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The Anti-Discrimination Norm in Human Rights and Charter Law: Nixon V. Vancouver Rape Relief

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ARTICLES

THE ANTI-DISCRIMINATION NORM IN HUMAN RIGHTS AND *CHARTER* LAW: *NIXON V. VANCOUVER RAPE RELIEF*

CHRISTINE BOYLE[†]

I. INTRODUCTION

The right to be free of discrimination is most prominently protected by two types of legal instruments – the constitution, primarily in the form of the *Canadian Charter of Rights and Freedoms*,[1] and human rights legislation. However, discrimination does not necessarily mean the same thing at the constitutional and legislative levels. Its meaning on the constitutional level is now governed by the Supreme Court of Canada decision in *R. v. Law*.[2] While *Law* is the Supreme Court of Canada's unanimous attempt to reconfigure and synthesize equality law, it has been a matter of debate whether that synthesis will be applied at the human rights level. At the moment, some, though not all, human rights tribunals have rejected its applicability, while courts have applied *Law* in cases where the argument has been made. This paper focuses on the issue of whether the human rights concept of discrimination should be consistent with the constitutional meaning.

An illustration of the possible significance of this issue is provided through discussion of whether it is discrimination for a women's group to exclude male to female transsexual persons, drawing to some extent on the issues arising out of the human rights complaint made by Kimberly Nixon against Vancouver Rape Relief Society in *Nixon v. Vancouver Rape Relief Society*.[3] An analysis, by counsel for Ms. Nixon, of the decision of the Tribunal was recently published in this journal, under the title "Real Women: *Kimberly Nixon v.*

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[1] Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.) 1982, c. 11 [*Charter*].

[2] [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1 [*Law*].

[3] 2001 BCHRT 1 [*Nixon*] (The author is co-counsel for Vancouver Rape Relief and Women's Shelter in this case).

Vancouver Rape Relief'.[4] While this paper addresses the meaning of discrimination more broadly, *Nixon* provides a useful illustration of the rare case, that is, one involving equality claims in conflict, where the choice of the meaning of discrimination in human rights law matters. To some extent therefore, it is a response to "Real Women". In addition, since that comment was published, the British Columbia Supreme Court, in a judicial review of the Human Rights Tribunal decision allowing Ms. Nixon's complaint, has overturned that decision.[5] However, the debate about the meaning of discrimination is likely to continue.

One consequence of a divergence between the human rights and constitutional meanings of discrimination would be that private individuals/groups might not be able to make distinctions and target programs in ways permitted to the state.[6] There is a possible theoretical foundation for this, since bills of rights should be seen as establishing a minimum level of protection for fundamental rights and freedoms, a level that legislatures are, to some extent, free to change for private actors. However, in cases involving human rights claims in conflict, the issue is the appropriate balance. The level cannot be raised for some without being simultaneously lowered for others. As well, in an era of increasing privatization of what would otherwise be government programs, and thus increasing fuzziness of the public/private distinction, different discrimination tests for "private" programs versus government programs may be difficult to defend.[7] A further concern is whether insistence on a relatively formal approach to discrimination in the human rights context could undermine a somewhat fragile commitment to substantive equality at the constitutional level.

This paper is about the meaning of discrimination on the human rights level. However, any debate about the human rights meaning could be seen against a backdrop of debate about the constitutional meaning. While substantive equality is often seen as providing a positive contrast to formal equality at that level, not all would agree with that view. Furthermore, not all

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[4] barbara findlay, "Real Women: *Kimberly Nixon v. Vancouver Rape Relief*" (2003) 36 U.B.C.L.Rev. 57 [findlay, "Real Women"] (The author takes issue with some of the factual characterizations in that article. At no point has Rape Relief taken the position that Ms. Nixon is not a "real woman" or not "one of them" or that "protection from discrimination on the basis of sex is available only to non-transsexual women" at 57).

[5] See *Vancouver Rape Relief Society v. Nixon et al.*, 2003 BCSC 1936 [*Vancouver Rape Relief*].

[6] This has both a substantive (in that the meaning of discrimination may vary) and a fact-finding (in that the allocation of the burden of proof affects outcomes) dimension.

[7] Stated more dramatically, leaving women's groups to defend themselves in the "private" realm without the tools the government can use in the public realm reactivates familiar concerns about the legal status of women.

proponents of substantive equality would support the use of the concept of human dignity, discussed below.[8] It is not my purpose to engage in discussion of the best approach to substantive equality in general. It may well be that substantive equality could be promoted by a different pivotal concept than dignity.[9] Rather, I address the arguments about whether there should be a consistent approach to discrimination in the human rights and constitutional fields, given that there is some commitment to substantive equality in the latter.

Tarnopolsky and Pentney have touched on this topic briefly, stating:

> Charter jurisprudence is a source of authority for cases involving the anti-discrimination provisions of human rights codes. Indeed it would be remarkable if this were *not* the case, in view of the paramount authority of the Charter and the almost precise identity between the grounds enumerated under s. 15 and those identified in human rights enactments ...
>
> The direction taken by the Supreme Court in *Law* and *Granofsky* is *prima facie* binding on human rights tribunals in future decisions. It is submitted that these decisions direct tribunals to look beyond differential treatment and nexus to enumerated grounds of discrimination in order to assess the existence and/or degree of incidental interference with claimants' personal dignity. The guiding principles in this second phase of analysis must be both "purposive" and "contextual" as those terms were elaborated *inter alia* in the *Law* case.[10]

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[8] For discussion of the debate and a useful contribution to it, see Donna Greschner, "Does *Law* Advance the Cause of Formal Equality?" (2001) 27 Queen's L.J. 300 [Greschner]. See also Peter W.Hogg, *Constitutional Law of Canada*, student ed., (Scarborough, Ont.: Thomson-Carswell, 2003), who states at 1080: "The element of human dignity that has been injected into the s.15 jurisprudence is, in my view, vague, confusing and burdensome to equality claimants". On the other hand, for serious efforts to develop a conception of dignity in both tort and discrimination law, see Denise G. Réaume, "Harm and Fault in Discrimination Law: The Transition from Intentional to Adverse Effect Discrimination" (2001) 2 Theor. Inq. L. 349; Denise G. Réaume, "Indignities: Making a Place for Dignity in Modern Legal Thought" (2002) 28 Queens L. J. 61 (Réaume suggests that "there is a trend afoot to appeal more widely to the value of dignity in interpreting and developing norms in a variety of contexts" at 93).

[9] See *e.g.* Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" (2001) 80 Can. Bar Rev. 299. Martin argues, at 329, "dignity belongs more to the realm of individual rights than to group based historical disadvantage. ... [D]ignity may prove to be too low or too ambiguous a common denominator if it removes from view how oppression operates. The Court [in *Law*] said that the interests protected by human dignity relate to the realization of personal autonomy and self-determination, self-respect, and physical and psychological integrity and empowerment. These rights fall within the classic liberal tradition".

[10] Walter S. Tarnopolsky & William F. Pentney, *Discrimination and the Law: Including Equality Rights Under the Charter*, looseleaf (Scarborough: Carswell, 2001) at 4-102.11-12.

The Tribunal in *Nixon*, discussed in more detail below, rejected such a view, while the British Columbia Supreme Court accepted it as governed by precedent.

II. THE COMPLAINT AGAINST VANCOUVER RAPE RELIEF

The complaint initiated by Ms. Nixon forms part of a broader issue of whether male to female transsexual persons have a human right of access to women's groups, and in particular rape crises centres and women's shelters. Vancouver Rape Relief and Women's Shelter (Rape Relief) describes itself as a volunteer feminist collective organized in the fight to end violence against women. It was formed in 1973 as a non-profit organization to respond to the needs of women in crisis. It operates a 24-hour rape crisis line and a transition house for battered women, providing peer counselling, support groups and information to women who have been assaulted. It offers accompaniment and advocacy through the medical, legal and social services systems that many women must negotiate after a violent attack. Rape Relief believes that to end women's oppression and to eliminate violence against women, women need to join together and fight back collectively, becoming a democratic force. Therefore, Rape Relief actively participates in the women's equality movement.

Ms. Nixon is "a post-operative male to female transsexual. Her birth certificate has been amended pursuant to s. 27(1) of the *Vital Statistics Act*[11] ... and records her gender as female."[12] She complained that Rape Relief had discriminated against her, on the basis of sex,[13] by denying her a service (framed as the opportunity for her to train to volunteer at Rape Relief) or refusing to employ her. Rape Relief, a women-only group,[14] took the position that it excludes people who do not have the "life experience of being treated

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[11] R.S.B.C. 1996, c.479.

[12] *Nixon*, *supra* note 3 at para. 1.

[13] In *Vancouver Rape Relief Society v. British Columbia (Human Rights Commission)* (2000), 75 C.R.R. (2d) 173, 2000 BCSC 889, it was held in *obiter* that the ground "sex" includes discrimination on the ground of transsexualism. See paras. 45-59 and in particular para. 59: "I am accordingly of the opinion that the prohibition against discrimination on the basis of 'sex' in the 1984 Act and the present Code includes a prohibition against discrimination on the basis of transsexualism." While Ms. findlay, in "Real Women", *supra* note 4 at 61, characterizes Rape Relief's position as being that "no transgendered people – not even transsexuals – are entitled to protection under the [Human Rights] *Code*", this case simply dealt with the meaning of sex as a ground.

[14] Approved as such under the human rights legislation in force in 1977. It is common ground in the case that Rape Relief appropriately excludes men, and it was argued by Ms. Nixon, at the judicial review, that Rape Relief could also exclude pre or non-operative male to female transgendered persons.

exclusively as [girls and women]" and do not "share... the life experience of being assigned the historically subordinate status assigned to women in our society."[15]

Tribunal member Heather MacNaughton found that Rape Relief was in breach of the *Human Rights Code*[16] in refusing to allow a person without the life experience of being treated as a woman to train as a volunteer peer counsellor at a women-only rape crisis centre and women's shelter, and ordered Rape Relief to pay $7,500 to the complainant for injury to feelings.

The following summary sets out the position of the Tribunal along with an indication of the subsequent history of each point.

1. The Tribunal held that the complaint fell within its jurisdiction under the *Code* because, in the circumstances of the case, the opportunity to volunteer falls within the meaning of "employment" and the training program designed to equip women to assist victims of male violence is a service to those participating in the training program. No judicial review was sought of these rulings.
2. There was a *prima facie* case of discrimination. This was overturned on judicial review.
3. While Rape Relief acted on a good faith standard which was rationally connected to the goal of providing a safe and supportive environment for women who seek its services, it had not met the burden of proof of showing that the standard of life experience as a woman or girl is reasonably necessary to be of assistance to its callers. The ruling on reasonable necessity was challenged on review but was not addressed by the court.
4. Rape Relief was not protected by s. 41 of the *Code* (which allows groups with a primary purpose of promoting the interests or welfare of an identifiable group characterized by sex or political belief to grant preference to members of that group) for reasons having to do with the findings of the Tribunal with respect to the Society's Objects, policies and screening process. On judicial review the court held that Rape Relief was protected by s. 41.[17]

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[15] See *Nixon*, *supra* note 3 at para. 182.

[16] R.S.B.C. 1996, c. 210, as amended [*Code*]. Amendments relating to the Human Rights Commission, but not affecting substantive protections, were proclaimed in force 31 March 2003. See *Human Rights Amendment Act*, S.B.C. 2002, c. 62.

[17] The author takes issue with the broad characterization of the decision in "Real Women". Compare findlay, "Real Women", *supra* note 4 at 57. Given the factual elements of the decision on whether Rape Relief was protected by the group rights in s. 41, it does not reflect a broad principle that "an individual ... must be assessed individually in relation to the service or employment being offered".

