

Escherian Reflections on the Charter and Human Rights in Canada

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Introduction

M.C. Escher's artistic work calls on us to see the world in ways that challenge and confound. His oeuvre includes drawings of animals metamorphizing¹, a hand drawing a hand drawing a hand², and a variety of examinations of reflections.³ Escher's work explores ideas such as recursion, in which a thing references itself, background and foreground interaction, fractal-like repetition, tessellated interlocking, reflections, and optical illusions made effective by translating from a two dimensional plane to three dimensional visual experience.⁴ Escher's approach serves as a useful metaphor to think about law and rights, and particular about labour rights in the context of human rights and the Charter of Rights and Freedoms.⁵ In 1993, Justice l'Hereux-Dube wrote about family and law being "engaged in an Escherian dialect, each shaping the other while at the same time being shaped."⁶ This also serves as an apt device to consider the interaction of the Charter and human rights law over the past thirty years, especially in relation to their framing the rights of workers within a complex amalgam of social, political and economic trends that often pull in competing directions. We simultaneously and perhaps paradoxically have the flowering of neo-liberalism and the growth of international human rights law as sources of key ideas about how we should govern and regulate the governors.

Academic discussion of labour rights as human rights is a growth industry. However, it is not a topic made easier by the plethora of interconnecting "rights" (labour rights, human rights, constitutional rights, Charter rights, rights in international law, fundamental rights). Nor are the interconnections clear: do labour rights even count as human rights;⁷ are Charter rights all human rights or are only some of them; is there value in constitutionalizing labour rights? In order to make this paper manageable, I provide a lens that will focus on the interaction of the Canadian domestic human rights regime with the Charter guarantees of freedom of association¹ and of equality set out in Section 2(d) and 15 respectively. I address how the body of domestic human rights law has influenced and is influenced by Charter jurisprudence. I note the Escherian dialectic between human rights and Charter discourse and some of the problems in developing a coherent Charter/human rights regime in relation to labour rights. I look at the problem of under-inclusion, especially of workers excluded from access to collective bargaining regimes, and note the failure of the Charter/human rights regime to adequately respond to the claims of some of the most vulnerable workers to participate like others in schemes that might provide a glimmer of potential for addressing some of the significant inequalities that they face.

¹ M.C. Escher, *Metamorphosis II* (online: <http://www.mcescher.com/gallery/most-popular/metamorphosis-ii/>).

² M.C. Escher, *Drawing Hands*, (online: <http://www.mcescher.com/gallery/lithograph/drawing-hands/>).

³ M.C. Escher, *Hand With Reflection Sphere*, (online: <http://www.mcescher.com/gallery/most-popular/hand-with-reflecting-sphere/>).

⁴ For an extended discussion of many concepts explored by Escher, see Douglas Hofstadter, *Godel, Escher, Bach: An Eternal Golden Braid* (New York: Basic Books, 1979).

⁵ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [hereafter, "the Charter"].

⁶ *Canada (Attorney General) v. Mossop*, [1993] 1 SCR 554.

⁷ Risse, M., "A Right to Work? A Right to Leisure? Labor Rights as Human Rights" (2009) 3(1) *Law & Ethics of Human Rights*, Article 1.

Domestic Human Rights Regime⁸

The Canadian human rights regime was in part a response to the Universal Declaration of Human Rights (UDHR) promulgated in 1948. The UDHR's commitment to the protection of human rights by the rule of law was heeded in Canada by the enactment of anti-discrimination laws by the federal government and by the provinces.⁹ Those statutes protected human rights by prohibiting discrimination on identified grounds, the particulars of which varied from jurisdiction to jurisdiction with the number of enumerated grounds substantially increasing over time. The statutory right to be free from discrimination was also commonly limited to particular spheres of activity such as accommodation, access to services and employment. The protection extended both to acts by public (governmental) and private actors. Enforcement mechanisms relied extensively on complaints initiated by individuals to administrative tribunals charged with responsibility for investigation, adjudication and remediation. This regime did not provide protection for a wide range of social and economic rights such as a right to education, healthcare or a right to work or to be free from poverty.

There have been significant developments in this domestic human rights regime over time. As Shepherd notes, the definition of discrimination was expanded in the 1980s to embrace adverse effects discrimination in addition to direct discrimination.¹⁰ This linking of discrimination to institutional rules, policies and processes rather than merely focusing on the stereotypical assumptions of the individual perpetrator or the characteristics of the person labelled as different, in Shepherd terms, "marks an historic moment in equality rights jurisprudence."¹¹

The Supreme Court has contributed significantly to the development of a complex and sometimes progressive understanding of human rights. It has come to acknowledge the quasi constitutional nature of human rights legislation,¹² granting it primacy over other legislative enactments in the face of ambiguities. The Court proposed a liberal and purposive interpretation in order to advance the broad policy considerations underlying the statutes,¹³ albeit not preventing the legislature from expressly exempting policies and programs from the application anti-discrimination standards. The Court would abandon its formalist approach to equality rights, particularly evident in decisions under the Canadian Bill of Rights, such as *Bliss v. Attorney General of Canada*.¹⁴ In that case it had denied that there was discrimination on the basis of sex when access to normal unemployment insurance benefits was denied to pregnant women, adopting the view that "if the [impugned provision] treats unemployed pregnant

⁸ The use of the word regime is meant to suggest a system of norms and decision-making procedures that are accepted by actors to regulate an area. See Jack Donnelly, "International Human Rights: A Regime Analysis" (1986) 40:3 *International Organizations* 599. Such regimes need not be strictly legal and can involve disparate commitment to implementation and enforcement.

⁹ Stanley Corbett, *Canadian Human Rights Law & Commentary* (Markham, LexisNexis Canada: 2007).

¹⁰ Colleen Sheppard, *Inclusive Equality: The Relations Dimensions of Systemic Discrimination in Canada* (Montreal & Kingston: McGill-Queen's University Press, 2010).

¹¹ *Ibid.*, at p. 21.

¹² *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 SCR 145; *Winnipeg School Division No. 1 v. Craton*, [1985] 2 SCR 150.

¹³ *B. v. Ontario (Human Rights Commission)*, 2002 SCC 66, [2002] 3 SCR 403.

¹⁴ [1979] 1 SCR 183.

women differently from other unemployed persons, be they male or female, it is, it seems to me, because they are pregnant and not because they are women.”¹⁵

The Court’s more expansive approach to human rights was developed throughout the 1980s in a series of significant decisions including *Brooks v. Canada Safeway Ltd.*,¹⁶ recognizing discrimination arising from pregnancy as a form of discrimination based on sex, and *Janzen v. Platy Enterprises Ltd.*,¹⁷ recognizing sexual harassment as a form of prohibited discrimination on the basis of sex. It significantly expanded the ambit of anti-discrimination laws by its recognition in *Ont. Human Rights Comm. and O’Malley v. Simpsons-Sears*¹⁸ that discrimination need not be intentional, but can arise from the detrimental impact of seemingly neutral rules. That decision was also significant in establishing that once a complainant establishes a *prima facie* case that a facially neutral rule has had an adverse impact on a prohibited ground of discrimination, the onus shifts to the respondent to establish that it has made reasonable efforts to accommodate the individual’s position to the point of undue hardship. In *Robichaud v. Canada (Treasury Board)*¹⁹ the Court held that employers can be held liable for the actions of their managers, supervisors and workers in the absence of having taken appropriate steps to create a discrimination free workplace. In *CN v. Canada (Canadian Human Rights Commission)*²⁰ the court, drawing on the influential work of Justice Rosalie Abella in her *Report of the Commission on Equality in Employment*²¹ recognized that discrimination can be systemic in nature and that there is a need to provide positive remedies to combat that problem. In 1999, the Supreme Court reviewed much of its prior jurisprudence and concluded that there should be a unified approach to both direct and adverse effects discrimination with a high justificatory burden for qualifications or requirements whether they explicitly make distinctions on prohibited grounds or whether they appear to be neutral rules that have an adverse impact.²² Moreover, the Court clarified that even where a qualification or requirement was justified there is an obligation on the respondent to accommodate individual circumstances to the point of undue hardship.

Other decisions have contributed to the percolation of human rights norms into the workplace by holding that such norms are incorporated into collective agreements²³ and that arbitrators have jurisdiction to consider and apply human rights statutes, as do other statutory tribunals in applying their constituent statutes²⁴ even to the point of ousting the jurisdiction of courts.²⁵

¹⁵ *Ibid.*, at p. 190.

¹⁶ [1989] 1 SCR 1219.

¹⁷ [1989] 1 SCR 1252.

¹⁸ [1985] 2 SCR 536.

¹⁹ [1987] 2 SCR 84.

²⁰ [1987] 1 SCR 1114.

²¹ Ottawa: Minister of Supply and Services Canada, 1984.

²² *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3 (*Meiorin*) ; *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 (*Grismer*).

²³ *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 SCR 157.

²⁴ *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 SCR 513.

