GROUNDS OF DISCRIMINATION: TOWARDS AN INCLUSIVE AND CONTEXTUAL APPROACH

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This article explores recent developments in the judicial interpretation of the grounds of discrimination in human rights law. The author maintains that courts have demonstrated a willingness to accord a large and liberal interpretation to the enumerated grounds of discrimination, drawing on examples involving discrimination on the basis of sex and disability. Nevertheless, courts have not always been willing to interpret the categories of human rights law expansively. Recently, it has been necessary to turn to the Canadian Charter of Rights and Freedoms, with its analogous grounds protection, to extend the scope of prohibited grounds in human rights legislation. A further dimension of the legal interpretation of the grounds of discrimination concerns the tension between the symmetrical and neutral language of the grounds of discrimination and the asymmetrical and unequal experience of the realities of discrimination between the groups targeted by the specific grounds. Legal protections against discrimination on the basis of sex or race, for example, do not convey the historical reality of inequality faced by women and people of colour. One response to this tension can be found in recent judicial efforts to contextualize antidiscrimination law as an integral part of our evolving understanding of substantive equality. Finally, the article explores the complexities of inequality experienced by individuals who are members of more than one group that has been historically disadvantaged and considers the extent to which a grounds-based categorical approach is attentive to the realities of multiple discrimination.

Cet article dresse un tableau des développements récents survenus dans l'interprétation judiciaire des motifs de discrimination en droits de la personne. À l'aide d'exemples de discrimination sur la base du sexe et du handicap, l'auteure soutient que les tribunaux ont fait preuve de leur volonté d'accorder une interprétation large et libérale aux motifs énumérés de discrimination. Cependant, les tribunaux n'ont pas toujours été d'accord pour interpréter de façon extensive les catégories de droits de la personne. Récemment, il a fallu se tourner vers la Charte canadienne des droits et libertés, avec sa protection par voie de motifs analogues, pour étendre le domaine d'application de motifs prohibés dans de la législation sur les droits de la personne. Une autre dimension de l'interprétation des motifs de discrimination concerne la tension

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qui existe entre, d'une part, le langage symétrique et neutre des motifs légaux de discrimination et, d'autre part, l'expérience, asymétrique et inégale, de la réalité de la discrimination entre des groupes visés par des motifs spécifiques. Les protections légales contre la discrimination sur la base du sexe ou de la couleur, par exemple, ne reflètent pas la réalité historique de la discrimination à laquelle font face les femmes ou les gens de couleur. On peut trouver une réaction à cette tension dans les efforts récents de la jurisprudence pour contextualiser le droit contre la discrimination, comme faisant partie intégrante de notre compréhension progressive de l'égalité. Finalement cet article explore la complexité de l'inégalité vécue par les individus qui appartiennent à plus d'un groupe ayant été désavantagé historiquement, et il envisage dans quelle mesure une approche catégorique fondée sur des motifs de discrimination est attentive aux réalités de la discrimination multiple.

I. *Introduction*

Legal categories are rarely adequate to address the myriad social problems to which they are applied. In the domain of human rights law, legislators began responding to the social problem of discrimination and the inadequacies of the common law and civil law responses through the introduction of legislation that enumerated a series of prohibited grounds of discrimination.[1] Some human rights statutes have long and inclusive lists of prohibited grounds; others are less comprehensive. The *Quebec Charter of Human Rights and Freedoms*,[2] for example, contains one of the most comprehensive lists of prohibited grounds, including: "race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap."[3]

[1] For a comprehensive overview of the historical development of human rights legislation, see Walter Tarnopolsky & William Pentney, *Discrimination and the Law in Canada* (Toronto: R. De Boo, 1985)

[2] R.S.Q. 1977, c. C-12, as amended [hereafter cited as *Quebec Charter*].

[3] *Ibid.* s. 10, as amended by S.Q. 1982, c. 61 and S.Q. 1989, c. 51.

Despite its fairly comprehensive coverage, questions of interpretation arise when new problems of discrimination are raised. The *Canadian Charter of Rights and Freedoms*[4] enumerates a certain number of prohibited grounds of discrimination while leaving open the possibility that other analogous grounds can be added through judicial interpretation and application.

This article explores the interpretive approaches courts have taken in applying the grounds of discrimination to various social problems, not all of which were even contemplated at the time of the specific enumeration of the prohibited grounds. It begins by exploring a growing willingness on the part of judges to accord a large and liberal interpretation to the specific grounds of discrimination, using the examples of sex and disability discrimination. Prior to amendments to human rights legislation providing explicit protection for sexual harassment, pregnancy-based discrimination, and sexual orientation, for example, some judges were prepared to interpret the grounds of sex, family or civil status broadly to ensure coverage for these types of discrimination. Recently, the Quebec Human Rights Tribunal has interpreted sex discrimination to provide protection for discrimination on the basis of transsexualism.[5] In the area of disability discrimination, this past year, the Supreme Court of Canada has interpreted the term "handicap" in the *Quebec Charter* to encompass a perceived disability.[6] The impact of the *Canadian Charter* and the recognized quasi-constitutional status of human rights law have reinforced the importance of according a broad and liberal interpretation to human rights legislation.