There are thus a number of interesting and important issues in the case, which relate to accommodating the rights of individuals and groups to self-define. In particular, the scope of provisions protecting group rights is very significant, and one which the author intends to address in a further article. However, especially given the fact that not all human rights legislation has protection for groups similar to that in s. 41, the focus of this paper is on point 2, the meaning of discrimination.[18]

III. THE MEANING OF DISCRIMINATION: THE *CHARTER*

The *Charter* includes a right to equality – to be free from discrimination.

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

The extensive, and evolving, constitutional jurisprudence on the meaning of s.15 generally reflects an understanding of equality which at least claims to be substantive, and focused on the experience of disadvantage in the world, rather than a liberal understanding of equality focusing on mere distinctions.[19] Thus, at the constitutional level, it could not be assumed that distinctions between transsexual persons and persons with the life experience of being treated as girls and women is even *prima facie* discrimination. The application of the anti-discrimination norm would require a contextual analysis, governed by *Law*. *Law* does not create any dramatic change in Canadian equality law, but reflects the principle established in the famous case of *Law Society of British Columbia v. Andrews*[20] that a distinction is not necessarily discrimination, as quoted by Iacobucci J., for the Court:

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[18] While the author takes the position that one of the benefits of applying *Law* to the human rights concept of discrimination is a contextual analysis that leaves space for argument about equality-seeking respondents, the question of the legal meaning of discrimination can be addressed without expressing a view on the merits of the application of that concept to the facts of the *Nixon* case itself.

[19] For a useful summary, see Mary C. Hurley, *Charter Equality Rights: Interpretation of Section 15 in Supreme Court of Canada Decisions* (Ottawa: Library of Parliament Research Branch, 1995).

[20] [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 [*Andrews*].

> A discriminatory burden or denial of a benefit, McIntyre J. stated [in *Andrews*, at paras. 43-45], is to be understood in a substantive sense and in the context of the historical development of Canadian anti-discrimination law, notably the human rights codes: "The words 'without discrimination'...are a form of qualifier built into s.15 itself and limit those distinctions which are forbidden by the section to those which involve prejudice or disadvantage".[21]

Law makes it clear that the constitutional meaning of discrimination goes beyond mere distinctions, even if it is open to criticism that it does not robustly reflect substantive equality. In this paper it is referred to as reflecting a substantive approach in the sense that it leaves room for argument that particular distinctions reflect equality rather than discrimination. The case sets out a three-step test:

1. Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?[22]
2. Is the claimant subject to differential treatment on the basis of one or more enumerated and analogous grounds?
3. Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?[23]

The overall purpose of s.15 is to prevent the violation of human dignity, which is currently a key concept capturing the difference between a formal and a substantive approach. Thus the Court states:

> It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society,

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[21] *Law*, *supra* note 2 at para. 27.

[22] Whether there is a distinction or not may be a complex issue in cases involving groups or targeted programs. For instance, is a male to female transsexual, denied the opportunity to volunteer at a women's shelter, treated differently than those women eligible to volunteer, or the same as all others (including men, and women who do not share the political understanding underlying the work of the women's shelter in question)?

[23] *Law*, *supra* note 2 at para. 88.

> equally capable and equally deserving of concern, respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society. Alternatively, differential treatment will not likely constitute discrimination within the purpose of s. 15(1) where it does not violate the human dignity or freedom of a person or group in this way, and in particular where the differential treatment also assists in ameliorating the position of the disadvantaged within Canadian society.[24]

Law arose in relation to denial of survivor's benefits under the Canada Pension Plan on the basis of age. The Supreme Court of Canada held that the age distinction does not violate the human dignity of younger persons or suggest they are of less value as human beings. In the view of the Court, younger persons are not stereotyped, as the law is functioning not by the device of stereotype but by distinctions corresponding to the actual situation of individuals. The focus was on those whose need was greatest, a goal consistent with equality:

> The differential treatment does not reflect or promote the notion that [young people] are less capable or less deserving of concern, respect, and consideration. Nor does the differential treatment perpetuate the view that people in this class are less capable or less worthy of recognition or value as human beings or as members of Canadian society.[25]

Furthermore, the unanimous Court said that "Parliament is entitled ... to premise remedial legislation upon informed generalizations without running afoul of s. 15(1) of the *Charter* and being required to justify its position under s. 1".[26]

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[24] *Ibid.* at para. 51.

[25] *Ibid.* at para. 102.

[26] *Ibid.* at para. 106. For comment, see Greschner, *supra* note 8, who argues that *Law* does advance the cause of substantive equality. She argues that the goal of s. 15 is substantive equality: it takes into account opportunities, resources and choices within a society/community. Because the *Law* approach identifies substantive violations of equality rights in the third step, it promotes the overall goal of s. 15. The previous two-step approach implicitly defines equality as 'sameness' with any deviation requiring justification. This formalistic approach is inconsistent with the s. 15 goal of promoting substantive equality. However, Greschner goes on to argue that *Law* needs to be extended; the Court should explicitly reject formalism and the 'relevancy' approach from the *Egan* trilogy. The Court should also reconsider 'essential human dignity' as the core interest protected by equality rights. See also Daniel Proulx, "Les droits à l'égalité revus et corrigés par la Cour supreme du Canada dans l'arrêt *Law*: un pas en avant ou un pas en arrière?" (2001) 61 R. du B. 185; Beverly Baines, "*Law* v. *Canada*: Formatting

Law was applied in the later case of *Lovelace v. Ontario*.[27] It involved a claim by aboriginal people not registered as bands, that their exclusion from an agreement concerning casino proceeds between Ontario and aboriginal people registered as bands was discrimination. It was held that this was not discrimination as the agreement did not stereotype the claimants, there was a fit with the actual situation of the individuals affected and the exclusion did not undermine the ameliorative purpose of the program. While the claimants' needs corresponded to the needs addressed by the casino program, the Supreme Court of Canada held that more than a common need is required. The claimants had very different relations to land, government and gaming. The program was targeted at ameliorating the conditions of a specific disadvantaged group, and a targeted program is less likely to be associated with stereotyping or stigmatization.

The Supreme Court of Canada held that the program in *Lovelace* is consistent with s.15, and the exclusion of the claimants was not discrimination as it was not associated with a misconception of their needs, capacities and circumstances. The Court came to that conclusion even though the two groups have overlapping and largely shared histories of discrimination, poverty and systemic disadvantage, which cry out for improvement. The project supported the journey of the bands toward empowerment, dignity and self-reliance, and while it was not designed to meet similar needs in the other aboriginal communities, its failure was held not to amount to discrimination. It was held that the appellants had failed to demonstrate, viewed from the perspective of the reasonable individual, that the exclusion from the First Nations Fund had the effect of demeaning the appellants' human dignity.

Law and *Lovelace* make clear, at the constitutional level, that a purposive and contextual approach is required, given the strong remedial purpose of s. 15(1) of the *Charter*, (echoed in the stated purposes of human rights legislation), and to avoid the pitfalls of a formalistic approach. This approach requires claims of discrimination on particular grounds to be given their own distinctive analysis. As an example of such an approach in a context related to gender, *Law* cites *Weatherall v. Canada (Attorney General)*,[28] as illustrating that the larger historical, biological and sociological contexts (of violence) make some gender-based distinctions (in that case between men and women, and having to do with strip searches in prison) non-discriminatory. This approach can be contrasted to a formal equality approach which treats the experiences of men and women as the same, and, with respect to women,

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Equality" (2000) 11 Const. Forum Const. 65; Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" (2001) 80 Can. Bar Rev. 299.

[27] [2000] 1 S.C.R. 950, 188 D.L.R. (4th) 193, 2000 SCC 37 [*Lovelace*].

[28] [1993] 2 S.C.R. 872, 105 D.L.R. (4th) 210.

treats the experiences of male to female transsexuals, lesbians and women of colour as the same, thus making diversity invisible.[29]

Further, the approach involves a focus on what the Supreme Court of Canada currently views as the core value protected by the anti-discrimination norm, that of dignity, which is harmed by the imposition of disadvantage and stereotyping. It is not enough "simply to assert, without more, that his or her dignity has been adversely affected".[30] This focus would permit an argument, were a male to female transsexual to challenge legislation, or a government program, that the life experience distinction did not involve harm to dignity or stereotyping. Some transsexual persons and some women's groups may disagree about the political and therapeutic significance of experience of being treated as male. The constitutional approach at least allows an argument that such disagreement over targeting programs to people with the life experience of being treated as female is consistent with the human dignity of everyone involved.

A. THE PERSPECTIVE ON DIGNITY

The test of whether dignity has been harmed is both subjective and objective.[31] It is therefore necessary to look at the context from the perspective of a reasonable person in the circumstances of a claimant. Who is this reasonable person? It can now be argued that the reasonable person is one who shares the values in the *Charter*, which includes the values of equality, privacy, security of the person, freedom of association and freedom of thought and expression. For example, in *R. v. R.D.S.*,[32] L'Heureux-Dubé and McLachlin JJ. (La Forest and Gonthier JJ. concurring) stated that the "reasonable person [in the context of assessing bias] is an informed and right-minded member of the community, a community which, in Canada, supports the fundamental principles [of the *Charter*]".[33] Similarly, in *Minister of Indian and Northern Affairs Canada et al v. Corbière et al* [34] L'Heureux-Dubé J. (Gonthier, Iacobucci and Binnie JJ., concurring) stated:

> I would emphasize that the "reasonable person" considered by the subjective – objective perspective understands and recognizes not only the circumstances of

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[29] For some discussion of "false parallelism", see Constance Backhouse, "Bias in Canadian Law: A Lopsided Precipice" (1998) 10 C.J.W.L. 170 at 174-75.

[30] *Law*, *supra* note 2 at para. 59.

[31] *Ibid.* at para. 88.

[32] [1997] 3 S.C.R. 484, 161 N.S.R. (2d) 214.

[33] *Ibid.* at para. 46.

[34] [1999] 2 S.C.R. 203, 173 D.L.R. (4th) 1 [*Corbière*].

> those *like* him or her, but also appreciates the situation of others. Therefore, when legislation impacts on various groups, particularly if those groups are disadvantaged, the subjective-objective perspective will take into account the particular experiences and needs of all of those groups.[35]

Attention to dignity seems particularly important in a case of a group, or targeted program, which excludes others apart from the claimant. A formal, rather than a substantive approach, makes groupness *per se* discriminatory (at least in the *prima facie* sense), a position that would obviously make women's (and other) equality-seeking groups vulnerable to human rights complaints. Applying *Law* and *Lovelace*, it can be argued that a reasonable person would take into account the needs of disadvantaged groups to understand their own experience and to organize on that basis, as well as the fact that others are excluded from a particular group. Thus in *Nixon*, the complainant shared with the majority of British Columbians the lack of opportunity to volunteer at Rape Relief. She fell into a group which included men, pro-life women, women who do not agree that women should be free to love whom they will, women who are not willing to work against racism, and women with other political differences with Rape Relief. There is no reason to suppose that all, or even many, of these people do not support Rape Relief's right to define itself, and see their exclusion from this particular group as consistent with their human dignity.

The reasonable person should rationally take into account the open-ended list of contextual factors in *Law*.[36] All of these leave space for argument that the requirement of life-long experience of being treated as a girl and woman is not a discriminatory qualification for training as a volunteer at a rape crisis centre and women's shelter.