²⁵ *Weber v. Ontario Hydro*, [1995] 2 SCR 929.

The legislated anti-discrimination statutes are vital to the pursuit of justice in the workplace. For example, 75 percent of applications to the Human Rights Tribunal of Ontario relate to employment, a total of 2664 in 2009-10.²⁶ These numbers belie the reach of legislation, because its enforcement is not left only to human rights tribunals, but has become imbricated within the complex array of institutions responsible for resolving disputes in the workplace such as grievance arbitration and informal dispute resolution processes.

Despite the significant number of individualized complaints going to human rights tribunals and arbitrators, there are significant limitations to the ability of the domestic human rights regime to promote and achieve equality in Canada. One is that our human rights laws take a categorical approach by requiring complainants to identify how their discriminatory treatment corresponds to a particular ground of discrimination.²⁷ By so doing it both encourages individuals to isolate and highlight only one aspect of their social identity as an explanation for their discriminatory treatment at the expense of the overlapping and multiple facets constituting identity. It ignores the intersectionality of discrimination that makes discrimination qualitatively different. This particularly plays out in the problem of under-inclusion where access to statutory regimes (collective bargaining legislation, employment standards protection) may be limited to categories of individuals (agricultural workers, domestic workers, part-time workers) who are directly correlated with a prohibited ground of discrimination.²⁸

As well, it has long been recognized that the approach of general anti-discrimination statutes falls far short of ensuring equality and fairness in the workplace. Statistics continue to demonstrate the underrepresentation of various groups at work²⁹, and the ongoing challenges of achieving pay equity between men and women.³⁰ Although there have been some cases challenging systemic discrimination, with the consequent awarding of systemic remedies, these have been few and far between. The cost and evidentiary burden of establishing systemic discrimination have led to additional efforts to develop more effective means of addressing the problem, such as the enactment of pay equity and employment equity laws. These in turn have been the subject of considerable controversy, so that their reach has been considerably limited, with most pay equity statutes confined to the public sector, and only the federal government having an employment equity statute which itself is quite narrow in its scope.

Moreover, although there is putatively a unified approach to direct and indirect forms of discrimination since the Supreme Court decision in *Meiorin*,³¹ there has been some uncertainty with respect to the test for discrimination. By referencing a need for complainants to demonstrate that a respondent's actions are arbitrary or grounded in stereotyping or prejudice, the courts have, in some cases influenced by Charter section 15 jurisprudence, incorporated the respondent's perspective into the analysis at the risk

²⁶ Human Rights Tribunal of Ontario, [Annual Report 2009-10](#).

²⁷ Sheppard, *supra* note 4 at p. 32.

²⁸ This issue is examined more closely later in the paper.

²⁹ See for example Sheila Block and Grace Edward-Galabuze, *Canada's Colour-Coded Labour Market* (Ottawa: Canadian Centre for Policy Alternatives, 2011); Human Resources and Skills Development Canada, *Employment Equity Annual Report 2011* (Ottawa: 2013).

³⁰ Marie Drolet and Karen Mumford, "The Gender Pay Gap for Private-Sector Employees in Canada and Britain" (2012), 50 *British Journal of Industrial Relations* 529.

³¹ *Meiorin*, *supra* note 16.

of undermining “the potential for applying human rights statutes in a concrete and substantive way.”³² Later sections of the paper will assess the ongoing dialectic between the Charter and human rights jurisprudence in defining the concept of discrimination.

Labour Rights and Human Rights

The general anti-discrimination statutes are not the only source of protection against discrimination. In particular, the labour law regime promulgated by labour relations statutes play a key role in protecting certain work-related rights. These statutes generally describe a right of workers to associate, and foster this right both by providing a mechanism whereby workers, through majority consent, can have their representative trade union certified as bargaining representative. The series of statutory prescriptions designed to facilitate collective bargaining and to prevent discrimination against those who exercise their associative rights are key to the scheme. Although not often characterized as *human rights* statutes, they provide a domestic legal base to the internationally recognized freedom of association and worker rights. At the international level, these worker and associative rights are accorded status as human rights, through inclusion in the UDHR, as well as in other constitutive international human rights instruments such as the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the various instruments of the International Labour Organization.³³

This complex array of statutory human rights initiatives provides a background to the development of constitutional rights expressly set out in the Charter. The Charter, enacted in 1982, marks a turning point in rights discourse in Canada. The Charter’s guarantees of fundamental freedoms such as freedom of association and freedom of expression, along with mobility and equality rights appeared to significantly expand the space in which workers might seek to promote claims to fairness and justice in workplace relations. However, the Charter differs from human rights laws in several fundamentally important ways. First, as it applies only to government actions it does not directly impose obligations on private sector employers to recognize and respect worker freedoms and rights. Second, the guarantees are not absolute and can be legally infringed pursuant to section 1 if governments can demonstrate the infringement is a reasonable limit prescribed by law which is demonstrably justified in a free and democratic society.³⁴

³² Karen Schucker, “Human Rights Statutes as a Tool to Eliminate and Prevent Discrimination: Reflections on the Supreme Court of Canada’s Jurisprudence” (2010), 50 *Supreme Court Law Review* (2d) 387 at 403, noting in particular the minority judgement of Justice Abella in *McGill University Health Centre v. Syndicat des Employés de l’Hôpital Général de Montréal*, 2007 SCC 4, [2007] 1 SCR 161.

³³ For an extended discussion of labour rights as human rights in international law, see Virginia A Leery, “The Paradox of Workers’ Rights as Human Rights” in L. Compa and S. Diamond, (eds.), *Human Rights, Labor Rights and International Trade* (1996); Patrick Macklem, “The Right to Bargain Collectively in International Law: Workers’ Right, Human Right, International Right?” in Philip Alston, ed., *Labour Rights as Human Rights* 61 (Oxford: Oxford University Press, 2005); Brian Burkett, “The International Labour Dimension: An Introduction” in John D.R. Craig and S. Michael Lynk, *Globalization and the Future of Labour Law* 15 (Cambridge: Cambridge University Press, 2006); Virginia Mantouvalou, “Are Labour Rights Human Rights?” (2012), 3 *European Labour Law Journal* 151.

³⁴ *Canadian Charter of Rights and Freedoms*, s 1, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11

There was considerable debate in the early years of the Charter about the extent, if any, that it protected fundamental rights such as collective bargaining and striking. In 1987 Justice LeDain, in the *Alberta Reference*, concluded that freedom of association provided no protection in part because collective bargaining and striking were “not fundamental rights or freedoms. They are the creation of legislation”³⁵ Justice McIntyre described freedom of association as “one of the most fundamental rights in a free society”³⁶ but also as a right meant to facilitate the attainment of *individual* goals, not the pursuit of collective goals. He emphasized the vital political and democratic role of the freedom in protecting associations which act to check the exercise of state action and power. He drew on American constitutional analysis, making no mention of any established connection between freedom of association and worker rights.

In his dissenting opinion, Chief Justice Dickson articulated a broader understanding of Charter rights as human rights. In particular, he noted that the similarity “between the policies and provisions of the Charter and those of international human rights documents” suggests that the interpretation of those international documents provide “important *indicia* of the meaning of “the full benefit of the *Charter’s* protection.”³⁷ He also recognized freedom of association as of “the central importance to the individual of his or her interaction with fellow human beings.”³⁸ Although Dickson CJ does not explicitly describe labour rights or workers’ rights as human rights, he does describe work as one of the most fundamental aspects of a person’s life, strongly linked to identity, self-worth and emotional well-being.³⁹

Despite Dickson's views, the Supreme Court went on to hold not only that freedom of association did not provide any protection for a right to strike, it did not protect collective bargaining either.⁴⁰ In the majority decision of Sopinka J., there is no attempt to analyze the nature of collective bargaining, other than to describe it as “not, of itself, a constitutional freedom of individuals, and it is not an individual legal right in circumstances in which a collective bargaining regime has been implemented.”⁴¹

Recent Supreme Court jurisprudence has borrowed from Dickson's dissent leading to less rigid applications of freedom of association. In *Dunmore*,⁴² for example, Justice Bastarache undertakes a purposive analysis of freedom of association which, among other goals, aims to “honour Canada’s obligations under international human rights law.”⁴³ In calling on international human rights law, he concludes, for instance, that freedom of association has a collective dimension which lends protection to certain activities which have no individual analogue. An important element of the analysis is the recognition that underinclusion in a statutory scheme can be a discriminatory practice that implicates an excluded group’s dignity interest in a way that infringes on freedom of association.⁴⁴ Moreover, the

³⁵ *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313 at para. 144.

³⁶ Justice McIntyre *ibid.*, at para. 148

³⁷ *Ibid.*, at para 59.

³⁸ *Ibid.*, at para. 86.

³⁹ *Ibid.*, at para. 91.

⁴⁰ *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 SCR 367.

⁴¹ *Ibid.* at p. 404.

⁴² *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 SCR 1016.