Courts do not always accord a large and liberal interpretation to ambiguous legal categories, however.[7] One potential obstacle to doing so is evidence of a legislative intent to limit the meaning or scope for a particular enumerated ground of discrimination. Thus, I examine the role of legislative intent in the interpretation of human rights statutes. Ironically, the possibility of relying on the more open-ended scope of protection in the

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[4] Part I of the *Constitution Act, 1982*, which is Schedule B of the *Canada Act, 1982*, c. 11 (U.K.) [hereafter referred to as the *Charter*], s. 15(1).

[5] See *Commission des droits de la personne et des droits de la jeunesse* v. *Maison des jeunes and C.T. and A.T.*, [1998] R.J.Q. 2549 (Quebec Human Rights Tribunal).

[6] See *Quebec (Commission des droits de la personne et des droits de la jeunesse)* v. *Montreal (City); Quebec Commission des droits de law personne et des droits de la jeunesse)* v. *Boisbriand (City)*, [2000] I. S.C.R. 665.

[7] Social condition provides an interesting example where of judges have sought to limit the scope of a ground that could potentially cover a wide array of circumstances if given a literal interpretation. The example of social condition is not addressed in this paper. For a useful review of its interpretation in the Quebec jurisprudence, see H. Berry & M. M. Lepage, "Social Condition - Literature Search", Canadian Human Rights Act Review, Research Paper. See also, *Quebec Human Rights Commission Guidelines, 1994*; commissioned L. Lamarche, "Social Condition as a Prohibited Ground of Discrimination in Human Rights Legislation: Review of the Quebec Charter of Human Rights and Freedoms", Canadian Human Rights Act Review, Commissioned Research Paper, November 1999.

Canadian Charter as a check on human rights statutes appears to have reduced the need for an expansive interpretation of certain grounds of discrimination. In the face of a gap in the scope of human rights protection, the Supreme Court of Canada has relied on the *Canadian Charter* to conclude that an omission or a failure to include a particular ground of discrimination in human rights legislation may violate the equality guarantees of the *Charter*.[8] Thus, for example, in *Vriend*, the Supreme Court was prepared to require a provincial legislature to add sexual orientation as a ground of discrimination rather than endeavouring to interpret sex-based discrimination to include discrimination on the basis of sexual orientation. These important constitutional developments are also explored below.

A further aspect of the law on the grounds of discrimination discussed in this article is the tension between the neutrality or symmetry of the stated grounds of discrimination and the asymmetries in the experience of discrimination. The language of human rights documents extends symmetrical protection to men and women, for example, pursuant to the prohibition on sex discrimination. Similarly, prohibitions on race-based discrimination protect individuals from minority as well as majority races. Yet, despite this formal protection, legal prohibitions against sex discrimination and race discrimination emerged to respond to a social problem of inequality against women and persons of colour. The historical patterns and continuing realities of group-based inequalities belie the symmetry of the legal categories of Canadian human rights documents.

Finally, I discuss the growing recognition of complexity of discrimination when it implicates more than one ground of discrimination. Often the realities of inequality affect individuals who are members of more than one socially disadvantaged group in society. For example, a single mother who is a member of racial minority and on social assistance may be discriminated against on the basis of race, sex, social condition, and family status.[9] Moreover the nature of discrimination experienced in such a case may be both quantitatively and qualitatively different. It may not be an amalgam of discrimination on the basis of sex, race, family status and social condition, but rather something uniquely different. It is important to recognize therefore the specificity of experiences of inequality which encompass more than one ground of discrimination. An analysis that

[8] *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493 [hereinafter referred to as *Vriend*].

[9] This example is derived from the facts in the case, *Sparks v. Halifax Housing Authority* (1992), 112 N.S.R. (2d) 389 (N.S.C.C.).

incorporates an appreciation of the complexities of the intersectionality of various inequalities is needed.[10]

Through an exploration of the interpretation and application of the grounds of discrimination in human rights laws, I hope to heighten awareness of the limits of legal language, the imperfectness of legal categories, the gap between articulated legal rights and obligations and the complex realities of systemic inequality. In the ambiguity of language, in its imprecisions, in its multiple meanings and diverse applications, however, there exists a space for inclusive, purposive and contextual advocacy and judicial interpretation.