B. THE CONTEXTUAL FACTORS

1. PRE-EXISTING DISADVANTAGE

A pre-existing disadvantage in a group is not conclusive concerning whether a distinction is "discrimination". *Lovelace* states that this factor does not require

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[35] *Ibid.* at para. 65 [emphasis in original]. While *Corbière* held that a restriction of voting rights to aboriginal band members ordinarily resident on a reserve was contrary to s. 15, there are significant differences between it and *Nixon*. For example, aboriginals resident off a reserve have important financial, cultural and political interests in common with persons resident on a reserve. Nevertheless, *Corbière* supports the view that distinctions between off and on reserve aboriginal persons are not discriminatory *per se*. See para. 23, which contemplates balancing the rights of both sets of band members, and para. 74, which states that a purely local voting system would not violate the right to equality.

[36] *Law*, *supra* note 2 at para. 62 *et seq.*

claimants to engage in a "race to the bottom".[37] There, the Supreme Court of Canada acknowledged "the disadvantages suffered both by the claimants [non-band aboriginals] and the comparator group [band aboriginals]". The Court said:

> In short, beyond the unseemly nature of the relative disadvantage approach ... its narrow focus is inconsistent with the fullness of the substantive equality analysis ... [and]
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> [W]hile it is often true that distinctions may produce discrimination, there are many other situations where substantive equality requires that distinctions be made in order to take into account the actual circumstances of individuals as they are located in varying social, political and economic situations.[38]

It can be argued that the disadvantages suffered by a male to female transsexual (or transgendered persons in general), are different in nature from those suffered by persons who have been treated as women all or most of their lives (all forms of disadvantaged treatment deserving their own distinctive analysis). At the time such a person was growing up being treated as male, a social experience simply demonstrated by the fact that it is possible for such an experience to be meaningfully spoken or written, other people were growing up being treated as female. This was reflected in evidence called by both the complainant and respondent in the *Nixon* case itself. For instance, Dr. Ross, a sociologist called by the complainant, testified about the "enormous pressure on individuals, almost from birth, to conform to society's view of what is acceptable male or female behaviour."[39] Thus, while the complainant was experiencing pressure to conform to societal expectations of the male gender, girls were experiencing pressure to conform to societal expectations of the female gender. *Law* leaves space for respect for different forms of disadvantage, including recognition of the fact that growing up as a girl *is* an experience, obviously a varied one, but nevertheless an experience that can be the subject of research, conversation, and judicial notice.

More fundamentally, the conflation of growing up being treated as male/female casts doubt on whether girls and women exist at all, including as subjects of, and actors in, a political movement such as the women's

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[37] See also *Trociuk v. British Columbia (Attorney General)* (2003), 226 D.L.R. (4th) 1, 2003 SCC 34 [*Trociuk*], in which the Court stated, at para. 20, that while historical disadvantage is probably the most compelling factor, "it is settled law that neither the presence or absence of any of the contextual factors set out in *Law* is dispositive of a s. 15(1) claim ... because no single factor can determine, in all circumstances, whether a reasonable claimant would perceive that an impugned distinction infringes his or her dignity".

[38] *Lovelace*, *supra* note 27 at paras. 59-60.

[39] *Nixon*, *supra* note 3 at para. 135.

movement. It rejects, at least at the finding of discrimination stage, the freedom of individuals and groups to organize around their own understanding of oppression, even if they cannot, on a literal level, point to one defining biological factor, such as menstruation or pregnancy, or social experience, such as being paid less than men, being particularly vulnerable to sexual assault, or lacking credibility when called as a witness in a legal proceeding.

Similarly, it would not be possible to prove that there is such a thing as race, or one defining experience of racism, but that does not mean that racism does not exist or that law should not respect racialized persons' own understanding of their experiences.[40] Thus it should at least be arguable that it is not discrimination for people of colour to define themselves in various ways, including on the basis of a lifetime experience of being visibly identifiable as a minority person. A substantive analysis has the potential to include analysis both of race as a harmful social construct, and the equality-promoting effects of the use of racial groupings to fight racism.

As well, it is distinctive to the experience of being transgendered that there is an on-going debate about the most appropriate approach to eradicating disadvantage, for example, with respect to the ethics of sex reassignment surgery.[41] However, *Lovelace* encourages the avoidance of an "unseemly" argument about the relative disadvantage of women who grew up being treated as girls and women, and people whose gender identity has always been female but who have lived being treated as boys and men.

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[40] See *e.g.* Constance Backhouse, *Colour-Coded: A Legal History of Canada 1900-1950* (Toronto: University of Toronto Press, 1999) ("'Race' is a mythical construct. 'Racism' is not" at 7).

[41] See *e.g.* Pat Califia, *Sex Changes: The Politics of Transgenderism* (San Francisco: Cleis Press, 1997) at 245-47:

> Until the latter part of this decade, transsexual activism focused on gaining social acceptance for post-reassignment transsexuals... More recently, transgendered activists have been questioning the entire system of binary and polarized gender. Some leaders ... have called for transsexuals to direct their political efforts toward eliminating the notions of 'men' and 'women', rather than working to be perceived by nontranssexuals as a member of either gender. This has coincided with an increase in the numbers of people who label themselves as third gender, two-spirit ...
>
> One of the most visible and articulate proponents of this view is Kate Bornstein. In her book *Gender Outlaw: On Men, Women and the Rest of Us*, [New York: Routledge, 1994 at p.8] Bornstein labels her own gender as follows: 'I know I'm not a man – about that much I'm very clear, and I've come to the conclusion that I'm probably not a woman either, at least not according to a lot of people's rules on this sort of thing. The trouble is, we're living in a world that insists we be one or the other – a world that doesn't bother to tell us exactly what one or the other *is*'.
>
> In Bornstein's opinion, transgendered people are not born into the wrong bodies; they are people who bridge male/female categories or combine them in new ways.

2. CORRESPONDENCE

Law analyses "correspondence" as the relationship between the ground of discrimination and the characteristics or circumstances of the included and excluded groups. *Lovelace* expresses this factor as correspondence to needs, capacities, and circumstances. So this can be conveniently referred to as the "correspondence factor". Both cases say that where there is a high level of correspondence, the distinction is unlikely to be "discrimination".

With respect to the issue of whether it is discrimination for women's groups to exclude male to female transsexuals, it can be argued that the level of correspondence is high. Attention to life experience is attention to capacities and circumstances. Needs are more complex. If the need of a particular transgendered person is to help victims of male violence, it may be possible to meet that need without neglecting the needs of those victims. For example, women's groups can have structures which allow all supporters to help them in particular ways, such as by fund-raising. If the need of a particular individual is validation as a woman without distinction as to life experience, a need that might be described as a need for formal equality, then some rape crises centres and women's shelters are arguably not in a position to meet that need consistent with the needs of their service users and political objectives.

In *Lovelace*, the Court accepted that the different aboriginal communities face the same social problems and have the same needs, but despite that, held that there was not "discrimination". More than a common need is required. It must be possible to target programs by paying attention to the unique circumstances and capabilities of potential program beneficiaries.[42]

3. AMELIORATIVE PURPOSE OR EFFECTS

Where the exclusion relates to the ameliorative purpose or effects, it is unlikely to be "discrimination." This factor does not focus on "a simplistic measuring or balancing of relative disadvantage" or on the fact that, as in *Lovelace,* the two groups are equally disadvantaged. Instead, the focus is on the fact that a program is "targeted at ameliorating the conditions of a specific disadvantaged group rather than at disadvantage potentially experienced by any member of society." The Court also held that "exclusion from a targeted ... program [consistent with the equality goals of s. 15] is less likely to be associated with stereotyping or stigmatization or conveying the message that the excluded group is less worthy of recognition and participation in the larger society."[43]

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[42] *Lovelace, supra* note 27 at para. 75.

[43] *Ibid.* at paras. 85-86.

It can be argued that requiring volunteer trainees at women's shelters to have the life experience of being treated as girls and women is not associated with stereotyping or conveying the message that the excluded group is less worthy of recognition and participation in the larger society. For instance, women's groups may also exclude men from participation, not because they are thought to lack personal empathy or to have any other negative characteristics, but because they are not peers to people who have grown up with the life experience of the social subordination of women.

4. NATURE OF INTEREST AFFECTED

The Supreme Court of Canada cases require a consideration of the nature of the interests affected, both the claimant's and others', in considering whether the distinction amounts to "discrimination". Does the exclusion restrict access to a fundamental social institution, affect a basic aspect of full membership in Canadian society, or constitute complete non-recognition of a particular group?

Again, it can be argued that the inability to volunteer at a particular women's group does not affect a fundamental interest. The ability to volunteer does not affect the meaning of membership in Canadian society, nor does it constitute complete non-recognition of a particular group. In contrast, the nature of the interest affected for women seeking help from rape crises centres and women's shelters includes equality, privacy and security of the person, and for both callers and staff and volunteers, freedom of association.

The broader the interests protected by human rights legislation, the weaker the interests affected may become for complainants. Thus, if employment is construed to include volunteering and service is construed to include the opportunity to help others as a service to oneself; the claim that a basic aspect of membership of society is affected becomes more tenuous.

The contextual approach, as set out in *Law*, requires all these factors to be considered. In *Nixon*, the Tribunal held that the *Law* approach did not apply but then went on to consider the issue of dignity in any event, holding that the her exclusion from the volunteer training program was inconsistent with Ms. Nixon's dignity. The court found both conclusions to be in error. The rejection of the *Law* approach was incorrect in light of a decision of the British Columbia Court of Appeal in *Reaney*, discussed below. Further, the court held that the Tribunal was unreasonable in finding an impact on dignity - exclusion from a small, self-defined identifiable group cannot, on the basis of objective scrutiny, impact negatively on the dignity of any person excluded. This is particularly so where it is "imperative that membership requirements become more standardized so legitimate (membership claimants) can be identified".[44]

[44] *Vancouver Rape Relief, supra* note 5 at para. 146 (here the court was quoting from *R.v.Powley* (2003), 203 D.L.R. (4th) 1, 2003 SCC 43, in its discussion of Métis membership).

The court took the view that legislated exclusions are more likely to have a negative impact on dignity than exclusion from self-defining organizations, persons not included within the membership of groups have the same rights as most people, and case law suggests that it is not the function of the *Code*

> to provide a referee with authority to impose state-sanctioned penalties in political disputes between private organizations established to promote the interests of self-defined 'identifiable groups' and their members or prospective members.[45]

C. SECTIONS 15(2) AND 1

An argument could be made that the elaborate analysis set out above is out of place under s. 15(1) given the existence of both ss. 15(2) and 1 of the *Charter*. A similar argument can also be anticipated with respect to the human rights meaning of discrimination, especially given the existence of defences. There are several responses. First, the *Law* analysis does not track affirmative action analysis, even if it is animated by similar values, thus leaving at least the theoretical possibility that s. 15(2) has a role to play other than as an interpretative confirmation of s. 15(1).[46] It seems clear, however, that s. 15(2) should rarely, if ever, be needed. Second, *Lovelace* addresses the inter-relationship of the two sub-sections, providing strong support for the view that s. 15(2) is confirmatory, supplementary, and of interpretative assistance to s. 15(1), thus ensuring the internal coherence of the *Charter* as a working statute.[47] However, the Court contemplated the possibility of reconsideration of this matter.[48]

Nevertheless, it is now clear that, on the constitutional level, targeting a program at a particular group (in other words, a lack of inclusiveness *per se*) does not automatically make programs discriminatory, even on the *prima facie* level. And this is true even if people who experience disadvantage are excluded. The *Law* approach, whether or not it is an ideal reflection of substantive equality, gives a great deal of scope for a nuanced analysis very different from a formal equality approach. This is discussed further after the meaning of discrimination in the human rights context has been explored.