⁴³ Para. 13.

⁴⁴ Para. 27.

prohibited discrimination is not confined to traditional prohibited grounds of discrimination such as sex, race and nationality but extends to any discrimination, including occupational status. Thus a very close alignment of freedom of association and a right against discrimination is recognized as a result of incorporating international human rights norms. Of course, *Dunmore* did not go so far as to recognize collective bargaining as a collective activity protected by freedom of association, instead positing a narrower obligation on government to take positive action to protect the right of marginalized workers to engage in organizational activity. Despite the conceptualization of the constitutional protection for groups omitted from the scope of collective bargaining statutes as a human rights issue involving discrimination, which is normally within the province of the equality guarantee in section 15 of the Charter, the *Dunmore* majority nevertheless concluded that in 'rare cases' the claim for inclusion is cognizable under the fundamental freedoms. This, combined with the continuing insistence that occupational category is not an analogous ground under s. 15 has meant that freedom of association has become the primary vehicle in which claims to access to collective bargaining protection have been adjudicated.

In the second case of the modern trilogy on collective bargaining, *BC Health Services*⁴⁵ the Supreme Court finally made a definitive finding that freedom of association includes protection for collective bargaining. In doing so, it reiterated the view that the Charter should be presumed to provide as great a level of protection as found in international human rights documents that Canada has ratified.⁴⁶ "Canada's *current* international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the *Charter*."⁴⁷

In the third case of the current trilogy, *Fraser*, the Supreme Court majority again reiterated its commitment to interpreting freedom of association in conjunction with Canada's values and international human rights and labour law commitments.⁴⁸ While the *Fraser* decision's interpretation of the scope of section 2(d)'s protection for collective bargaining has generated extensive commentary, the point of this review is not to determine whether the Court got it right in either *BC Health Services* or in *Fraser*, but to highlight the Escherian dialectic of Charter interpretation with international human rights discourse on that nature of collective bargaining rights. The framing of collective bargaining as a human right has facilitated the Supreme Court's characterization of freedom of association as imposing a set of obligations on government to both refrain from unduly interfering with the process of collective bargaining and in some circumstances to provide positive access to a regulated collective bargaining regime.

However, that framing of freedom of association as a human right is not without its problems. There has been trenchant criticism of the Supreme Court's reliance on international human rights law (or

⁴⁵ *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 SCR 391.

⁴⁶ Para. 70.

⁴⁷ Para. 78.

⁴⁸ Para. 75.

thought) as a guide to determining the meaning of freedom of association.⁴⁹ One of the contentious issues is whether freedom of association is best characterized as an individual right, or whether it can be viewed as protecting group rights. If collective bargaining is inherently a group right, but freedom of association is inherently an individual right, then freedom of association cannot provide a basis for protecting collective bargaining. This was the view of Justice McIntyre in the Alberta Reference, and was at the heart of Justice Rothstein's attempt in *Fraser* to turn back the constitutional clock and resile from the position that freedom of association provides any protection for collective bargaining.⁵⁰ Just as there is a divided view on the meaning of freedom of association in s. 2(d) of the Charter and what it means for labour rights, the ongoing debate about the very nature of human rights claims "underscores the need to ensure that fundamental labor rights are fully connected with their elaborative jurisprudence and supporting legal norms."⁵¹

Charter and Human Rights Permeability: Equality and Discrimination

Patmore, writing in 1990, attempted to trace what he termed the 'permeability' of human rights legislation and section 15 of the Charter. By permeability he meant "the use of s. 15 norms under human rights legislation and the applicability of human rights norms under the *Charter* to enhance the equality guarantee."⁵² It reminds one of the Escher drawing of a hand drawing a hand drawing a hand, an exercise in recursivity in which items repeat themselves in self-similar ways. These are useful devices to organize thinking about one aspect of the interaction of the Charter and human rights. I proceed by considering how human rights norms established through non-discrimination legislation have influenced s. 15 jurisprudence. This is followed by elaborating on the differences between s. 15 and human rights legislation. Next follows a consideration of how s. 15 norms have affected human rights jurisprudence.

Prior to 1982, there was a judicial disposition towards "narrow, technical, individualistic interpretation" of anti-discrimination provisions in human rights codes and of rights under the Canadian Bill of Rights.⁵³

⁴⁹ See, for example, Brian Langille and Benjamin Oliphant, "From the Frying Pan into the Fire: Fraser and the Shift from International Law to International Thought in Charter Cases", (2011) 16 Canadian Lab. & Emp. L.J. 181 arguing that the Supreme Court has misinterpreted and misused international law in defending its approach to freedom of association in section 2(d) of the Charter. Contrast this with Kevin Banks, "The Role and Promise of International Law in Canada's New Labour Law Constitutionalism" (2011) 16 Canadian Lab. & Emp. L.J. 233 arguing the need for "a better and fuller use of international law by our courts." (at p. 235.) John Currie also joins the chorus, arguing that the Supreme Court should clarify precisely how international human rights law is to be relied on in Charter interpretation, preferably by treating international human rights obligations binding on Canada as setting a minimum content floor for Charter interpretation while treating non-binding international human rights obligations as relevant and persuasive: John Currie, "International Human Rights Law in the Supreme Court's Charter Jurisprudence: Commitment, Retrenchment and Retreat – In No Particular Order" (2010) 50 Supreme Court Law Review (2d) 423.

⁵⁰ For an extensive discussion and defence of the view that freedom of association is a group right which provides protection for collective bargaining, see Alan Bogg and Keith Ewing, "A (Muted) Voice at Work: Collective Bargaining in the Supreme Court of Canada" (2012), 33 Comp. Lab. L. & Pol'y J. 379.

⁵¹ Bogg and Ewing, *ibid.*, at p. 416.

⁵² G.A. Patmore, *An Inquiry into the Norm of Non-Discrimination in Canada* 102 (Kingston, Ont.: Industrial Relations Centre, Queen's University, 1990).

⁵³ Sheila McIntyre, "The Equality Jurisprudence of the McLachlin Court: Back to the 70s" (2010), 50 Supreme Court Law Review (2d) 129.

In the words of Sheila McIntyre, “[t]he path of Canadian equality jurisprudence over the past 30 years has come full circle....Although the jurisprudence itself is muddled and contradictory, the outcomes now form a pattern that is leading equality advocates to look to Charter guarantees other than the section 15 and to fora other than the Supreme Court of Canada to combat systemic discrimination.”⁵⁴

In the 1989 SCC decision in *Andrews v. Law Society of British Columbia*,⁵⁵ Justice McIntyre set out the leading approach to interpretation and application of s. 15 of the Charter. He noted that the specific working of s. 15 was influenced both by the shortcomings of the right to equality expressed in the Canadian Bill of Rights and by the expanded concept of equality being developed by various statutory human rights codes enacted subsequent to the Canadian Bill of Rights. McIntyre J. turned to the human rights statutes to assist in understanding the meaning of the term discrimination used in s. 15. For example, he proffered the definition of discrimination outlined in *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*,⁵⁶ and in *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*,⁵⁷ both of which emphasized the importance of looking at the effects of actions, not merely the intention with which they are done.

Andrews set the stage for drawing on human rights jurisprudence to inform the interpretation and application of the equality guarantee in the Charter, and in turn for the Court to turn to Section 15 cases to elaborate on the meaning of discrimination in human rights cases. For example, not long after the *Andrews* decision, we see the Supreme Court in *Brooks v. Canada Safeway Ltd.*⁵⁸ turning to *Andrews*' discussion of discrimination as it determined whether differential treatment of pregnant women constituted statutorily prohibited discrimination on the basis of sex. In a later decision under the Saskatchewan Human Rights Code, we have the Supreme Court relying on the definition of discrimination proffered in *Andrews* to aid in the interpretation of the term under the Code.⁵⁹ Again, in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*⁶⁰ the Supreme Court cites *Andrews* as it develops a unified analytical approach to direct and indirect discrimination. In *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*⁶¹ the Court noted the extent to which it has turned to the analysis of the concept of discrimination in *Andrews* and in particular relied on it to assist in coming to the conclusion that in assessing discrimination on the basis of

⁵⁴ *Ibid.* at pp. 129-30.

⁵⁵ [1989] 1 SCR 143, 1989 CanLII 2.

⁵⁶ *Supra* note 11.

⁵⁷ *Supra* note 13.

⁵⁸ *Supra* note 9.

⁵⁹ *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 SCR 566. An employer who provided a disability benefit discriminated on the basis of mental illness by imposing more stringent conditions for continuation of the benefit for persons suffering from mental disability compared to those affected by a physical disability.

⁶⁰ [1999] 3 SCR 3.

