondent's defence. The *bfor* undue hardship framework is focused on assessing how the respondent's needs and interests can address the discrimination. The proportionality framework under s. 1 of the *Charter*, even though the s.15 and s.1 analyses are supposed to be distinct, has involved a more explicit balancing of the needs and interests of the claimant with those of the respondent and others. This distinction is consistent with the argument that human rights statutes provide defences to discrimination, whereas s. 1 provides an excuse or justification for the discrimination. In the human rights context, where a defence is accepted the legal conclusion is that the conduct giving rise to the claim was not discriminatory. In the *Charter* context, where an excuse is available, the legal conclusion is that the conduct giving rise to the claim was discriminatory but can be justified for other reasons or when balanced against other interests. These differences between the provisions that limit the scope of discrimination under statutory human rights and the scope of discrimination under s. 15 of the *Charter* provide yet one reason to reject the argument for importation of the *Law* test based on consistency between the two legal contexts.

**c. Special Programme Defence**

Human rights statutes and s. 15 of the *Charter* both include "affirmative action" type provisions. It is difficult to make general observations about either the statutory affirmative action provisions or s. 15(2) of the *Charter*, since neither has been the subject of much interpretation and application. To date, however, there appears to have been a difference in approach to the two categories of provisions. The statutory provisions have for the most part been interpreted as "exceptions" or "defences" to discrimination, [113] whereas s. 15(2) of the *Charter* has been interpreted to as an interpretive gloss on s. 15(1) rather than as an exception to the rights guaranteed by s. 15(1).[114]

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[113] See for example *Ontario Human Rights Commission v. Ontario* (1994), 19 O.R. (3d) 387 (C.A.).

[114] See, for example, *Lovelace, supra* note 3 at para 105. See also Natasha Kim and Tina Piper, "Gosselin v. Quebec: Back to the Poorhouse" (2003) 48 McGill L.J. 749 at para. 51. For an example of this approach to affirmative action in the statutory human rights context, see *Keyes v. Pandora Publishing Ltd.*, [1992] N.S.H.R.D.I.D. No. 1.

Affirmative action provisions were originally intended to protect remedial measures from "reverse discrimination" claims by relationally advantaged social groups. These provisions are now also being invoked in cases where both claimants and respondents represent competing equality claims. Competing equality claims raise particular challenges for addressing human rights claims in a litigation context.[115] They raise a number of difficult issues, including the issue of whether or not a hierarchical approach to disadvantages can and should be taken. For purposes of this paper, the main point is that there are differences in approach to affirmative action provisions under human rights statutes and the *Charter*. These differences provide further support for the conclusion that there is no legal requirement to import the *Law* test for discrimination into the statutory human rights context.

### d. Charitable, Philanthropic and Religious Organizations

Canadian human rights statutes also typically have specific exceptions for charitable, philanthropic and religious organizations. This type of provision was relied on by the Supreme Court of Canada in *Caldwell v. St. Thomas Aquinas High School*[116] to allow a Roman Catholic school board to impose employment requirements that were *prima facie* discriminatory. More recently, the British Columbia Court of Appeal in *Nixon* applied this provision in the British Columbia *Code* to excuse the discrimination against Ms. Nixon. These exceptions reflect more of a hierarchical approach to competing rights under human rights statutes, where one right or claim can explicitly trump another. The *Charter* addresses issues of competing claims differently. Where distinct *Charter* rights are in issue, the courts describe what they are doing in non-hierarchical terms as an attempt to reach an interpretation that balances the competing rights (even if this balancing in fact has the effect of one claim trumping another).[117] In the most extreme case, s. 33 authorizes a government to override *Charter* rights for reasons that go beyond the *Charter*. Again, these differences between statutory human rights and the *Charter* support arguments against importing *Charter* s. 15 analyses that into the statutory human rights context.

## VII. Conclusion: Renewing the Commitment to a Substantive Approach to Discrimination Under Human Rights Statutes

The Supreme Court of Canada decisions of the 1980s and 90s laid down clear principles for the construction of human rights legislation and, with rare exceptions, demonstrated a willingness to recognize the experience of people whose voices are not routinely heard and valued, and to redress entrenched inequalities. More recently, some human rights decisions have imported the *Law* approach to the identification of discrimination into statutory context. This has created a new set of concerns about the application of this problematic test in a different context (in addition to those associated with its application in the *Charter* context).

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[115] For example, *Nixon, supra* note 52.

[116] [1984] 2 S.C.R. 603.

[117] *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710 and *Trinity Western University v. College of Teachers*, [2001] 1 S.C.R. 772.

The Supreme Court of Canada initially drew on human rights law to inform and guide a substantive approach to s. 15(1) equality rights. The Court has never stated an intention to move away from a commitment to substantive equality under the *Charter*. However, the effect of the *Law* test is to undermine a substantive approach to equality rights. It would be a step backwards for the Court to seek to establish consistency between human rights interpretation and s. 15 of the *Charter* by requiring the importation of a more narrow and limited approach to discrimination that has developed under the *Charter*. Traditionally there has been a low threshold associated with the *prima facie* element of human rights adjudications, for the reasons discussed above. Reliance on *Law* introduces a screening device that interferes with the statutory relationship between commissions and tribunals, and that raises the evidentiary bar for complainants by redefining dignity as an element of the burden of proof rather than a value that animates the entire statutory regime. Reliance on *Law* also supplants statutory definitions of "discrimination" and creates defences against a finding of discrimination that are inconsistent with statutory language and the development of human rights principles.

LEAF is opposed to any expansion of the use of the *Law* test and does not support its importation into the human rights context. The use of the *Law* test in the context of the *Charter* has not advanced the equality rights of women or other equality rights claimants and has failed to fulfill the promise of s.15. LEAF is concerned that, in part as a result of *Law*, equality rights law has not really progressed beyond the much-critiqued formal approach to equality. It is critical to maintain an understanding of substantive equality that can provide for the protection and promotion of equality in the human rights context. It is equally critical that human rights claims provide an effective means through which to achieve social justice. LEAF has developed a critique of the *Law* test and an approach to reinstating a substantive approach to equality under s. 15 of the *Charter*.[118] In the statutory human rights context, the traditional *prima facie* approach – with a focus on the effects of conduct and differential treatment - provides a better mechanism to achieve this goal than does the *Law* test for discrimination. At this juncture in the evolution of statutory human rights jurisprudence, this is the preferred approach from LEAF's perspective.

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[118] LEAF factum in *Health Services and Support-Facilities Subsector Bargaining Assn.* v. *British Columbia ("Bill 29")*, December 2005 available at www.leaf.ca