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[45] *Vancouver Rape Relief, supra* note 5 at para. 157.

[46] See *Lovelace, supra* note 27at para. 100.

[47] *Ibid.* at paras. 93 –108. The Court noted at the time the *Charter* was drafted there was a worry that affirmative action programs would be overturned on the basis of reverse discrimination. The concern expressed in this paper is that that worry has not been dispelled in the human rights context.

[48] *Ibid.* at para. 108.

IV. THE MEANING OF DISCRIMINATION – HUMAN RIGHTS LEGISLATION

Turning to the human rights context, it is clear that some provincial legislatures, courts and human rights bodies are only beginning to grapple with the implications of substantive equality for human rights. When one looks at human rights adjudication, it appears that while human rights law is somewhat attentive to substantive equality in an overall sense, with respect to the meaning of discrimination, there is a preference for what I would suggest is formal equality. Human rights bodies routinely jump from the finding of a distinction to a *prima facie* finding of discrimination. This is so even though the structure of human rights legislation is generally very similar to the *Charter*.

	Charter	Human rights legislation (BC)
1.	s. 15(1) equality (informed by affirmative action)	non-discrimination
2.	s. 1 limitations	bona fide exceptions
3.	s. 15(2) affirmative action	affirmative action type defences

This routine jump also happens even though well-known case law supports the proposition that human rights legislation and s. 15 of the *Charter* should be construed consistently. McIntyre J. referred to the interpretation and application of s. 15 of the *Charter* in *Andrews*. Speaking for the majority of the Supreme Court of Canada, he said that, 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 section 15(1) [of the *Charter*]."[49] Similarly, in *Brooks* v. *Canada Safeway Ltd.*,[50] Dickson C.J.C., for the Supreme Court, although considering whether a disability plan was discriminatory under the Manitoba Human Rights legislation, expressly relied upon the definition found in *Charter* jurisprudence:

> What does discrimination mean? The most recent pronouncement on this point will be found in the judgment of my colleague, McIntyre, J., in *Andrews* v. *Law Society of British Columbia* ...[51]

Nevertheless, it appears to have been assumed that the *Law* analysis does not apply to the human rights field, an assumption that is now called into question by a number of court decisions which are discussed below.

The preference for formal equality does not appear to have been explicitly based on the legislative wording. The drafting of provincial and federal human

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[49] *Andrews*, *supra* note 20 at para. 38.

[50] [1989] 1 S.C.R. 1219, 59 D.L.R. (4th) 321 [*Brooks*].

[51] *Ibid.* at para. 22.

rights legislation varies, thus leaving more or less room for argument about the applicability of *Law* depending on the jurisdiction. One can compare British Columbia, Alberta, Canada and Ontario by way of illustration.

In British Columbia, for instance, s. 13(1) of the *Code* states that a person must not:

> (a) refuse to employ a person ..., or
>
> (b) discriminate against a person regarding employment ... because of the ... sex ... of that person ...

Section 1 of the *Code* says "'discrimination' includes the conduct described in section 7, 8(1)(a), 9(a) or (b), 10(1)(a), 11, 13(1)(a) or (2), 14(a) or (b) or 43". There are defences of *bona fide* occupational requirement or justification, group exemption and affirmative action programs.

The wording is very similar in Alberta's *Human Rights, Citizenship and Multiculturalism Act*.[52] However, the Alberta version of *bona fide* defences can be found in s.11, which contains a provision similar to s. 1 of the *Charter* in that it says that 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."

The wording of the *Canadian Human Rights Act*[53] is somewhat similar, albeit against a background of a purpose, set out in s. 2, which uses the term equal and refers to obligations.

> The purpose of this Act is to extend the laws in Canada to give effect ... to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

Section 5 states, for example:

> It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public
>
> (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or

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[52] R.S.A. 2000, c. H-14, s. 7.

[53] R.S.C. 1985, c. H-6.

(b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.

In contrast, in the Ontario *Human Rights Code*,[54] the wording much more clearly suggests consistency with the constitutional jurisprudence. For instance, s. 1 says:

> Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status or disability.

Furthermore, in s. 10, "'equal' means subject to all requirements, qualifications and considerations that are not a prohibited ground of discrimination". Section 14(1) is similar to s. 15(2) of the *Charter*.

> A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.

Provisions allowing for *bona fide* occupational requirements are also included.[55]

While wording varies, human rights adjudicative bodies commonly ask whether there is a *prima facie* case of discrimination, rather than use the precise legislative wording to pose the question.[56] Indeed, this is consistent with the interpretive approach required by the Supreme Court of Canada.[57] Thus in *Nixon*, the Tribunal asked if there was a *prima facie* case of discrimination, rather than whether the complainant had been refused employment or a service "because" of sex.[58]

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[54] R.S.O. 1990, c. H.19.

[55] See *e.g. ibid.*, ss. 17, 18, 24.

[56] In order for a complainant to establish a *prima facie* case, there must be evidence on the basis of which the Tribunal could decide that there was discrimination. In *Ontario (Human Rights Comm.) and O'Malley v. Simpsons-Sears*, [1985] 2 S.C.R. 536 at para. 28, 23 D.L.R. (4th) 321, the Court described a *prima facie* case as "one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the absence of an answer from the [respondent]".

[57] See *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353 at para. 32, 102 D.L.R. (4th) 665, cited in *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571 at para. 6, 133 D.L.R. (4th) 449: "If human rights legislation is to be interpreted in a purposive manner, differences in wording between provinces should not obscure the essentially similar purposes of such provisions, unless the wording clearly evinces a different purpose on behalf of a particular provincial legislature".

[58] Were the question to be asked in a way that tracks the wording of the *Code* then the word "because" would need to bear the burden of the *Law* analysis.

This is typical in that decisions tend to refer simply to a *prima facie* case of discrimination, without referring to human dignity analysis, as the Tribunal pointed out in *Nixon*:

> [t]he Court's conclusion in *Meiorin*,[59] that the claimant had discharged the burden of establishing a *prima facie* case, makes no mention of human dignity. Rather, the Court simply says that the arbitrator held that, because of their generally lower aerobic capacity, most women are adversely affected by the high aerobic standard at issue. The burden then shifted to the respondent to demonstrate that the aerobic standard set was a *bona fide* occupational requirement ... . In *Grismer*,[60] the Court applied its new unified approach in a case involving the delivery of public services and said that the new test applied to all claims of discrimination under the *Code*.... Again, the Court made no mention of the s. 15(1) analysis or human dignity in concluding that the complainant had established a *prima facie* case of discrimination. It simply said that Mr. Grismer had established a *prima facie* case of discrimination by showing that he was denied a licence that was available to others based on a physical disability.[61]

A relevant illustration of this more formal (in the sense that it does not involve a contextual analysis) approach can be found in *Kavanagh and Canadian Human Rights Commission and Attorney General of Canada and the Zenith Foundation and Trans/Action*.[62] An issue in *Kavanagh* was whether placing pre-operative transsexual inmates in prisons corresponding to their anatomical sex was contrary to the Canadian human rights legislation. It was held, and indeed conceded, that since other inmates were placed in accordance with both their anatomical sex and gender, this was *prima facie* discriminatory, thus placing the burden on the Correctional Service of Canada to prove a *bona fide* justification. The justification was accepted on the basis of the difficulties placement in a target gender institution would pose for women inmates, "a vulnerable group, who are entitled to have their needs recognized and respected."[63] However, it was assumed without analysis that a difference had to be justified rather than analysed to see if it were discriminatory at all.

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[59] *British Columbia (Public Service Relations Committee) v. British Columbia Government and Service Employees' Union*, [1999] 3 S.C.R. 3 at paras. 69-70, 176 D.L.R. (4th) 1.

[60] *British Columbia (Superintendent of Motor Vehicles)* v. *British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 at paras. 19, 23, 181 D.L.R. (4th) 385.

[61] *Nixon, supra* note 3 at para. 116.

[62] *Kavanagh v. Canada (Attorney* General), [2001] C.H.R.D. No. 21, 41 C.H.R.R. D/119 (CHRT) [*Kavanagh*].

[63] *Ibid.* at para. 158 (Interestingly, Ms. Nixon argued in the Supreme Court that Rape Relief could exclude pre-operative persons: *Vancouver Rape Relief, supra* note 5 at para. 43).

Nevertheless, not all human rights adjudicators adopt this approach. A striking illustration is from a somewhat similar case, involving a challenge to a women-only newspaper, *Keyes v. Pandora Publishing Ltd.*[64] This case involved a complaint by Gene Keyes against Pandora Publishing Association, a women-only group that published a newspaper, *Pandora*, for, by and about women. Keyes had a particular interest in the issue of custody. He had been involved in protracted legal proceedings respecting custody of, and access to, his children, and was not satisfied with the results of those proceedings. He wanted *Pandora* to publish a letter on the subject and was advised that under no circumstances would his letter be published because he was a man. Keyes then complained to the Human Rights Commission that he had been discriminated against because of his sex.[65]

The Board of Inquiry addressed the question of the meaning of discrimination and whether the human rights meaning should be consistent with s. 15, by referring to *Andrews*, quoting as follows:

> It must be recognized, however, as well that the promotion of equality under s. 15 has a much more specific goal than the mere elimination of distinctions. If the *Charter* was intended to eliminate all distinctions, then there would be no place for sections such as 27(multicultural heritage); 2(a) (freedom of conscience and religion); 25(aboriginal rights and freedoms); and other such provisions designed to safeguard certain distinctions. Moreover, the fact that identical treatment may frequently produce serious inequality is recognized in s. 15(2), which states that the equality rights in s. 15(1) do "not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups ..."[66]

The Board noted that McIntyre J., in *Andrews*, was satisfied that "identical treatment may frequently produce serious inequality."[67]

The problem was that the wording of the legislation did not appear to give the Board any interpretative leeway. *Pandora* argued that discrimination must

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[64] (1992), 16 C.H.R.R D/148 (NSHRBI) [*Keyes*].

[65] The complaint was dealt with as one of discrimination against men in general. However, the complainant also attempted, unsuccessfully, to claim discrimination against a disadvantaged sub-group of men, that is, divorced and separated fathers claiming custody or access rights to their children. It was suggested that even if *Pandora* could advantage women over men generally in its letter writing policy, it could not advantage women over this alleged sub-group of men claimed to have been discriminated against on the basis of sex. The Tribunal saw no merit in this proposition, which was outside the scope of the inquiry, inconsistent with the evidence, lacking in authority, doubtful in terms of whether the group was in fact disadvantaged, and even if it were, this would not limit *Pandora*'s right to prefer women in its letters to the Editor policy.

[66] *Andrews*, *supra* note 20 at para. 24, quoted in *Keyes*, *supra* note 64 at 156.

[67] *Ibid.* at para. 26.

be construed consistently with the *Charter* as a matter of law. While the Board was conscious of the limitations in the application of the *Charter* to human rights legislation, it did not see that those limitations applied when the issue was the legal content of the prohibition against discrimination. In the Board's opinion, the provisions of the [Nova Scotia Human Rights] Act must be interpreted and applied so as to permit the making of distinctions between classes of individuals if the distinction is part of an activity or programme that has as its object the amelioration of conditions of disadvantaged individuals or groups.[68]

The Board concluded:

> Accordingly, I am satisfied that in law women may form single sex organizations for the purpose of promoting equality. I am further satisfied as a general statement, of the law, that such organizations may prefer or advantage women even if the effect of that is to discriminate against men (as a group or individually) on the basis of sex, without violating the anti-discrimination provisions of the Act.[69]

In rejecting the complaint, the Board thus adopted an approach to discrimination both influenced by the constitutional understanding that affirmative action is consistent with equality and positive to equality-seeking groups.[70]

A recent body of case law now provides support for the *Keyes* approach. The British Columbia Court of Appeal in *British Columbia Government and Service Employees' Union v. British Columbia (Public Service Employee Relations Commission)*,[71] has now unanimously held that:

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[68] The Board appeared to find support for this conclusion in the fact that the Act had been amended in various ways, including R.S.N.S. 1989, c. 214, as am. by S.N.S. 1991, c. 12, s. 6: "Subsection (1) of Section 5 does not apply ... (i) to preclude a law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or classes of individuals including those who are disadvantaged because of a characteristic referred to in clauses (h) to (v) of subsection (1) of Section 5." In the Board's opinion, the amendments brought the language of the Act into conformity with the *Charter*, but the Act was already subject to the *Charter* in those respects.