⁶¹ 2000 SCC 27, [2000] 1 SCR 665.

handicap, it is necessary to consider not only actual functional limitations arising from the handicap but also to assess whether perception, myths and stereotypes contribute to discrimination.⁶²

So it is not surprising that in 2013 we have the Federal Court of Appeal stating:

“The equality jurisprudence under the Charter informs the content of the equality jurisprudence under human rights legislation and vice versa.”⁶³

While there is an Escherian dialectic between the two sources of anti-discrimination analysis, there is far from complete congruence. Having acknowledged the general applicability of human rights approaches to discrimination in interpreting s. 15, McIntyre J. in *Andrews* is nevertheless careful to elaborate the differences between human rights statutes and the Charter equality guarantee. These include the fact that human rights legislation apply to private acts while the Charter is limited to discrimination caused by the operation or application of law;⁶⁴ human rights statutes limit the grounds of discrimination to which the statutes apply but the Charter is not so limited; where discrimination in human rights statutes is prohibited, the prohibition is absolute and provisions limiting the scope of discrimination or exempting conduct as non-discriminatory are also absolute whereas under the Charter the government has the opportunity to provide justification under section 1 for conduct that is found to be discriminatory.

For example, we see in *Dickason v. University of Alberta*⁶⁵ the Supreme Court determining that the statutory exception allowing “reasonable and justifiable” discrimination, while similar to section 1 of the Charter, nevertheless calls for less deference to employers under the statutory exception than is to be shown to legislators under the Charter standard. As a result, “any legislated defence to acts of discrimination should be construed narrowly.”⁶⁶ As well, in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*⁶⁷ we see the Supreme Court asserting that “While there is no requirement that the provisions of the [Quebec] Charter mirror those of the Canadian Charter, they must nevertheless be interpreted in light of the Canadian Charter.”

Although s. 15 jurisprudence has drawn on the substantive equality jurisprudence in the human rights regime, the Supreme Court has struggled to articulate a clear vision of what section 15 demands. By 1999, the Court had tentatively settled on a uniform approach in *Law v. Canada (Minister of Employment and Immigration)* by identifying the rectification of historical social advantage and the

⁶² Three persons were either denied employment or dismissed because of disabilities that did not in fact prevent them from performing the jobs. The employers unsuccessfully argued that they were not in fact handicapped and therefore were not entitled to the protection of the Quebec human rights statute.

⁶³ *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 at para. 19.

⁶⁴ This point had been emphatically asserted in the earlier Supreme Court decision in *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 SCR 573, addressing whether the guarantee of freedom of expression or association applied to limit courts in granting an injunction to prohibit secondary picketing.

⁶⁵ [1992] 2 SCR 1103. Although the court purported to apply less deference to employer choices than legislative choices, it nevertheless found that the University of Alberta’s mandatory retirement policy was not a violation of the statute.

⁶⁶ *Ibid.*

⁶⁷ 2000 SCC 27, [2000] 1 SCR 665 at para. 42.

promotion of human dignity as key purposes of section 15. As Sheppard points out, there is a tension between these purposes. The emphasis on human dignity contributed to uncertainty “because it tended to reinforce an individual approach to equality claims, one that was potentially in tension with the more group-based dimensions of anti-discrimination law.”⁶⁸ Indeed, the application of the human dignity test appears to have increased the threshold for establishing an equality claim with the result that claimants were more regularly failing to establish their claims. Nine years later in *R. v. Kapp*⁶⁹ the Court resiled from using infringement on human dignity as the litmus test for determining whether there has been discrimination. Yet, the continuing emphasis on stereotyping, and the application of the contextual factors that the Supreme Court’s *Law* decision suggests should be used, make equality analysis complex and unpredictable. Indeed, one critic has noted in her analysis of the Supreme Court’s *Kapp* decision that “[i]t is ironic that the Court, even as it explicitly crafts a return to *Andrews*, creates doctrine that seems geared to put us farther and farther away from reaching the promise of what was best and clearest in *Andrews*.”⁷⁰

The Supreme Court’s embracing of the human rights approach of confining discrimination to enumerated or analogous grounds has significantly impacted the Charter’s reach. While the Court has identified a small number of analogous grounds of discrimination beyond those explicitly identified in section 15, these have been extensively limited.⁷¹ This in particular has had a profound impact on the ability of workers who have been excluded from particular legislative regimes to be able to challenge differential treatment, whether in terms of rights under workers compensation statutes⁷², or on the right or ability to participate in collective bargaining regimes or make claims to equally benefit from employment standard regimes. This is explored in more detail in the section on under-inclusion.

These limitations of the equality analysis under the Charter may come to play a significant role in the adjudication of human rights complaints as well. The Ontario Court of Appeal decision in *Ontario (Disability Support Program) v. Tranchemontagne*⁷³ provides a backdrop within which to consider the issue. In 2006, the Supreme Court of Canada ruled that the Social Benefits Tribunal had jurisdiction to consider a claim that denial of disability benefits under the *Ontario Disability Support Program Act, 1997* because of alcoholism violated the Ontario Human Rights Code.⁷⁴ The Tribunal subsequently determined

⁶⁸ Sheppard, *supra* note 4 at p. 42.

⁶⁹ 2008 SCC 41, [2008] 2 SCR 483.

⁷⁰ Margot Young, “Unequal to the Task: “Kapp”ing the Substantive Potential of Section 15” (2010) Supreme Court Law Review (2d) 183, at p. 185.

⁷¹ The Court has found that “citizenship” (*Andrews*, *supra* note 40), “marital status” (*Miron v. Trudel*, [1995] 2 S.C.R. 418) “sexual orientation” (*Egan v. Canada*, [1995] 2 S.C.R. 513) and off-reserve band member status of aboriginal persons (*Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203) are analogous grounds. Besides rejecting occupation or employment status as analogous grounds (*Baier v. Alberta*, [2007] 2 S.C.R. 673), it has also rejected province of residence (*R. v. Turpin*, [1989] 1 S.C.R. 1296), membership in military (*R. v. Genereux*, [1992] 1 S.C.R. 259), permanent residents convicted of serious offences (*Canada (Minister of Employment) v. Chiarelli*, [1992] 1 S.C.R. 711.), status as a new resident in province (*Haig v. Canada; Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995), and location of crime as analogous grounds (*R. v. Finta*, [1994] 1 S.C.R. 701).

⁷² *Reference Re Workers’ Compensation Act, 1983 (Nfld.)*, [1989] 1 S.C.R. 922.

⁷³ 2010 ONCA 593.

⁷⁴ *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513.

that the exclusion of benefits to those whose sole disability was substance dependence was indeed such a violation. On review, the courts were confronted with the question of whether section 15 Charter jurisprudence defining discrimination should apply or whether the *prima facie* approach adumbrated in *O'Malley* apply. The Ontario Court of Appeal found that for a distinction to be discriminatory, the complainant must demonstrate that it creates a disadvantage and to also demonstrate that the treatment “perpetuates prejudice or pre-existing disadvantage or stereotyping”, citing the test set out in *Kapp*. While the Court acknowledged that an inference of stereotyping or perpetuating disadvantage or prejudice can often be made from evidence showing a distinction on a prohibited ground creating a disadvantage, at least in some contexts a more nuanced inquiry may be necessary. The Ontario Court of Appeal relied on Abella J.s opinion in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*⁷⁵ as standing for the proposition that the complainant must, as a part of the *prima facie* case demonstrate the arbitrariness of the distinction. Finally the Court of Appeal noted that while the onus may be on the respondent to prove statutory defences, it does not have the onus of proving that there has been no discrimination. “Although an evidentiary burden to rebut discrimination may shift to the responding party once the claimant has led sufficient evidence, if believed, to support a finding of discrimination in the absence of an answer from the responding party, the onus of proving discrimination remains on the claimant throughout.”⁷⁶

This suggests there is at least a partial convergence between the Charter approach and the human rights approach to the determination of whether there has been discrimination, with a more stringent Charter standard being applied. Arguably, the use of the discrimination test from *Kapp* has the potential to impose a somewhat higher burden on complainants than the traditional human rights test set out in *O'Malley*. The importance of the *Tranchemontagne* decision is indicated to some small extent by the extent to which it is being cited, especially in Ontario and especially by the Human Rights Tribunal.⁷⁷

The *Tranchemontagne* approach has also been the subject of some considerable critique. Denise Rheaume, for example, argues that the result of recent Charter cases interpreting the term “discrimination” has led to “a different conception of discrimination under the Charter than has been operational under the codes.”⁷⁸ The traditional human rights approach of having the complainant establish a *prima facie* case has been a relatively light burden and the leading cases have not required the complainant to establish substantive discrimination at this stage.⁷⁹ The burden of establishing substantive discrimination has exempted many forms of differential treatment from the kind of necessity assessment that human rights codes have traditionally imposed on respondents. Rheaume expresses concern that what had been a benign practice of drawing on human rights experience to inform Charter interpretation “now threatens to derail conventional practice in statutory human rights

⁷⁵ 2007 SCC 4, [2007] 1 S.C.R. 161.

⁷⁶ *Supra*, note 38 at para. 119.