II. *Expanding the Categories: Interpreting Sex Discrimination*

Prohibitions on sex discrimination were amongst the first to test the importance of an inclusive interpretation of the grounds of discrimination. Pregnancy discrimination provides a clear example. When Stella Bliss was denied human rights protection pursuant to the prohibitions on sex discrimination in the *Canadian Bill of Rights*[11], the impact was felt in the human rights statutory domain.[12] Interpreting sex discrimination narrowly, Justice Ritchie cited the following conclusions from the Federal Court of Appeal judgment:

> Assuming the respondent [Bliss] to have been 'discriminated against', it would not have been by reason of her sex.... If section 46 treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is, it seems to me, because they are pregnant and not because they are women.[13]

Some legislatures responded to the Supreme Court's limited reading of sex discrimination by amending human rights legislation to provide express protection against discrimination on the basis of pregnancy or to define sex discrimination as inclusive of pregnancy.[14] A decade later, the Supreme Court of Canada overruled the *Bliss* decision. Dickson C.J. commented:

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[10] See K. Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" [1989] U. of Chi. Leg. Forum 139. See also, Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Color" (1991) 43 Stanford L. Rev. 1241; Stan. N. Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) 6 C.J.W.L. 25; M. Eaton, "Patently Confused: Complex Inequality and *Canada v. Mossop*" (1994) 1 Rev. of Const. Studies 203.

[11] R.S.C. 1970, App. III [now R.S.C., 1985, App. III].

[12] See *Bliss* v. *A.G. Canada*, [1979] 1 S.C.R. 183.

[13] Per Pratte J., (Federal Court of Appeal) *ibid.* at 190-91.

[14] See, for example, *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 3(2); *Ontario Human Rights Code*, R.S.O. 1990, H-19, s. 10(2).

> Over ten years have elapsed since the decision in *Bliss*. During that time there have been profound changes in women's labour force participation. With the benefit of a decade of hindsight and ten years of experience with claims of human rights discrimination and jurisprudence arising therefrom, I am prepared to say that *Bliss* was wrongly decided or, in any event, that *Bliss* would not be decided now as it was decided then. Combining paid work with motherhood and accommodating the childbearing needs of working women are ever-increasing imperatives. That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious. It is only women who bear children; no man can become pregnant... It is difficult to conceive that distinctions or discriminations based upon pregnancy could ever be regarded as other than discrimination based upon sex...[15]

A similar pattern of legislative reform to secure expansive human rights protection occurred with respect to sexual harassment. Before widespread reform of human rights legislation to include express prohibitions of sexual harassment, arguments were advanced that sexual harassment constituted a form of sex discrimination.[16] The United States jurisprudential developments finding that sexual harassment constituted sex discrimination helped to inform the Canadian jurisprudence on this point.[17] Unlike many Canadian jurisdictions, however, legislative reform of the major statutory source of workplace discrimination, Title VII of the *Civil Rights Act of 1964*, to make its protections more explicit, did not occur.[18]

In Quebec, the prohibition on sex discrimination has been relied upon successfully by a transsexual confronted with employment discrimination. In the case of *Commission des droits de la personne et des droits de la jeunesse* v. *Maison des jeunes and C.T. and A.T.*,[19] M.L. alleged discrimination on the grounds of sex or civil status when she lost her job as a streetworker following a sex change operation. The case raised the novel question as to whether discrimination against a transsexual constituted a

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[15] *Brooks* v. *Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 at 1243-44.

[16] See *Janzen* v. *Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252.

[17] See *Meritor Savings Bank* v. *Vinson*, 106 S. Ct. 2399 (1986).

[18] Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-2(a)(1) prohibits workplace discrimination on the grounds race, national origin, religion and sex. In the United States, the absence of explicit prohibitions with respect to both harassment and discrimination on the basis of sexual orientation means that individuals faced with same-sex harassment are required to fit their claims into the category of sex discrimination The United States Supreme Court has affirmed that protection against same-sex harassment is available pursuant to Title VII: see *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998); see also *Doe* v. *City of Belleville*, 119 F.3d 563 (7th Cir. 07/17/1997) at para. 30. Despite a generous interpretation of Title VII *vis-à-vis* same-sex harassment, Courts have been careful to distinguish same-sex harassment from more general protection against discrimination on the basis of sexual orientation or transsexualism. courts have concluded that these types of discrimination are not protected under Title VII. See, for example, *Ulane* v. *Eastern Airlines*, 742 F.2d 1081 (1984) at 1085-86.