[69] *Keyes*, *supra* note 64 at 159. Further, the Board did not need to find that it absolutely necessary for all women's newspapers to have a policy of excluding all material which was not written by women in order for *Pandora* to justify its letter to the editor policy. It need only be a policy that might reasonably be adopted in the circumstances. It stated at 160: "[R]easonable women might take different views as to whether or not a women's newspaper should limit itself to letters and articles written by women only. I can also accept that women might reasonably conclude that such a policy is appropriate to one women's publication having regard to the circumstances and objectives of that publication and that it is not appropriate to another having regard to its circumstances and objectives".

[70] For a more recent example, see *Wignall v. Canada (Department of National Revenue (Taxation))*, [2001] C.H.R.D. No. 9.

[71] (2002), 216 D.L.R. (4th) 322, 2002 BCCA 476 [*Reaney*].

> In my opinion, the same analytical framework [as that in *Law* governing whether there has been a violation of s.15 of the *Charter*] must govern the determination of whether there has been a violation of s.13 of the Human Rights Code of British Columbia.[72]

The issue in *Reaney* was whether treating adopting mothers less generously than biological mothers constitutes discrimination (on the ground of family status) under s. 13 of the *Human Rights Code*. On appeal the arbitrator's decision was overturned by the court, which applied a purposive analysis to the leave provisions of the collective agreement, stating that the "precise question in this appeal then is what is the *purpose* of the Maternity Leave and Maternity Allowance provisions."[73]

The court held that the difference between adopting and biological mothers was not discriminatory because the purpose of the provisions

> when seen in their context, is not the encouragement of family formation but, rather, protecting the health and well being of pregnant women and new biological mothers, (not simply new parents), while undergoing the health and other stresses of giving birth and recovering from giving birth, so that they can effectively return to the work force.[74]

Further, the court concluded, quoting *Schacter v. Canada*,[75] that the Supreme Court "has repeatedly stated that Parliament may constitutionally attack one problem, or part of a problem, at a time."[76] *Vancouver Rape Relief* follows *Reaney* in holding that the *Law* analysis applies.

The view of the British Columbia Court of Appeal also finds support in several Alberta cases. In *Gwinner v. Alberta (Human Resources and Employment)*[77] a government widows' pension scheme was challenged as discriminatory on the basis of marital status under the *Human Rights, Citizenship and Multiculturalism Act*.[78] The court observed that the elaborate third step scrutiny in *Law* will neither be necessary and appropriate in most

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[72] *Ibid.* at para. 12.

[73] *Ibid.* at para. 16 [emphasis added].

[74] *Ibid.* at para. 17.

[75] [1992] 2 S.C.R. 679, 93 D.L.R. (4th) 1.

[76] *Ibid.* at para. 106, cited in *Reaney, supra* note 71 at para. 20.

[77] (2002), 217 D.L.R. (4th) 341, 2002 ABQB 685 [*Gwinner*].

[78] R.S.A. 2000, c. H-14 (this legislation has supremacy over other Alberta legislation. Section 1(1) states that "[u]nless it is declared by an Act of the Legislature that it operates notwithstanding this Act, every law of Alberta is inoperative to the extent that it authorizes or requires the doing of anything prohibited by this Act").

human rights cases,[79] and that human rights tribunals (including that in *Nixon*) have resisted the application of the *Law* analysis.[80] Nevertheless, "it will be appropriate in some cases to apply the entire *Law* analysis".[81] Here there was a serious question as to whether the dignity interest of the claimants was engaged.[82]

Mis v. Alberta (Human Rights and Citizenship Commission)[83] followed *Gwinner* in applying the *Law* analysis to a pension scheme at the University of Alberta, the court stating:

> I am of the view that this analysis [of whether the distinction impacts on human dignity] should apply not only to s. 15(1) of the *Charter* but also to Alberta's human rights legislation, given that they both have a common intent.[84]

So where do we stand at the moment? In contrast to recent court decisions, it appears that there is some reluctance among human rights adjudicators to apply *Law* in the human rights field.

V. SHOULD DISCRIMINATION BE GIVEN A CONSISTENT MEANING?

In many cases discrimination is obvious once a distinction is shown. In rare cases, most strikingly in cases involving equality-seeking groups, or targeted programs, it is not. All parties in *Nixon* agreed (without explanation as to why) that one gender-based distinction (the exclusion of men) was permissible. The complainant and respondent led consistent evidence that gender is not binary, but rather falls on a continuum. Hence this case could have been seen as raising the issue of whether a distinction, other than the binary male/female distinction, is discriminatory.[85] Similar issues can easily be imagined. Is it

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[79] *Gwinner, supra* note 77at para. 104.

[80] *Ibid.* at paras. 104-05.

[81] *Ibid.* at para. 103.

[82] The court went on to conclude that the omission of the divorced and separated from the pension scheme was discriminatory and not reasonable and justifiable, while the omission of the single was discriminatory but reasonable and justifiable.

[83] (2002), 10 Alta. L.R. (4th) 320, 2002 ABQB 570 [*Mis*].

[84] *Ibid.* at para. 70.

[85] There are two possible forms that such discrimination could take. First, exclusion could be discriminatory *per se*, no matter how the exclusion was identified and implemented. The argument in the text relates to this form. Second, there could be discrimination in the manner that an individual is excluded, even though the fact of excluding that individual is not discriminatory. *Sheridan* v. *Sanctuary Investments Ltd. (c.o.b. B.J.'s Lounge)*, [1999] B.C.H.R.T.D. No. 43, 33 C.H.R.R. D/467 [*Sheridan*], addresses the manner of exclusion of an individual, *inter alia*. In *Sheridan*, at para. 111, it was noted, "if any inquiries ... need to be

discriminatory for a lesbian group to exclude bisexual persons? Is it discriminatory for a group composed of people of colour, such as African-Canadians, to exclude persons who are not visibly identifiable as African-Canadians? Is it discriminatory for a group of aboriginals living on reserves to exclude off-reserve aboriginals?[86] Or should such equality-seeking groups be faced with a finding of *prima facie* discrimination and forced to bear the burden of proof of defences?[87]

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made to verify that an individual is a transsexual in transition, such inquiries need to be made in a dignified, private, and non-confrontational manner". Discrimination arising from the manner of exclusion can in turn be analysed as having two potential components. First, there is the question of whether any inquiry is discriminatory. Second, there is the question of whether the style of communication is discriminatory. In *Nixon*, *supra* note 3, Rape Relief argued that, given that it was common ground that men can be excluded, mere inquiry regarding an individual's gender is not discrimination. There are some people who can legitimately be excluded, in a context in which appearance would appropriately trigger inquiry. Further, inquiries into the background of volunteers and employees is commonplace and appropriate in society generally, especially for those seeking to work with children and other vulnerable groups. Inquiry into experience does not impose a burden or disadvantage not imposed on others, as contemplated by *Andrews*, *supra* note 20 at paras 37-39. Rape Relief also argued that it met the standard set out in *Sheridan* (a case decided after the incident which was the subject of the complaint) of using a dignified, private, and non-confrontational manner to ask the complainant to leave.

[86] A form of this issue arose in *Corbière*, *supra* note 34. There the issue was whether s. 77(1) of the *Indian Act*, R.S.C. 1985, c.1-5, violated the equality rights of s. 15. In particular did the words "and is ordinarily resident on the reserve" discriminate against band members living off reserve with respect to their voting rights? The Court delivered a unanimous decision to the effect that the actual distinction in issue was discriminatory, but there were different reasons given. However, both McLachlin C.J.C. in the majority of 5 and L'Heureux-Dubé J. in the minority of 4 agreed that "aboriginality-residence" is an analogous ground to the enumerated grounds in s. 15(1) and that the third step of the contextual approach is required to determine whether the exclusion was in fact discriminatory. McLachlin C.J.C. made this clear at para. 10 by stating that after the ground of aboriginality-residence is established "the analysis moves to the third stage: whether the distinction amounts, in purpose or effect, to discrimination on the facts of the case." L'Heureux-Dubé J. made a similar claim at para. 94: "The above analysis also does not suggest that *any* distinction between on-reserve and off-reserve band members would be stereotypical, interfere with off-reserve members' dignity, or conflict with the purposes of s. 15(1). There are clearly important differences between on-reserve and off-reserve band members, which Parliament could legitimately recognize." This it is clear that, depending on context, non-discriminatory distinctions can be made between on and off reserve aboriginal persons.

[87] It is implicit in this argument that the interests of potential respondents should be taken into account in framing and interpreting human rights law, and that such interests may be equality-promoting. "A satisfactory rationale for discrimination law requires that the legitimate interests of both constituencies – potential defendants and potential plaintiffs – be taken into account in the design of the cause of action": Denise G. Réaume, "Harm and Fault", *supra* note 8 at 352-53.

In *Nixon*, the complainant relied on the case law, such as *Meiorin* and *Grismer*, discussed above, supporting the view that a distinction shows a *prima facie* case of discrimination. The respondent drew on the constitutional understanding of discrimination, such as that as reflected in *Keyes* (and now in the recent case law), to argue that, while the right of the complainant to be free of sex discrimination in all the many situations where gendered life experience is irrelevant, such as shelter, education, and most employment and services, should be recognized, in the rare case where gendered life experience is relevant, drawing a distinction between women with the life experience of being treated as women and male to female transsexual persons is not discrimination.

The Tribunal Member devoted considerable attention to this issue in her decision, although without coming to a very clear conclusion. While she categorized the respondent's argument as suggesting a change in the elements required of a *prima facie* case,[88] she said that "[u]nquestionably, human rights legislation and s. 15 ... are to be construed consistently."[89] Given that *Law* did not change the *Andrews* approach, she took the view that it did not alter "twenty years of jurisprudence under human rights legislation."[90] What did this jurisprudence establish? "There is no question that, in the human rights context, a distinction *per se* does not amount to discrimination. A contravention of the *Code* requires that a distinction is discriminatory ..." Here the Tribunal quoted *Barrett at al. V. Cominco at al.*,[91] in which Tribunal Member Parrack said:

> ...the assessment of whether there is a disadvantage resulting in discrimination requires consideration of the context in which the claim is made and a purposive analysis to determine if the disadvantage results in discrimination in the substantive sense.

Thus *Nixon* appears to adopt the *Barrett* approach of holding that "discrimination under the *Code* requires a substantive analysis", as well as the rejection of the applicability of the *Law* analysis to the human rights field. Thus, the Tribunal did "not accept the ... argument ... that a violation of human dignity is an independent and necessary element of a *prima facie*

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[88] *Nixon, supra* note 3 at para. 95.

[89] *Ibid.* at para. 96.

[90] *Ibid.* at para. 110.