⁷⁷ A search done in CanLII shows it has been cited in 82 decisions by the Ontario Human Rights Tribunal, from its release in 2010 up to June 2014.

⁷⁸ Rheaume, Denise, “Defending the Human Rights Codes from the Charter Human Rights Code v. Charter: Implications of *Tranchemontagne*” (2012), 9 *Journal of Law & Inequality* 67 at p. 68.

⁷⁹ Benjamin Oliphant, “Prima Facie Discrimination: Is *Tranchemontagne* Consistent with the Supreme Court of Canada's Human Rights Code Jurisprudence?” (2012), 9 *Journal of Law & Inequality* 33.

law.”⁸⁰ Her fear is that the use of the Charter approach to discrimination in the statutory human right context will narrow the scope of the concept in undesirable ways.

It may be that the convergence between the Charter and human rights approaches is most pronounced in human rights cases challenging differential treatment with respect to government services. Mumme argues that the Charter decisions following the Supreme Court’s decision in *Law* may be one of the reasons why government service claims under human rights codes, rather than under the Charter, have become so popular over the past decade.⁸¹ The application of a stricter Charter approach to determination of discrimination may arise from the tension between commitment to Parliamentary sovereignty and democratic decision-making leading to a bounding of the scope of judicial review. The same concerns may not arise where the differential treatment under examination is by a private actor, and so it is still unresolved whether the convergence of Charter and human rights approaches will be limited to cases reviewing provision of government service, or whether it may be extended to all forms of human rights claims.

However, it is also worth noting that the Supreme Court, in the recent *Moore* decision dealing with access to special education for a child with severe learning disabilities, does not mention *Tranchemontagne* and with little hesitation relies on the traditional formulation of the human rights *prima facie* approach, reiterating that:

*[T]o demonstrate prima facie discrimination, complainants are required to show that they have a characteristic protected from discrimination under the Code; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a prima facie case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.*⁸²

Here there is no mention of a need to demonstrate that the adverse impact is substantive or that it “perpetuates prejudice or pre-existing disadvantage or stereotyping.” The only Charter case cited in the decision is *Withler* to emphasize the dangers of using comparator groups for purposes of determining whether discrimination has occurred. The *Moore* case also usefully comments on the limits of financial distress as a defence to governmental discriminatory actions, noting that the district school board had failed to demonstrate that it had considered other means of accommodating those with severe learning disabilities in the face of evidence that there were other options by which support services might have been provided.

As well, a recent Supreme Court decision on section 15 appears to confirm that view that the Court is moving away from some of the problematic aspects of the dignity approach in determining whether

⁸⁰ *Supra*, note 51.

⁸¹ Claire Mumme, “At the Crossroads in Discrimination Law: How the Human Rights Codes Overtook the Charter in Canadian Government Services Cases” (2012), 9 *Journal of Law & Inequality* 103.

⁸² *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 SCR 360.

there has been discrimination. In *Quebec (Attorney General) v. A*,⁸³ determining the constitutionality of Quebec's exclusion of de facto spouses from its Civil Code regime dealing with the economic consequences of a termination of marital relationships. An interesting aspect of the decision is that in Justice Label's minority opinion, finding that there was no discrimination, he focussed solely on Charter cases with no reference to the human rights jurisprudence on discrimination. In Justice Abella's majority opinion, finding that there was discrimination, she hearkens back to the human rights cases like *O'Malley* and *Action Travail des Femmes* emphasizing the importance of considering the impact of laws on the individual or group concerned. She deemphasizes the focus on demonstrating prejudice or stereotyping pointing out a focus on only those two approaches carries the danger of transforming section 15 into a protection only against intentional discrimination.

Bruce Ryder argues that the result of these decisions is that 1) earlier decisions, like the Ontario Court of Appeal decision in *Tranchemontagne* is no longer a reliable statement of the law, in particular in requiring a claimant in a statutory human rights case to demonstrate disadvantage, prejudice and stereotyping; and 2) in section 15 Charter cases the claimant no longer need demonstrate that the law perpetuates prejudice or stereotyping (although such evidence would be a sufficient basis for finding discrimination).⁸⁴ Ryder applauds both simplicity of the application of the *prima facie* test for discrimination in *Moore*, and the reconsideration of section 15 doctrine in *Quebec v. A*, but is also skeptical about whether the latter change will lead to different results. He continues to be concerned about the inaccessibility of Charter litigation and foresees that "statutory equality rights administered by human rights commissions and tribunals will continue to play a dominant role in promoting substantive equality."⁸⁵ Whether Ryder is correct about the ongoing influence of *Tranchemontagne* may be debatable, given that the Ontario Human Rights Tribunal continues to cite it as the applicable jurisprudence setting out the test for discrimination.⁸⁶ Nevertheless, he is undoubtedly correct that the barriers to successful s. 15 Charter challenges remain formidable so that resort to claims under human rights codes are likely to provide a more accessible route to pursuit of substantive equality claims.

Several other elements of the equality jurisprudence have also raised concerns. One is the extent to which assessment of discrimination requires the decision-maker to engage in analysis of the difference in treatment between comparator groups. Thus we have such cases as *Granovsky*⁸⁷, *Auton*,⁸⁸ and

⁸³ 2013 SCC 5. Abella J. wrote the decision for the majority finding that there was a violation of section 15 but was in dissent with the majority view that the violation was justified pursuant to section 1 of the Charter.

⁸⁴ Bruce Ryder, "The Strange Double Life of Canadian Equality Rights" (2013) 63 S. C. L. R. (2d) 261.

⁸⁵ *Ibid.* at p. 293.

⁸⁶ See note 77, *supra*.

⁸⁷ *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28, [2000] 1 SCR 703: entitlement to Canada Pension Plan benefits requires comparison of treatment of persons temporarily disabled with those permanently disabled.

⁸⁸ *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 SCR 657: entitlement to government funded behavioural therapy for autistic children requires comparison of such children with non-disabled persons or persons with non-mental disabilities seeking similar access to funding of treatment.

*Hodge*⁸⁹ in which the delineation of appropriate comparator groups causes the Court to fail “to connect individual instances of alleged discrimination to larger patterns of social exclusion and discrimination.”⁹⁰ Andrea Wright noted a trend in the interpretation of human rights statutes to also rely on and misuse “rigid comparison formulas”⁹¹ rather than applying the broader and adaptable approach to *prima facie* determination of discrimination set out in *O’Malley*. The consequences, she argues, is to force complainants to attempt to filter their claims to fit inappropriate templates, to narrow the analysis to a search for formal equality at the expense of contextualization of the complaint and the achievement of substantive equality. This is what we might call a pernicious feature of the Escherian dynamic of Charter and human rights analysis.

However, the Supreme Court has more recently in *Withler*⁹² acknowledged the problem with using comparator groups as a means of determining whether there is discrimination, thus arguably returning to the substantive equality approach established in *Andrews*. The Court cited Wright’s work in support of the view that “[t]he probative value of comparative evidence, viewed in this contextual sense, will depend on the circumstances.”⁹³ While it does not cite any specific human rights decisions to inform the move to a more contextualized comparative analysis, it would appear that the more open-textured human rights approach may, through the academic literature cited, have influenced the *Charter* interpretation.

One final aspect of the interaction of Charter and human rights jurisprudence will be mentioned. In Charter cases alleging a violation of a fundamental freedom such as religion, the claimant will often request a remedy that leads the Court to assess how the individual can be accommodated. Buckingham has argued that the Court has in a number of cases “used a deliberately convergent approach to human rights interpretation of reasonable accommodation”⁹⁴ citing the decisions in *Eldridge*⁹⁵ and *Multani*.⁹⁶ The minimal impairment analysis under the *Oakes* test explains the appropriateness of analogizing with the reasonable accommodation duty in human rights law. However, the more recent decision of the

⁸⁹ *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65, [2004] 3 SCR 357: entitlement of common law spouse to survivor pension under Canada Pension Plan; appropriate comparator group is divorced spouses rather than separated married spouses.

⁹⁰ Sheppard, *supra*, note 4 at p. 46.

⁹¹ Wright, Andrea. “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* 409 (Toronto: Irwin Law, 2006).

⁹² *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396 dealing with entitlement of spouses to supplementary death benefits under federal pension schemes, rejects the need to identify a mirror comparator group for purposes of determining whether there has been discrimination. Instead, the Court calls for analysis focusing on the full context of the claimant group’s situation including the impact of the impugned law on that situation and whether the law perpetuates disadvantage or negative stereotypes.

⁹³ *Ibid.*, at para. 65.

⁹⁴ Janet Epp Buckingham, “Oil and Vinegar: Resolving Conflicting Rights Under the Charter and Ontario’s *Human Rights Code*” in Shaheen Azmi, Lorne Foster and Lesley Jacobs, eds., *Balancing Competing Human Rights Claims in a Diverse Society: Institutions, Policy, Principles* (Toronto: Irwin Law, 2012) 113 at p. 120.

⁹⁵ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624.

