Under the Influence:

Discrimination under Human Rights Legislation and Section 15 of the *Charter*

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DISCRIMINATION UNDER HUMAN RIGHTS LEGISLATION
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INTRODUCTION

In the Supreme Court's most recent human rights judgment, *Moore v British Columbia (Education)*,[1] the Court declined to explicitly clarify the proper test for discrimination. This was a missed opportunity in light of the uncertainty over the appropriate test for the last several years. This uncertainty flows, at least in part, from debate about the extent to which the approach under section 15 of the *Canadian Charter of Rights and Freedoms*[2] should influence the test for discrimination under human rights legislation.

In this paper, I will review the approaches to discrimination under both human rights legislation and the *Charter*, considering the Supreme Court's historical approaches through to its most recent decisions in *Moore* and *Quebec v A*[3]. I will then present a case study from the Alberta Court of Appeal – *Wright v College and Association of Registered Nurses of Alberta (Appeals Committee)*[4] – to illustrate the impact that the different approaches to discrimination may have on case outcomes. Next, I will consider the arguments for and against keeping the approaches under human rights legislation and the *Charter* distinct, or perhaps more appropriately, for shielding human rights analysis from some of the stricter requirements under section 15 of the *Charter*. I will argue that regardless of the prevailing approach under the *Charter*, the test for discrimination under human rights legislation should remain the traditional, *prima facie* approach, and that the Supreme Court of Canada should take the next available opportunity to make this clear.

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[1] *Moore v British Columbia (Education),* 2012 SCC 61 [*Moore*].

[2] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act, 1982* (U.K.) 1982, c. 11 [hereinafter *Charter*].

[3] *Quebec (Attorney General) v A*, 2013 SCC 5.

[4] *Wright v College and Association of Registered Nurses of Alberta (Appeals Committee),* 2012 ABCA 267, leave to appeal denied, 2013 CanLII 15573 (SCC) [*Wright*].

THE TEST(S) FOR DISCRIMINATION: A BRIEF HISTORY

From *O'Malley* to *Andrews* to *Law*

The *prima facie* approach to discrimination was explained by Justice McIntyre in *Ontario Human Rights Commission and O'Malley v Simpsons-Sears* as follows: "A *prima facie* case … is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent…".[5] What the complainant must prove is that the conduct of the respondent has the effect of imposing "obligations, penalties or restrictive conditions not imposed on other members of the community."[6] In *Moore*, this approach was described by Justice Abella as a three step test: "complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact."[7]

O'Malley was cited in *Andrews v Law Society of British Columbia*, where the Supreme Court first developed the test for discrimination under section 15 of the *Charter*.[8] Writing for the Court once again, Justice McIntyre noted In *Andrews* that while there are important differences between human rights legislation and the *Charter*, "In general, it may be said that the principles which have been applied under the Human Rights Acts are equally applicable in considering questions of discrimination under s. 15(1)."[9] Those principles included the points that discrimination need not be intentional and could be based on the adverse impact or effects of a law or policy, and that justifications of discriminatory actions were to be kept separate from the discrimination analysis.[10] Human rights legislation can be seen to have had a positive influence on *Charter* equality rights in this regard. In *Andrews*, the Court rejected an approach that that would have protected against only unreasonable discrimination, and instead defined discrimination in terms of disadvantage related to enumerated and analogous grounds,[11] which was not much of a departure from the traditional approach under human rights legislation.

Andrews provided the governing approach to equality rights for some years, but differences began to develop within the Supreme Court on the proper test for discrimination under the *Charter*. Those differences were seemingly resolved in *Law v Canada (Minister of Employment and Immigration)*,

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[5] *Ontario Human Rights Commission and O'Malley v Simpsons-Sears,* [1985] 2 SCR 536 at para 28 [*O'Malley*].
[6] *Ibid* at para 12.
[7] *Moore, supra* note 1 at para 33. See also *Health Employers Assn. of British Columbia v. British Columbia Nurses' Union*, 2006 BCCA 57; *Armstrong v. British Columbia (Ministry of Health)*, 2010 BCCA 56; leave to appeal refused [2010] SCCA No 128) [*Armstrong*]. Whether this test was actually applied in *Moore* will be discussed below.
[8] *Andrews v Law Society of British Columbia,* [1989] 1 SCR 143 [*Andrews*].
[9] *Ibid* at para 38.
[10] *Ibid* at paras 26, 37, 40.
[11] *Ibid* at paras 42-47.