[91] [2001] B.C.H.R.T.D. No. 46 at para. 96, cited in *Nixon, supra* note 3 at para. 112. See also *Dame v. South Fraser Health Region (c.o.b. Langley Mental Health Clinic)*, [2002] B.C.H.R.D.T. No. 46.

case."[92] She based this on the fact that human rights decisions of the Supreme Court of Canada, such as *Meiorin* and *Grismer*, mentioned above, did not embark on a dignity analysis (although later it is pointed out that presumably in such cases discrimination in the substantive sense is evident),[93] the differences between human rights legislation and the *Charter* noted in *Andrews*,[94] that a human rights respondent is not entitled to deference,[95] that defences exist which form part of the ultimate decision on discrimination, that the nature of the interest affected (part of the contextual analysis) is taken into account in the listing of protected spheres of activity, e.g. housing and employment,[96] and that individual complainants were not singled out for invidious treatment in the recent s. 15(1) cases.[97] Once the onus shifts to a respondent to justify its conduct, then the impact on dignity "may" be considered.[98]

It is difficult to assess what view of discrimination is adopted in such cases as *Nixon* and *Barrett*. It is said that human rights and s. 15 should be consistent. The meaning of discrimination is established in the human rights field in cases where discrimination in the substantive sense is evident, and yet their approach would be changed by following *Law*. A distinction is not discrimination, and yet an impact on dignity is not part of a *prima facie* case (or indeed an essential part of the case overall). The approach is said to be purposive and contextual, but in practice either a facial or effects distinction will be enough for a *prima facie* case.

It seems that the constitutional approach, as reflected in current case law, has been largely rejected as part of the concept of a *prima facie* case by human rights adjudicators. While they may claim to take a contextual, purposive approach, the approach in practice is formal rather than contextual. Such a rejection of an actual contextual analysis presents a number of difficulties that go beyond the obscurities of several Tribunal decisions.

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[92] *Nixon*, *supra* note 3 at para. 114 (nevertheless, she went on to consider the issue and found, in *obiter*, that there was harm to the complainant's dignity).

[93] *Ibid.* at para. 123.

[94] *Ibid.* at para. 118 (These are that legislation applied to private activities, to a specific list of prohibited grounds, has exemptions/defences compared to s. 1 of the *Charter*. However, there is no analysis of why any of these points would explain why non-discriminatory government action is legitimately labeled discriminatory when private).

[95] *Ibid.* at para. 120.

[96] *Ibid.* at para. 122.

[97] *Ibid.* at para. 123.

[98] *Ibid.* at para. 124.

A. DOES INCONSISTENCY HAVE A DISPARATE IMPACT?

The tension in a case such as *Nixon*, where a member of a disadvantaged group challenges a disadvantaged group is obvious. On the one hand, the disadvantage of a complainant (the pre-existing disadvantage factor), which has both an individual and group dimension,[99] points in the direction of a finding of discrimination; on the other, the disadvantage of the group women with the life experience of being treated as women (the ameliorative purpose factor), points in the opposite direction. Refusal to use a contextual analysis, which takes such factors into account, makes a discrimination complaint easier for all complainants (including men laying complaints against women's groups), but has a negative impact on disadvantaged groups who seek to form groups reflecting their understanding of their own oppression.

A true contextual approach to discrimination in human rights case would permit analysis of the special and unusual aspect of group cases, since groupness by definition requires insiders and outsiders. A more formal approach treats groupness as *per se* discriminatory, with respondent groups left to prove that they fit within some group exemption. This pits associational rights against the non-discrimination norm, and tends to neglect the equality-promoting role of some groups. A contextual approach is at least capable of recognizing that groupness has inequality-reflecting and equality-promoting aspects.

Attention to the group factor makes space for an argument that the childhood socialization of women, and their experience of developing the social status associated with womanhood, is relevant to the work of rape crises centres and women's shelters. That work can be both therapeutic and political. It can be argued that the anti-discrimination norm does not require people to be treated as interchangeable individuals rather than as members of groups with distinctive and meaningful life experiences and with political perspectives on those life experiences.

The distinctive nature of group cases can perhaps be best illustrated by turning to the first step of the discrimination analysis – that of whether a distinction has been made. With respect to a group, a complainant is both treated differently from people eligible to be members, and the same as those who are ineligible. Thus the question of the comparator group should be seen as not susceptible to an easy answer.[100] In *Nixon*, Rape Relief argued that,

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[99] The point that most human rights cases involve individuals while the recent s. 15 cases have not surely does not justify inconsistency. All cases have a group and individual element. In *Nixon* itself, the group, persons who have the life experience of being treated as male, was excluded, as was the individual, Kimberly Nixon. *Law* affected both the group, surviving spouses under 45, and the individual, Nancy Law.

[100] In *Nixon*, it at first appeared to be assumed that the comparator group was women with the life experience of being treated as women, or that there is no need for a comparator in

from a subjective/objective perspective, an appropriate comparator group is women who do not accept Rape Relief's political beliefs, which focus on oppression from birth, and includes women who identify themselves as pro-life, who are not prepared to work against racism and do not accept that women have the right to love whom they will. The complainant could thus be seen, in a dignified way, as part of a sub-category of women whose political beliefs were significantly different from those of Rape Relief.

A true contextual approach also leaves space for the recognition of the value of diversity. One way in which diversity can flourish is through respect for a variety of non-governmental groups. Healthy and active non-governmental groups are an important feature of Canadian life.

B. DO DEFENCES REFLECT THE SUBSTANTIVE APPROACH?

Nixon did not require attention to dignity at any stage in the analysis (although it "may" occur at the defences stage). This absence of a requirement of a human dignity analysis means that a respondent, including an equality-seeking group, can be found to have breached human rights legislation, and ordered to pay damages for injury to dignity, without any analysis of whether there was any actual injury to dignity (as understood in the constitutional jurisprudence). This raises the question of whether human rights defences incorporate the elements of the *Law* analysis so that it can be said that the bottom line determination of a breach of human rights legislation reflects overall consistency with the *Charter*. It might be argued that inconsistency is justified by the fact that it is the bottom line (after defences have been included in the analysis) that reflects substantive equality rather than the first-step discrimination question. If that were the case, then the only inconsistency that would remain would be the allocation of the burden of proof, discussed below.

So a significant doctrinal issue relates to the question of the role of at least some defences if discrimination were given a meaning consistent with the *Charter*. This concern is not exclusive to the human rights field, as the inter-relationship of s. 15, subsections (1) and (2), has been a matter of debate, as mentioned above and discussed in *Lovelace*. In that context the issue is at least currently resolved by approaching s. 15(2) as confirmatory of the substantive equality approach to s. 15(1), although leaving open the possibility that it might also have some independent role.

Using the *bona fide* occupational requirement (BFOR) and *bona fide* justification (BFJ) defences as examples, it can be seen that there is some, but not complete overlap between the *Law* analysis and these defences. There are three elements to such defences: rational connection, good faith, and

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human rights law. The arguments later developed, a comparison being drawn between male to female transsexuals and women capable of being mistaken for men.

reasonable necessity. The most striking difference is the requirement of good faith. The *Law* analysis of discrimination does not turn on good faith. A claimant, rightly, does not have to show bad faith. Requiring a respondent to prove good faith is a factor independent of the *Law* contextual analysis, which suggests that these are defences proper rather than elements of a discrimination analysis. The argument, roughly, is: "Well, what I did was discrimination, but I did it, in good faith, for a good reason." The "good reason" aspect is reflected in the requirements of rational connection and reasonable necessity. The rational connection could be seen as roughly equivalent to the correspondence factor in *Law*. Reasonable necessity requires that the respondent show that it cannot accommodate the complainant without undue hardship. There may be some overlap with the contextual approach here, since a reasonable complainant would take hardship into account. Undue hardship, however, bears more similarity to a s. 1 analysis under the *Charter* in which considerations other than those internal to the anti-discrimination norm may justify discrimination.

It is clear that these defences would not operate to protect respondents in all cases where a contextual analysis would protect them and would excuse respondents in some cases where a contextual analysis would not. Thus bad faith state action could be defended as not discrimination under the contextual approach, and a human rights respondent could argue that undue hardship justifies a distinction that would otherwise be discriminatory.

The same is true of group exemptions, which typically have quite narrow requirements, for instance, that the respondent be a non-profit organization, and of affirmative action defences. What role would these defences play were a substantive approach to be taken to discrimination? Affirmative action defences can be seen as playing a role similar to that of s. 15(2). With respect to group exemptions, it may be helpful to consider the underlying values at stake and the different types of groups that might claim exemption. For instance, the group exemption provision in British Columbia, s. 41, is drafted in terms that do not distinguish between equality-seeking and other groups. An alternative approach, where there is a clash of equality claims so to speak, would be to analyse equality-seeking groups under the concept of discrimination, leaving s. 41 for groups whose nature simply pits freedom of association against non-discrimination. In this latter situation, exclusion would be inconsistent with human dignity but justified (under narrow circumstances) by the right to associate. Narrow requirements for successful group exemption arguments and the placement of the burden of proof on respondents seem more appropriate for non equality-seeking groups than for equality-seeking groups. There seems no reason, for example, why a women's group should be not be able to make a profit. An approach sensitive to context, in the sense of the nature of the group at issue, would leave group exemptions with a role to

play, and avoid forcing human rights promoting groups through the same narrow hoop as other groups.

There may, however, be some appeal, in terms of the coherence of the legislation, to seeing substantive equality as reflected in the bottom line rather than the issue of whether there is a *prima facie* case of discrimination. Aside from concerns that the legislation does not provide sufficient doctrinal coverage to ensure a contextual analysis, there is a more significant objection to the bottom line approach, which has influenced the position taken by the Supreme Court of Canada.

C. REVERSE DISCRIMINATION BACKLASH?

The bottom line approach gives rise to a very significant objection on the level of our basic orientation to equality, as stated in *Lovelace*.

> Colleen Sheppard ... pointed out that interpreting s. 15(2) as an exemption or defence requires the courts to inappropriately frame equity programs as constituting *prima facie* violations of s. 15(1). *Such a view is inconsistent with the substantive equality analysis* and encourages a negative approach to ameliorative programs. In this regard, she stated, at p. 2:
>
> > ...equity programs should be understood as integral to, and consistent with, legal guarantees of equality for historically disadvantaged groups in society, thereby rejecting the view that affirmative action is a source of discrimination. Thus, affirmative action is presented as an expression of equality, rather than an exception to it.[101]

This possible effect is part of a more general legal, but more importantly political, effect of labelling affirmative action as discrimination, feeding into a mind-set favourable to reverse discrimination backlash. That is, a more formal equality approach stigmatizes affirmative action as discrimination. It silences the view that a contextual, respectful, recognition of difference can be basic to equality.

D. THE BURDEN OF PROOF?

The allocation of the burden of proof has both a doctrinal and a more political dimension. A formal, rather than a substantive, approach to discrimination, coupled with defences with the burden of proof placed on the respondent, means that doubt, with respect to the facts of a case having to do with the context of a distinction, is managed in favour of complainants. In the vast

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[101] *Lovelace*, *supra* note 27 at para. 101, citing Colleen Sheppard, *Litigating the Relationship Between Equity and Equality* (Toronto: Ontario Law Reform Commission, 1993) [emphasis added].

majority of cases, this may, and should, mean that doubt is resolved in favour of human rights. However, in cases where the respondent is an equality-seeking group, there is no public interest in favour of managing doubt in a way that disadvantages the respondent. Fact-finding may involve under-researched issues, such as whether and how women are a disadvantaged group, whether and how transgendered persons are a disadvantaged group, or whether raped women might be traumatized by encountering people they perceive as male in a women-only space. Placing a burden of proof on a women's group in a world without socially validated sources of information about women can be seen as an exercise in discrimination in itself. This may lead to labelling women's groups as discriminatory and force them to prove some defence, relying on knowledge that may not be recognized, such as respected feminist psychiatric knowledge, and research into the impact on traumatized women of unexpectedly encountering people without the life experience of women.[102]

E. THE ROLE OF THE STATE?

The result of the divergence between constitutional law and human rights law exposes respondents to the risk of being held liable for discrimination where governments would not have been found to have acted contrary to s. 15. This could be justified on two grounds. First, governments are entitled to deference and non-governmental associations are not. Second, since bills of rights set minimal standards, there is no reason why the state should not demand more of itself and/or private individuals or groups.