⁹⁶ *Multani v. Commission Scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 SCR 256.

Supreme Court in *Alberta v. Hutterian Brethern of Wilson Colony*⁹⁷ appears to reverse direction and abandon the claim that the concept of reasonable accommodation should inform the minimal impairment analysis, with the result, according to Buckingham that “reasonable accommodation under human rights codes will develop independently of similar complaints brought against government under the Charter”⁹⁸ or it will only be narrowly applied in Charter cases where an individual remedy is sought.

So what is one to make of this permeability of human rights and Charter approaches to discrimination as it relates to work? As indicated earlier, some of the most important advances in human rights jurisprudence have taken place in the context of work-related claims. It would appear that Section 15 of the Charter has been developed less in the context of workplace issues, and that much of the jurisprudence on discrimination is shaped by the fact that decisions are being made about access to government funded benefits which raise the spectre of open-ended government liability for failing to expansively extend benefits to complainant groups. There have, however, been some important Section 15 cases that have come to the Supreme Court and which do apply more directly to workplace issues. These include age discrimination cases,⁹⁹ a pay equity case,¹⁰⁰ cases dealing with differential access to workers’ compensation benefits¹⁰¹ and the failure of human rights legislation to protect workers from discrimination on the basis of sexual orientation.¹⁰² The results have been mixed. The courts have generally upheld age discrimination in the form of authorization of employer/union initiated mandatory retirement schemes as justified. It has found that legislation refusing to abide by the terms of a pay equity scheme was also justified by the financial crisis cited by government as justification for the legislative intervention. While the Supreme Court boldly read “sexual orientation” into the prohibited grounds under the Alberta human rights statute in *Vriend*, that case may have marked the high water mark of judicial reading of the equality demands of section 15 in a workplace context.

However, it may be possible that the Charter works more indirectly to infuse general employment law norms with a commitment to equality and fairness. The next section explores the extent to which this might be the case.

The Charter and Human Rights Values Permeating Labour and Employment Law

We begin to see another dimension of the Escherian dialectic engagement between Charter rights, human rights and the pursuit of equality for vulnerable workers in other types of employment law adjudication. The issue becomes the extent to which Charter values should be understood as infusing labour and employment law more generally.

⁹⁷ 2009 SCC 37, [2009] 2 SCR 56.

⁹⁸ Buckingham, *supra* note 76 at pp. 121-2.

⁹⁹ *McKinney v. University of Guelph* [1990] 3 SCR 229.

¹⁰⁰ *Newfoundland (Treasury Board) v. N.A.P.E* [2004] 3 S.C.R 81.

¹⁰¹ *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur* [2003] 2 S.C.R 504.

¹⁰² *Vriend v. Alberta* [1998] 1 S.C.R 493.

In an important early Charter decision, *Slaight Communications Inc. v. Davidson*¹⁰³, the Court affirmed the applicability of Charter rights in employment contexts holding that an adjudicator under the Canada Labour Code is subject to the Charter in relation to the design of remedies in resolving an unjust dismissal complaint. In particular, it was held that the adjudicator's remedial order requiring an employer to provide a letter of reference with specified content, and prohibiting the employer from expressing its opinion about the complainant's qualification other than by reference to the mandated letter was a violation of the employer's freedom of expression. More important, though, was the Court's recognition of the legislative scheme as an "attempt to remedy the unequal balance of power that normally exists between an employer and employee" advancing a government objective "of protection of a particularly vulnerable group, or members thereof." Thus, in assessing whether the infringement on freedom of expression was justified pursuant to s. 1 of the Charter, Chief Justice Dickson stated his concern "to avoid constitutionalizing inequalities of power in the workplace and between societal actors in general." The point is not just that Charter values might infuse the domain of employment, but that the values of protective employment legislation must be recognized as a limit on the invocation of the Charter in a way that might perpetuate unequal bargaining power.

In a number of Charter decisions, the Supreme Court has emphasized the role of Charter values, both in interpreting the Charter itself¹⁰⁴ and in determining the content of common law rules which may not be technically subject to Charter review.¹⁰⁵ In *McKinley*,¹⁰⁶ a case dealing with whether an employee's conduct justified dismissal without notice, the Supreme Court elaborated the importance of proportionality, requiring a balance to be struck between an employee's conduct and the sanction imposed. In explaining the importance of this balancing exercise, Justice Iacobucci points to Dickson's dissenting opinion in the *Alberta Reference*,¹⁰⁷ and in particular his identification of the connection between employment and an individual's sense of identity, self-worth and emotional well-being.¹⁰⁸ The same passage on which he relied was also cited in two other non-Charter decisions, *Matchinger*¹⁰⁹ and *Wallace*,¹¹⁰ which also recognize employee vulnerability in the face of inequality of bargaining power. In developing the proportionality principle, Iacobucci J. explicitly references the desire to avoid rules that could foster "unreasonable and unjust" outcomes.

Geoffrey England argues that this reliance on Charter values of "fairness, equality and proportionality in the treatment of vulnerable workers" is playing an important role in fashioning the legal rules applied by courts in resolving "common law" disputes between employers and employees.¹¹¹ This indirect effect of the Charter, he acknowledges, is still extremely difficult to isolate, but he nevertheless argues that the Charter is at least a contributing factor to adjusting employment law rules so as to "give real weight to

¹⁰³ [1989] 1 SCR 1038.

¹⁰⁴ *B.C. Health Services*, *supra* note 35.

¹⁰⁵ *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 SCR 156.

¹⁰⁶ *McKinley v. BC Tel*, 2001 SCC 38, [2001] 2 SCR 161.

¹⁰⁷ *Supra*, note 25.

¹⁰⁸ *Ibid.*, at para. 53.

¹⁰⁹ *Machtinger v. HOJ Industries Ltd.*, [1992] 1 SCR 986.

¹¹⁰ *Wallace v. United Grain Growers Ltd.*, [1997] 3 SCR 701.

¹¹¹ Geoffrey England, "The Impact of the Charter on Individual Employment Law in Canada: Rewriting an Old Story" (xxxx) 13 Canadian Labour & Employment Law Journal 1 at 2.

the economic security, personal dignity and autonomy of the employee.”¹¹² Another way of understanding these references to the Charter however, is that they are not so much a recognition of the applicability of Charter to employment relationships, but rather a recognition of the vulnerability of employees in relationships of unequal power that calls for a sensitive development of the law whether it be through the interpretation of the Charter, legislation or common law rules. Alon-Shenker and Davidov¹¹³ argue that the principle of proportionality should be more fully extended to the private sector employment relationship, and that it should be more structured to parallel the concept of proportionality as it has been developed in Section 1 jurisprudence under the Charter.

The 2013 decision of the Supreme Court in *CEP, Local 30 v. Irving Pulp & Paper Ltd.*¹¹⁴ demonstrates a more recent Court use of the Charter to shape the development of the law in a non-Charter case. The case arose from a union’s grievance about an employer’s mandatory imposition of a random alcohol and drug testing requirement. In assessing the reasonableness of the employer’s exercise of management rights authorized under the collective agreement, the Court accepted the need to balance an employer’s role in ensuring a safe workplace against the rights of individual employees. While the Court asserted that cases dealing with random alcohol or drug testing in non-unionized workplaces under human rights statutes were of little conceptual assistance in resolving the dispute, it nevertheless turned to its Charter jurisprudence on seizure of bodily samples as an invasion “of personal privacy essential to the maintenance of [a person’s] human dignity.”¹¹⁵ In the end, the Court concluded that the arbitrator had acted reasonably in concluding that the significant invasion of privacy interests was not justified in the face of insufficient evidence about the expected safety gains from the random testing.

And even more recently, the Supreme Court emphasized the importance of labour rights¹¹⁶ including collective bargaining, striking and picketing in striking down the Alberta Personal Information Protection Act given its provisions that would have limited the rights of a legally striking union to publicize photos of persons crossing a picket line. In particular, the Court analyzed the restrictions on the expressive activity of unions in the context of “the Charter protected right of workers to associate to further common workplace goals under s. 2(d).”¹¹⁷ While this might be better seen as an example of invoking one Charter right to aid in assessing the justifiability of another Charter violation, it nevertheless also emphasizes the Court’s willingness to appeal to the Charter’s protection for workers in resolving conflicting rights.

Yet we should not be overly sanguine about the willingness of the Court to apply Charter values in a worker-friendly manner. In *Plourde v. Wal-Mart Canada Corp.*,¹¹⁸ the Court engaged in an interpretation of the Quebec Labour Code and concluded that particular unfair labour practice

¹¹² *Ibid.*, at 35.

¹¹³ Pnina Alon-Shenker and Guy Davidov, “Applying the Principle of Proportionality in Employment and Labour Law Contexts” (2013) 59 McGill Law Journal 375.

¹¹⁴ 2013 SCC 34.

¹¹⁵ *Ibid.*, at para. 50.