It is possible to think of strong reasons why state priorities and programs are entitled to deference. Sheer complexity is one. Governments have to take into account many complex, overlapping and competing interests, including financial factors, international obligations, constitutional division of powers and political concerns. Democracy is another, since the judiciary might well see it as proper to defer to some extent to the decisions of elected representatives, even while carrying out the judicial role of protecting fundamental rights and freedoms under the *Charter*.

However, one can leap too quickly to the conclusion that lack of a need for deference justifies a different approach to discrimination in the human rights field. There are several reasons for this:

- it is misleading to say governments are entitled to deference, since a broad range of government activity, such as employment, is subject to

[102] Of course, it is not a concern exclusive to women that the state may place the burden of proof on groups lacking the resources to meet it. See *e.g.* Christine Boyle & Marilyn MacCrimmon, "To Serve the Cause of Justice: Disciplining Fact Determination" (2001) 20 Windsor Y.B. Access Just. 55 at 66-69 (with respect to aboriginal claims).

the human rights complaint process and some human rights legislation, such as that of Alberta, renders inconsistent legislation inoperative;

- the very fact that the state enjoys deference while non-governmental programs or groups do not heightens the need for a more contextual analysis of discrimination rather than weakening it;
- the role of deference can be overstated if one neglects the critique of it as diminishing the judicial role in protecting human rights;
- references to deference without analysis of its justification risks diminishing the purposive approach to human rights interpretation. A superficial institutional point (i.e. this is a private not a public respondent) replaces attention to human rights values. Even assuming deference to governments, there may well be other reasons for deference, including the nature of a particular respondent as an equality-seeking group. If there is to be deference to an assessment about the needs and interests of a group, in this case women, there may well be more of a risk that the government will get this wrong than that a non-governmental women's group itself will;
- the complexity and democracy arguments are not completely irrelevant with respect to non-governmental groups. They too may have to make complex decisions with respect to the service they can offer and to whom. More significantly, groups whose interests may not be a priority in the mainstream political process should be seen as having a distinctive claim to having their self-definition respected;
- there is another form of deference which should be considered here. Basically human rights tribunals would be asserting that they have a better understanding of discrimination than do judges interpreting the constitution;
- state-sanctioned distinctions may have a greater negative effect on dignity than those drawn in the world of non-governmental groups, a world in which the state recognizes the human rights-enhancing role of groups;
- the bottom line is that the position that human rights decision-makers and judges should show deference to the state but not to independent women's groups is not obviously persuasive.

Similarly, we should not leap too quickly to the conclusion that a formal approach is more or better than the minimal *Charter* protection from discrimination. Since the focus of this paper is on equality claims in conflict, a formal approach could just as easily be seen as lowering, rather than increasing, protection from discrimination. Of course, the remedy for such a negative impact would be a claim that a formal approach discriminates against groups on the basis of whatever ground they are organizing around. The idea

of challenging formal equality as discriminatory with respect to groups who need substantive equality to improve their status is a complex one which may not translate easily to litigation, but in theory it challenges any assumption that the human rights approach is more than the constitutional minimum.

F. NEGLECT OF THE INTERESTS OF THIRD PARTIES?

It is now trite law in Canada that constitutional rights are to be construed as co-existing rather than in a hierarchical fashion.[103] An approach consistent with this in the human rights field would include an analysis of the co-existing rights of complainants, respondent equality-seeking groups and any third parties.

A substantive approach is flexible enough to permit attention to the interests of third parties, in contrast to the more rigid formal approach coupled with statutory defences. One way of stating the issue is how to be attentive to the human rights of both transgendered persons, raped and beaten women seeking help from a women-only space, and women with the life experience of being treated as women who want to combat male violence. This has not been decided, as far as I can tell, in any comparable jurisdiction. However, other jurisdictions are struggling with similar issues brought to the fore by increasing attention to the human rights of transgendered persons. Although the analysis rarely touches directly on discrimination, analogies suggesting attentiveness to the interests of raped and beaten women are apparent.

Even though it is now rare for a person's sexual classification to matter in law, the biological, psychological, sociological and political meanings of sex or gender are still the subject of debate and evolving understanding, both here and in other jurisdictions. Canadian law does not permit an individual to choose what sex will be designated in that individual's birth records, and it does not even accept completion of sexual reassignment surgery for changing such designation in all circumstances. Section 27 of the British Columbia *Vital Statistics Act*[104] permits a change of sex designation in birth registration, but only for those individuals who are unmarried at the time of the application

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[103] See *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12 (*per* Lamer C.J.C. for the majority: "A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights" at para. 75).

[104] R.S.B.C. 1996, c. 479. For other legislation allowing changes of designation in varying or unspecified circumstances, see S.A. 2000, c. 33, s. 22; C.C.S.M. c. V60, s. 25; N.B.C.S. 2000, c. V-3, s. 34; R.S.N.S. 1989, c. 494, s. 25; R.S.O. 1990, c. V.4, s. 36; R.S.P.E.I. 1993, c. V-4.1, s. 12; S.S. 1995, c. V-7.1, s. 29; R.S.Y. 2002, c. 225, s. 12; R.S.N.L., 1990, c. V-6, s. 19; S.Q. 1991, c. 64, ss. 71-73.

for a change in designation. Canadian federal law does not yet address the possibility of changing sex, nor explain the effects of sexual reassignment surgery, although changes to the law on capacity to marry will have an obvious impact on such effects.[105] It is not clear what effect the information on a birth certificate has on legal status.[106] Nor is there any law that has determined that these different pathways to sex designation, or different life experience, must be ignored for all purposes. There is some case law showing the beginnings of struggle with the legal issues relating to transgendered persons, which shows some attentiveness to the interests of others.

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[105] See *Halpern v. Canada* (2003), 225 D.L.R. (4th) 529, 172 O.A.C. 276 (C.A.); *EGALE Canada Inc. v. Canada (Attorney General)* (2003), 225 D.L.R. (4th) 472, 2003 BCCA 251, varied (2003), 228 D.L.R. (4th) 416, 2003 BCCA 406; *Hendricks c. Canada (Procteur général)* (2003), J.E. 2003-466, [2003] J.Q. No. 343 (QL) (C.A.). Obviously if sex is irrelevant to capacity to marry, marriage should also be irrelevant with respect to a change in birth registration. The House of Lords has recently addressed the issue of capacity to marry in *Bellinger v.Bellinger*, [2003] 2 All E.R. 593, [2003] 2 W.L.R. 1174, [2003] UKHL 21, which contains a useful discussion of case law in various jurisdictions. The Court held that a person classified as male at birth could not then become a woman in the context of marriage law, but that this was not compatible with the *European Convention for the Protection of Human Rights and Freedoms*. The complexity of the legal issues relating to changes of sex designation was recognized. For instance, Lord Nicholls of Birkenhead stated at para. 32:

> Thus the circumstances in which, and the purposes for which, gender reassignment is recognized are matters of much importance. These are not easy questions. The circumstances of transsexual people vary widely. The distinction between male and female is material in widely differing contexts. The criteria appropriate for recognizing self-perceived gender in one context, such as marriage, may not be appropriate in another, such as competitive sport.

Further, at para.45:

> the recognition of gender reassignment for the purposes of marriage is part of a wider problem which should be considered as a whole and not dealt with in a piecemeal fashion. There should be a clear, coherent policy. The decision regarding recognition of gender reassignment for the purpose of marriage cannot sensibly be made in isolation from a decision on the like problem in other areas where a distinction is drawn between people on the basis of gender. These areas include education, child care, occupational qualifications, criminal law (gender-specific offences), prison regulations, sport, the needs of decency, and birth certificates. Birth certificates, indeed, are one of the matters of most concern to transsexual people, because birth certificates are frequently required as proof of identity or age or place of birth. When, and in what circumstances, should these certificates be capable of being reissued in a revised form which does not disclose that the person has undergone gender reassignment?

[106] However, see *Gill v. Murray*, 2001 BCHRT 34, tribunal order varied, *British Columbia (Minister of Health Planning) v. British Columbia (Human Rights Tribunal)* (2003), 17 B.C.L.R. (4th) 193, 2003 BCSC 1112, a case relating to the registration of same sex partners as parents on birth certificates, where it was stated, at para. 76, with respect to the effect of a birth certificate: "While the birth certificate is not a declaration of legal parentage, the Act provides that registration is prima facie proof of the relationship (s. 41)."

Relevant case law can be found in the United Kingdom. In *X, Y, and Z v. United Kingdom*,[107] X was a female-to-male transsexual living with Y and a child, Z, born to Y as a result of artificial insemination. X was prohibited from being registered as the child's father even though the law of the United Kingdom allows the biological male partner of a woman who has given birth as a result of artificial insemination to be so registered.

X, Y and Z recognized that "transsexuality raises complex scientific, legal, moral and social issues".[108] The case involved a possible conflict of interests, between persons in the position of X and children, since "it is not clear that it [registration] would necessarily be to the advantage of such children" and "might have undesirable or unforeseen ramifications for children in Z's position".[109] There was therefore no obligation for the State to recognize as the father of a child a person who is not the biological father.[110] The case is distinct from *Nixon* in a number of significant ways. There is no equivalent to such provisions as the B.C. *Vital Statistics Act* in English law. The Commission analysed the issue in relation to respect for family life rather than discrimination, but it stated that a separate discrimination analysis would be duplicative. A discrimination analysis would thus duplicate attention to the interests of third parties such as children, illustrating an approach that does not assume that the interests of third parties are to be treated as irrelevant to the discrimination analysis.

On the other hand, *R. (on the application of E.) v. Ashworth Hospital Authority*[111] more closely resembles the dominant human rights approach in Canada. It also illustrated attention to the interests of third parties, but at the justification stage. The issue was whether it was lawful for Ashworth Hospital Authority (a special hospital where patients are detained, in men's and women's wards and in conditions of high security), to prevent the claimant, a 46 year-old man, from dressing as a woman outside his own room. The claimant was detained for reasons separate from the issue of cross-dressing. Medical experts disagreed about the medical diagnosis with respect to cross-dressing. For example, the medical officer responsible for the claimant was of the opinion that he was a fetishistic transvestite, who wished to wear women's clothes for sexual arousal, that dressing publicly as a woman would interfere with his treatment, and, based on his history, would lead to him to behave in an unwise manner and put others, such as female staff, at risk. The Head of a

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[107] [1997] 2 F.L.R. 892, 24 E.H.R.R.143 [*X, Y and Z*].

[108] *Ibid.* at para. 52.

[109] *Ibid.* at para. 47.

[110] *Ibid.* at para. 52.

[111] [2001] EWHC Admin 1089 (Q.B. Admin. Ct.).