¹¹⁶ *Alberta (Information and Privacy Commissioner) v. UFCW, Local 401*, 2013 SCC 62, [2013] 3 SCR 733.

¹¹⁷ *Ibid.* at para. 30.

¹¹⁸ 2009 SCC 54, [2009] 3 SCR 465.

provisions of the Code did not prohibit Wal-Mart's actions in closing a store that had been recently unionized, even if the closing in part resulted from anti-union motivations. In response to the argument made by the union that it should interpret the provisions in light of Charter values, in particular the recognition of collective bargaining as a constitutionally protected right, the Court rather summarily dismissed the claim stating:

“the entire Code is the embodiment and legislative vehicle to implement freedom of association in the Quebec workplace. The Code must be read as a whole. It cannot be correct that the Constitution requires that every provision (including s. 17) must be interpreted to favour the union and the employees. Care must be taken not only to avoid upsetting the balance the legislature has struck in the Code taken as a whole, but not to hand to one side (labour) a lopsided advantage because employees bargain through their union (and can thereby invoke freedom of association) whereas employers, for the most part, bargain individually.”¹¹⁹

The notion that reading the statute in a way that meaningfully advances freedom of association would give employees a lopsided advantage is itself somewhat absurd. That the Court would make such an assertion should certainly give us caution in assuming that Charter values will be an important element in advancing labour rights.

Once again in assessing the Escherian dialectical engagement between the Charter and employment law generally, the problem is in determining which affects which more. While the Supreme Court has explicitly acknowledged the importance of taking Charter values into account, it is also clear that it is the Court's understanding of the inherent inequality of the employment relationship that to some extent has influenced its assessment of how the Charter might apply, and in particular its assessment of regulatory interventions that are designed to in part ameliorate the impact of this inequality. As in many self-referential systems focussed on in Escher's art, it becomes difficult to isolate what is influencing what.

The Problem of Underinclusion

A great deal of academic literature of late has focused on the problem of vulnerable workers and precarious work.¹²⁰ The markers of such precarity include employment in part-time and casual employment, engagement in work under legal forms that may not technically come within the definition of employment contracts, and for some, working in jobs that have little employment security and few job benefits. Such precarity often disproportionately affects members of groups who have traditionally been subject to discriminations such as women, racialized groups, immigrants, and persons with disabilities.

One of the features of the relationship between the employer and workers engaged in precarious employment is a heightened degree of inequality of bargaining power. To the extent that a traditional justification for collective bargaining is the equalization of bargaining power, then access to collective

¹¹⁹ *Ibid.* at para. 56.

¹²⁰ Much of the academic literature is reviewed in Law Commission of Ontario, *Vulnerable Work and Precarious Work: Final Report* (Toronto: 2012) and in the background studies for the Report.

bargaining can be seen as an important option for not only helping such workers improve their economic well-being, but also to give them a voice and opportunity for greater autonomy and dignity in the workplace. Such regimes serve to instantiate worker freedoms by providing a mechanism by which employers can be compelled to bargain with the a bargaining agent chosen by the workers and which protects workers from discrimination and retaliation by employers for engaging pursuing associational representation. Unfortunately, for some of these workers, that path to dignity and autonomy is blocked by legislation which excludes these workers from accessing the statutory collective bargaining regime.

If a labour statute of general application denies protection to a particular group of workers, then, unless an alternative scheme with roughly equivalent protections is available, the resulting lacuna seriously jeopardizes the ability of such workers to pursue justice. This differential treatment of workers raises the issue of whether it is possible to use human rights/Charter claims to challenge the disparate treatment. Under the Charter there are two possible means of characterizing the claim: one is that the Charter guarantee of freedom of association includes protection for collective bargaining, so that exclusion from a collective bargaining statute is, in the absence of appropriate justification, a violation of the Charter. The second is that the differential treatment is discriminatory and a violation of the equality guarantees in s. 15 of the Charter. The issue I want to think about is whether applying a “human rights” perspective serves to better frame the appropriate scope of protection for accessing collective bargaining.

Elliott and Elliott make a strong case for extending section 15 protect even where the claimant cannot demonstrate that the discriminatory treatment is on an enumerated or analagous ground.¹²¹ They argue that challenges to differential treatment should be allowed when it can be shown that they related to a “fundamental interest” under the constitution. Brian Langille, too, has argued that by drawing on the idea of equality, we can avoid all kinds of problems that he sees with the efforts to constitutionalize protection for collective bargaining through the development of the notion of freedom of association.¹²² Langille’s aspiration for equality rights as a means of constitutionally ensuring access to a collective bargaining regime for workers currently excluded from statutory scheme is not novel, the claim having been made in parallel with the freedom of association claim in such cases as *Delisle*, *Dunmore*, *B.C. Health Services* and *Fraser*. The advantage of a human rights/equality approach is that, traditionally, human rights law is used to impose postive obligation on state to regulate private conduct¹²³

Much of the equality jurisprudence under the Charter is aimed at determining where lines should be drawn by government determining who is entitled to government benefits or who should be protected by specific regulatory regimes. To provide just a few examples, in *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, the Supreme Court concluded that the automtaic denial of

¹²¹ Robin Elliott and Michael Elliott, “The Addition of an Interest-Based Route into Section 15 of the Charter: Why It’s Necessary and How It Can be Justified” (2014), 64 S.C.L.R. (2d) 461.

¹²² Brian Langille, “The Freedom of Association Mess: How We Got Into It and How We Can Get Out of It” (2009), 54 McGill L.J. 177.

¹²³ Virginia Mantouvalou, “Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Workers” (2012) 34 Comp. Lab. L. & Pol’y J. 133 at 158.

unemployment insurance benefits to applicants because they were over the age of sixty-five was an unjustified violation of section 15.¹²⁴ In *Schachter v. Canada*, lower courts determined that provisions of the Unemployment Insurance Act providing parental leave benefits to adoptive parents but not to natural parents constituted discrimination on the basis of “parental status”.¹²⁵ In *Nova Scotia (Workers' Compensation Board) v. Martin*, the Court held that the exclusion of chronic pain as a compensable condition under the workers' compensation law was an unjustified infringement on s. 15, leading to the declaration of invalidity of the offending regulations mandating the exclusion.¹²⁶ In contrast, there have been a number of cases in which the Court has also held that the limitation on access to benefits either is not a violation of the equality guarantee in section 15 or is justified pursuant to section 1. These include such cases upholding mandatory retirement through the exclusion of those over the age of 65 from age discrimination protection,¹²⁷ the denial of survivor benefits under the Canada Pension Plan to unmarried and separated spouses,¹²⁸ the age-related differential treatment of surviving spouses to survivor benefits under the Canada Pension Plan,¹²⁹ differential death benefits under several federal occupational-related pension schemes,¹³⁰ and Income Tax Act rules prohibiting the claiming of childcare expenses as a business expense despite the evidence that issues of child care negatively affect women in employment terms.¹³¹

The Supreme Court has proved unwilling to expansively apply section 15 to declare invalid statutory provisions that differentially treat particular occupational groups by denying them access to collective bargaining. For example, in *Delisle v. Canada (Deputy Attorney General)*¹³² the Court held that the exclusion of RCMP officers from both the Canada Labour Code and the Public Service Staff Relations Act was neither a violation of freedom of association or freedom of expression nor a denial of equality rights under section 15 of the Charter. In dismissing the equality claim, Bastarache J. concluded that the differential treatment was not discriminatory nor was it based on a prohibited ground set out in section 15, or on an analogous ground. He opined that: “A distinction based on employment does not identify, here, “a type of decision making that is suspect because it often leads to discrimination and denial of substantive equality” (Corbiere, at para. 8), in view in particular of the status of police officers in society.”¹³³ In *Corbiere*,¹³⁴ the Supreme Court had concluded that an analogous ground must share, with

¹²⁴ [1991] 2 SCR 22.

¹²⁵ [1992] 2 SCR 679. Whether section 15 was violated was not addressed by the Supreme Court as the government did not appeal the substantive ruling. The Supreme Court held that the appropriate remedy was to strike down the offending provision with a suspension of the declaration of invalidity for a period of time to provide the government with the opportunity to determine how best to amend the defective regime.

¹²⁶ 2003 SCC 54, [2003] 2 SCR 504.

¹²⁷ *Mckinney v. University of Guelph*, [1990] 3 SCR 229; *Harrison v. University of British Columbia*, [1990] 3 SCR 451; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 SCR 570.

¹²⁸ *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65, [2004] 3 SCR 357.

¹²⁹ *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497.

¹³⁰ *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396.

¹³¹ *Symes v. Canada*, [1993] 4 SCR 695

¹³² [1999] 2 SCR 989.

¹³³ *Ibid.* at para. 44.