Gender Identity Clinic took the view that the claimant was a transsexual, with a clinically recognized need to live as a woman. He was being denied an effective opportunity to express his gender dysphoria. Without attempting to resolve the medical issue, the court took the view that "the therapeutic and security concerns ... are rational and cannot be dismissed as insubstantial ... merely because they are of a generalized nature."[112] Further:

> I also consider that weight can properly be placed on the wider concerns expressed by the hospital as to the therapeutic and security risks in relation to other patients if the claimant were permitted the freedom that he seeks. What one patient is permitted to do in a high security hospital is plainly capable of affecting others within the hospital environment and there can be no rational basis for leaving the impact on others out of account. It is true that the wider concerns are of a generalized nature, but that does not destroy their force. They are based on a knowledge and understanding of the patient group and of the complex problems of managing such patients within the hospital environment.[113]

There is a danger in analysing security of the person concerns, as in *Ashworth*, as a justification for infringing the equality rights of others. As argued by Donna Greschner with respect to substantive equality at the constitutional level:

> labelling every distinction on enumerated or analogous grounds as a violation of equality...is inconsistent with substantive equality itself. Only violations of substantive equality should offend section 15; denying driver's licences to six-year-olds, for example, should not he held to violate equality rights. *Neither should affirmative action programs, or special educational programs for children with disabilities* ...
>
> The formalist approach ... also cheapens rights talk. It labels any deviation from identical treatment, even for the most meritorious reasons, as an infringement upon constitutional rights. Consequently, even if the impugned laws are easily justified under either section 1 or section 15(2), unsuccessful litigants will leave courtrooms armed with findings of constitutional violations, which gives these litigants more rhetorical ammunition in political debate.[114]

Lack of clear attention to the interests of vulnerable or equality-seeking third parties at the discrimination stage thus gives groups claiming rights against them power to claim the moral and political high ground. This danger is discussed below.

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[112] *Ibid.* at para. 27.

[113] *Ibid.* at para. 47.

[114] Greschner, *supra* note 8 at 309-10 [emphasis added].

G. SUPPORT FOR FORMAL EQUALITY?

Most importantly, the implications of having two parallel, but different, approaches to discrimination should be considered. Concern has been raised about the costs of a formal approach to discrimination, with more substantive arguments being left to be established as defences by human rights respondents. To the extent that the substantive, constitutional, approach is a good thing, it should influence both legislative developments and interpretations of discrimination at the human rights level. Of course, the process could work the other way, with human rights law influencing the constitutional meaning of discrimination.[115] It cannot be assumed that the commitment to substantive equality is so strong that it is not in danger of sliding into a more formal approach, influenced by human rights support for the latter. Indeed, some might take the view that the constitutional jurisprudence already reflects formal equality in practice.

The case of *Lavoie v. Canada*[116] could be seen as an illustration of the danger of undermining substantive equality, given the concerns of Arbour J. This case raised the issue of whether giving Canadian citizens preference in federal public service employment was a violation of the claimants' s. 15 equality rights. Four judges[117] of the Supreme Court held that this was contrary to s. 15 but saved by s. 1. Three judges[118] agreed that it was contrary to s. 15 but would not have found it saved by s. 1. Arbour and Le Bel JJ., in separate judgements, would not have found it contrary to s. 15. Here the Supreme Court appears to have returned to complex splits in their reasoning, suggesting that the *Law* synthesis masked on-going division. The difference within the majority turned on the third branch of the *Law* discrimination analysis, in particular how the reasonable non-citizen would view the preference. This is a challenging issue, since the very concept of citizen presupposes difference, a country being a "group" *par excellence*, providing a striking example of the creation of insiders and outsiders. A non-citizen living in any country might well be unsurprised to find that there are legal differences between her status and that of a citizen, and find that inoffensive in terms of human dignity. Indeed, it is pointed out that

> [it] may be ... that a law defining the core rights and privileges of citizens is incapable of perpetuating such a view [that non-citizens are less worthy of

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[115] This may be particularly dramatic in Alberta, where a constitutional government program could be found to infringe the human rights legislation, if inconsistent approaches are adopted.

[116] [2002] 1 S.C.R. 769, 2002 SCC 23 [*Lavoie*].

[117] Gonthier, Iacobucci, Major and Bastarache, JJ.

[118] McLachlin C.J.C., L'Heureux-Dubé and Binnie JJ., dissenting.

> recognition or value as human beings or as members of Canadian society]; indeed, such a law finds support in numerous international treaties and is accepted by almost every country in the world.[119]

There is not a striking difference between the subjective/objective test as expressed by Arbour J., and the more subjective test expressed in the plurality judgement of Bastarache J. The latter expressed the test as requiring a

> contextualized look at how a non-citizen legitimately feels ... Even if the non-citizen knows the preference has nothing to do with her capabilities – as most reasonable people would – she may still feel "less ... worthy of recognition ... as a member of Canadian society" ... This subjective view must be examined in context, that is, with a view to determining whether a rational foundation exists for the subjective belief.[120]

The former, Arbour J., placed more emphasis on the objective aspect of the test, quoting from *Law*, including that the "objective component means that it is not sufficient ... for a claimant simply to assert, without more, that his or her dignity has been adversely affected by a law" and that "the relevant point of view is that of the reasonable person, dispassionate and fully apprised of the circumstances".[121]

The application of the test, however, produced very different results, with Bastarache J. taking the view that given how vital employment is to livelihood and self-worth, and the lack of any apparent link between citizenship and ability to perform a particular job, the claimants felt legitimately burdened by the idea that their professional development was stifled. Further, discrimination in work and employment has the potential to marginalize immigrants, "*whether or not the discrimination operates on the basis of stereotyping; if it makes immigrants feel less deserving of concern, respect and consideration, it runs afoul of s. 15(1)*".[122] (Remember, however, that the discrimination was justified under s. 1.) Arbour J. took the view that "there is a valid state interest in tying the receipt of certain benefits to citizenship such that the withholding of those benefits from non-citizens cannot constitute an affront to human dignity."[123]

Of particular relevance to this paper are Arbour J.'s concerns about the implications of the plurality approach, which reveal a significant difference of

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[119] *Lavoie*, *supra* note 116 at para. 46, Bastarache J.

[120] *Ibid.*

[121] *Ibid.* at para. 79, quoting *Law*, *supra* note 2 at para. 59.

[122] *Lavoie*, *supra* note 116 at para. 52 [emphasis added]. This gives support to Greschner's criticism of the concept of dignity, *supra* note 8 at 312-13, that it "becomes an assertion, not an analysis".

[123] *Lavoie*, *supra* note 116, at para. 117.

opinion about the work to be done by s. 15 and s. 1 respectively. Her concern, in general terms, is that applying, in effect, a subjective test tends to make it too easy to show a breach of s. 15 and too easy to show a justification under s. 1. It echoes the Greschner image of equality rights becoming "like the Rio Grande river – a mile wide, but only an inch deep."[124] Being quick to find a breach means more pressure on s.1 to salvage a plethora of laws, in order to "avoid unravelling the legislative process", thus denuding equality rights of their meaning "while paying lip service to a broad and generous concept of equality."[125] She went on to say:

> Where conducting the discrimination analysis from the perspective of the claimant alone allows the fair terms of interaction by the individual and the state – the boundaries of individual rights - to be unilaterally determined by the claimant, attention to the objective component in the analysis recognizes the essentially bilateral character of rights. In the end a rights claim is nothing other than a legally binding demand for recognition of, and respect for, one's interests on the part of others. As a result it cannot avoid engaging the interests of those others. For if others are to be duty-bound to respect one's rights, fairness requires that they be given some say, that their own interests be taken account of, in determining those rights.[126]

The more subjective, and thus easier, the claim of violation of human dignity, the closer an avowedly substantive equality approach comes to formal equality.

While the more recent case of *Trociuk v. British Columbia (Attorney General)*[127] shows a unanimous application of the subjective/objective approach, in finding that ss. 3(1)(b) and 3(6)(b) of the *Vital Statistics Act*[128] violated s. 15(1) of the *Charter* on the basis of sex, it too might be seen as embodying formal equality. The Act allowed a mother to "unacknowledge" a father on a birth certificate thereby preventing the father from participating in the naming of the child. Further once the certificate was registered the father was left with no recourse to amend the document absent the mother's consent. The key to the ruling was the fact that a reasonable father would perceive his dignity as being infringed,[129] with little or no analysis of the broader social context including the interests of care-giving mothers in naming their children.

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[124] Greschner, *supra* note 8 at 306.

[125] *Lavoie*, *supra* note 116 at para. 86.

[126] *Ibid.* at para. 88.

[127] *Trociuk*, *supra* note 37.

[128] *Supra* note 11.

[129] *Trociuk*, *supra* note 37 at para. 25.

If *Lavoie*, and even *Trociuk*, is evidence that we are in danger of thus abandoning *Andrews*, concern about the influence of human rights law on this process is justified.

Not only may the human rights approach contribute to an atmosphere in which analysis tending toward formal equality is appealing as the easiest to apply and justify, Arbour J.'s critique highlights the implications of the contrast between human rights and the *Charter*. The dominant view of the human rights structure is that the interests of others are taken into account only at the defence stage, where human rights respondents enjoy no deference. Thus, in contrast to Arbour J.'s concern about the *Charter*, it may be both easy to make a *prima facie* case and hard to prove a defence, even in a case where there are strong human rights interests at stake on the side of the respondent.

VI. CONCLUSION

There are some reasons why human rights bodies tend to have adopted a more formal approach. Chiefly, human rights legislation covers a limited range of situations, such as services and employment, while the *Charter* applies to the whole potential range of legislation and government programs. As well, most complaints are quite straightforward. In most cases, taking into consideration any of the factors covered by the grounds of discrimination would be obviously improper, such as, usually, where the complainant shows race to have been a factor in denying employment. However, in more complex cases involving equality-seeking group respondents there are much stronger arguments for a substantive approach. Human rights tribunals and courts are now being asked to address the question of whether groups which are formed to address particular forms of oppression, and thus are not inclusive of all forms of oppression, are discriminating. An unreflective application of a formal approach designed for simpler issues, or mere lip-service to a contextual approach, is inadequate for the challenge posed by such issues.

On the other hand, the very critique of formal equality reminds one of the dangers of a one size fits all approach. A discrimination complaint brought by a transgendered person against an airline, which refused to employ her on that basis, is very different from a complaint brought by a man against a women-only shelter for raped and battered women. Analysis of the latter should not be forced into a mould suitable for the former. But conversely, recognition of this should not promote unnecessary complexity for the former. Mr. Justice Edwards in *Vancouver Rape Relief*, addressed this concern:

> The Court in *Law* recognized that while claimants bear the onus of establishing infringement of their s. 15(1) *Charter* equality rights, it is not necessarily the case that the claimant must adduce evidence to show a violation of human dignity or freedom, particularly where differential treatment is based on an enumerated

> ground and it will be evident on the basis of judicial notice and logical reasoning that the distinction is discriminatory.[130]

The thrust of this paper is that, whether through legislative reform or judicial interpretation, the concept of discrimination in human rights law should reflect a commitment to substantive equality. Equality-seeking group respondents can then make contextual and purposive arguments. However, is it possible to have the best of both worlds? The best situation would appear to be an easy case for most complainants to prove, with a more complex analysis reserved for cases with legitimate equality concerns on both sides. Such an ideal approach should not present a challenge. The cases so far where a more complex analysis has been required have been cases of programs and groups. In other words, they do not deal with goods, services or employment open to everyone. Thus, there are automatically insiders and outsiders and the question is not whether distinctions are permitted but rather which distinctions. Unusual cases such as *Nixon* and *Keyes* add another layer of complexity with the groups in question having human rights goals. Given the overall purposes of human rights law, the meaning of discrimination should be sophisticated enough to be attentive to such differences in claims and in particular to whether there are co-existing human rights at stake.

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[130] *Supra* note 5 at para. 130.