¹³⁴ *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, holding that off-reserve aboriginal status was an analogous ground so that legislation prohibiting such persons from voting in band elections was held to be a violation of Section 15.

the named grounds, the characteristic of being immutable, whether in fact, or constructively, such as religion. While it may be argued that RCMP officers were not in a particularly vulnerable position, the logic of the Court's approach, especially in denying that occupational status could not be considered as an analogous ground, is also likely to leave vulnerable groups unprotected. This approach to equality may be what then lay behind the Court's willingness to re-examine and expand the interpretation of freedom of association as it started to do in *Dunmore*.

In *Dunmore*, the Supreme Court was confronted with the exclusion of agricultural workers from the Labour Relations Act without alternative access to another regulated collective bargaining scheme. The complainants argued that this was both a violation of freedom of association and was discriminatory and hence a violation of section 15 of the Charter. The Court concluded that in certain situations the failure of government to provide access to an appropriate regime, thereby making it "impossible" for a particularly vulnerable group (in this case, agricultural workers) to exercise their freedom of association constituted a Charter violation. It found that the exclusion of the agricultural workers from the protections of the Ontario Labour Relations Act was unconstitutional. It did not go so far as to find that freedom of association directly provided protection for collective bargaining. Nor did it find that the exclusion of agricultural workers from the collective bargaining regime constituted a violation of equality rights, holding that there was no need to consider the claim given its finding that there was a violation of freedom of association.

The Court returned to the framing of limitations on bargaining rights as a violation of equality guarantees in *BC Health Services*. Although its decision finding that freedom of association provided protection for collective bargaining marked a significant shift in jurisprudence, it rather summarily dismissed the section 15 claim, positing that the distinctions made in the impugned legislation merely segregated different sectors of employment as is commonly done in collective bargaining legislation, and these distinctions do not amount to discrimination under s. 15. To the extent that the legislation may have had a differential and adverse impact on the basis of sex, given that a disproportionate number of the workers affected were women, the Court rather simply stated that the impact was because of the type of work that those affected do, not the persons they are. There was the Court said, no stereotypical application of group or personal characteristics. So much for the notion that individual identity is closely entwined with the work that people do!

The equality claim in relation to agricultural workers was raised again before the court in *Fraser*. *Fraser* addressed whether the Ontario government's response to *Dunmore*, providing agricultural workers access to a very limited regime while maintaining their exclusion from the general labour relations statute, was either a violation of freedom of association or of equality rights. The Court ended up holding that there was no violation of freedom of association, because the new statutory regime did provide, by implication, protection for "collective bargaining" through an implied obligation on employers to bargain in good faith with associations representing the agricultural workers

In addressing the s. 15 claim, the plurality found that that such a claim was premature. It found that on the basis of the record before it, "it has not been established that the regime utilizes unfair stereotypes or perpetuates existing prejudice and disadvantage. Until the regime established by the AEPA is tested,

it cannot be known whether it inappropriately disadvantages farm workers.”¹³⁵ It may be significant that the claim was not automatically rejected on the basis of *Delisle’s* reasoning that occupational status was not an analogous ground. The particularly vulnerable status of agricultural workers, as found in *Dunmore* was referenced and it may be that there still is room for particularly vulnerable groups of workers to pursue an equality claim which is not directly related to traditional human rights categories such as sex, race or disability. Justice Deschamps, in particular, notes that it might be better to directly tackle issues of substantive economic inequality by the recognition of more analogous grounds under s. 15, rather than conflating the right to freedom of association with equality. She acknowledges that this would entail a sea change in the interpretation of s. 15, and not one that she appeared willing to actually pursue in resolving the claims in *Fraser*.

One recent labour decision does contemplate the possibility of expanding the list of analogous grounds. In *L’Écuyer v. Côté*,¹³⁶ a union was challenging provisions of the Quebec Labour Code that effectively made it impossible for agricultural workers to have a union certified to represent them pursuant to the statute. While the decision repeats the view that an analogous ground must relate to “a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity” and that therefore the status of being an agricultural workers does not meet the test, it nevertheless suggested that the category of “migrant worker” could be an analogous ground. However, the Court still refused to find that there was a violation of section 15, because it was of the view that one could not conclude that any discrimination perpetrated by the statute was done *because* the excluded workers were migrant workers; it was because they were agricultural workers, whether migrant workers or not. It was the nature of the industry with its need for temporary seasonal workers that made it virtually impossible for workers to meet the barrier to certification created by the statutory requirement that there be at least three permanent workers in the bargaining unit. The court did not mention the possibility of an adverse impact analysis to determine if the statutory rule particularly affected migrant workers. Despite this, the Court did come to the conclusion that the statutory rule was a violation of freedom of association, for many of the same reasons that *Dunmore* and the Court of Appeal in *Fraser* had considered the exclusion of agricultural workers from the Ontario collective bargaining scheme to be unconstitutional. Like the Supreme Court in *Dunmore* it has suspended the declaration of invalidity for twelve months to give the Quebec government the opportunity to consider whether to create a modified scheme for agricultural workers.

One final case worth mentioning, because it does demonstrate the potential of an equality analysis for challenging the exclusion of particular groups of workers from a collective bargaining regime, is the Quebec Superior Court decision in *CSN c. Québec (Procureur général)*.¹³⁷ The Quebec government had modified legislation to establish that home care and child care workers were not employees and therefore had no access to the general collective bargaining scheme. The Court concluded not only that this was a violation of freedom of association but also that it violated section 15 because of the adverse impact it had on these workers who were predominantly women. Unlike the Supreme Court in *BC*

¹³⁵ *Ibid.* at para. 116.

¹³⁶ *L’Écuyer c. Côté*, 2013 QCCS 973.

¹³⁷ 2008 QCCS 5076.

Health Services, the Quebec court found that the disparate treatment for home-based care workers was causally linked to the fact that they were doing work that was traditionally perceived as being women's work normally done as an extension of traditional, familial and domestic unpaid work. Not only did the court find that there was discrimination on the basis of sex, it also held that care work performed at home primarily by women constituted an analogous ground under s. 15. The decision was not appealed and the Quebec government subsequently introduced a new legal collective bargaining framework for these workers.¹³⁸

In conclusion, what we see is that the Supreme Court, because of its narrowing of section 15, has incorporated an equality element into the freedom of association analysis to address denial of access of particularly vulnerable groups to collective bargaining. Given the range of caveats that it has now built around invocation of freedom of association, including the requirement of demonstrating that the government failure to act has made it *impossible* for members of that group to effectively associate, it makes it unlikely that section 2(d) can very often be effectively deployed by those challenging under-inclusive collective bargaining legislation. *Fraser* nevertheless suggests a faint hope for making a Section 15 claim, and commentators like Langille and Elliott and Elliott provide a persuasive case that section 15 could be extended, either by expanding the analogous grounds or by extending section 15 to the protection of fundamental constitutional interests. Moreover, with a more recent tendency to convergence of section 15 and statutory human rights understanding of what constitutes discrimination, there is a possibility that section 15 may yet emerge as an important site for the development of substantive equality rights of vulnerable and precarious workers, especially in the context of their exclusion from labour protective statutes.

Conclusion

This paper has drawn on the idea of Escherian dialectic as a means of thinking about the interaction of statutory human rights and Charter rights, especially equality rights. Escher focused on such matters as transformation, in lithographs such as *Metamorphoses*, where images morph into one another through gradual manipulation as the image advances across a plane. We have seen a similar transformation in Supreme Court jurisprudence as the Court borrows ideas about equality and discrimination developed in the context of statutory human rights cases to inform its approach to defining discrimination under section 15 of the Charter. But in doing so, what emerges is a considerably different representation of discrimination, one which is in part informed by the different context in which the Charter operates and which is manifested in the Court's efforts bringing into the analysis such concepts as human dignity, appropriate comparators and a need to identify prejudice and stereotyping. But Escher was also interested in how one could fill a plane with interlocking images that were complementary to each other, and the problem of fitting together equality claims and freedom of association exemplifies the Supreme Court making a similar effort. Another theme in Escher's work is recursivity, exemplified in his

¹³⁸ See Stephanie Bernstein, "Sector-Based Collective Bargaining Regimes and Gender Segregation: A Case Study of Self-Employed Home Childcare Workers in Quebec" in Judy Fudge, Shae McCrystal and Kamala Sankaran, *Challenging the Legal Boundaries of Work Regulation* 213 (Oxford and Portland, Ore.: Hart Publishing, 2012).

Drawing Hands. In its simplest form, recursivity is a process of repeating items in a self-similar way, and there is much evidence that the recent efforts of the Supreme Court to simplify the section 15 tests for discrimination and to maintain a simple test for discrimination in statutory human rights cases is a recursive process. Finally, Escher was interested in reflections, as marked by such works as Rippled Surface Colour and Hand With Reflecting Sphere. Escher's reflections help us to see realities in new ways, not always obvious from a direct observation. As the diversity of Escher's works reminds us, there is more than one means of fitting the pieces together, and we should not abandon continual exploration of the different possibilities for section 15, so that, for example, it could be applied to deal with the problem of under inclusion that plagues many protective labour relations and employment rights schemes.