[19] *Supra* note 5.

form of sex discrimination.[20] In her judgment, Rivet J. began by reviewing the governing interpretive principles in the domain of human rights law. She highlighted the importance of a contextual and purposive approach noting that "[t]he *Quebec Charter of Human Rights and Freedoms*, a quasi-constitutional statute, should be interpreted broadly and liberally according to its purpose."[21]

Rivet J. also emphasized the influence of international human rights law on the *Quebec Charter* and the animating principle of human dignity at the core of equality protections. Following an extensive review of family law cases dealing with transsexualism, and an examination of American and European cases, Rivet J. turned to definitions of transsexualism in legal and social science literature.

In this regard, Rivet J. discussed the need to understand the psycho-social meaning of gender rather than looking simply at a dichotomized construction of men and women based on biological differences. She concluded:

> Thus, we cannot understand the condition of transsexuals unless we accept the relativity of concepts such as sex, gender, man and woman. Transsexuality is characterized by such a marked dissociation of sex and gender that the person turns to treatments and multiple surgeries to align sex with gender as closely as possible. Therefore, transsexualism results in the reunification of the disparate criteria that make up sex and are a great source of anguish for a person. [22]

> ...we believe that sex does not include just the state of a person but also the very process of the unification and transformation that make up transsexualism.[23]

Rivet J. then went on to conclude that discrimination against transsexuals is included under the rubric of discrimination on the basis of sex.

> Drawing upon the aforementioned principles of interpretation of human rights, especially the inherent dignity of the human being, we can say that a transsexual person who is a victim of discrimination based on his being a transsexual may benefit from provisions against discrimination based on sex, once his transformations have been completed or, if you like, once his identification is perfectly unified.[24]

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[20] The complainant also based her case on civil status; however, the Tribunal focused on the ground of "sex". Social condition as a prohibited ground of discrimination was not raised.

[21] Rivet J. quotes the following from the Tribunal decision, *Commission des droits de la personne et des droits de la jeunesse c. Ville de Lachine*, [1998] R.J.Q. 658 at para. 37: "The limitative nature of the illicit criteria of discrimination in section 10 of the Charter means that these criteria must be defined broadly to achieve their purpose, in accordance with the development of Quebec society" (citing *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038).

[22] *Ibid.* at para. 99.

[23] *Ibid.* at para. 111.

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

> What is more, discrimination, even based on the process of the unification of disparate and contradictory sexual criteria, may also constitute sex-based discrimination while sex is at its most vaguely defined.[25]

Thus, the Quebec Human Rights Tribunal was willing to accord an expansive interpretation to sex discrimination to cover discrimination confronted by a transsexual in the workplace.[26]

III. *The Social Construction of Difference: Disability and Perceived Disability*

> More often than not, disadvantage arises from the way in which society treats particular individuals, rather than from any characteristic inherent in those individuals.[27]

A recent decision of the Supreme Court of Canada, interpreting the meaning of "handicap" in the Quebec *Charter of Human Rights and Freedoms*, provides another illustration of judicial willingness to accord a large and liberal interpretation to the categories of human rights law.[28] Affirming a decision of the Quebec Court of Appeal, the Supreme Court concluded that the protection against discrimination on the basis of "handicap" included protection against those perceived to be disabled even if they do not have any actual disabilities. The cases involved three employment discrimination complaints brought by individuals with medical conditions that did not cause any functional limitations in their ability to perform their work. In all three cases, however, the individuals had been denied employment opportunities because of their medical conditions.

In the first case, the City of Montreal refused to employ the complainant, Réjeanne Mercier, as a gardener-horticulturalist following a pre-employment medical examination that revealed a minor anomaly in her spinal column. The City was of the view that the anomaly increased the risk that the complainant would develop lower back pain. Two subsequent medical assessments indicated that the complainant was "perfectly able to perform the duties related to the position she was seeking".[29] The second

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[25] *Ibid.* at para. 114.

[26] See also, the recent decision, *Vancouver Rape Relief Society* v. *British Columbia (Human Rights Commission)*, [2000] B.C.J. No. 1143 (QL), 7 June 2000, finding protection for discrimination against transsexuals under the rubric of sex discrimination. It is regrettable that no reference to, nor discussion of, the Quebec Human Rights Tribunal's decision appeared in the decision.

[27] *Egan* v. *Canada*, [1995] 2 S.C.R. 513, at para. 53 per L'Heureux-Dube J [hereinafter *Egan*].

[28] *Quebec (Commission des droits de la personne et des droits de la jeunesse)* v. *Montreal (City); Quebec Commission des droits de law personne et des droits de la jeunesse)* v. *Boisbriand (City), supra* note 6.

[29] *Ibid.* at para 3.

case involved an individual, Palmerino Troilo, who was hired on probation as a police officer for the City of Boisbriand. He had successfully completed pre-employment medical examinations. During his probationary period, the complainant was treated surgically for "Crohn's disease", a condition that causes chronic inflammation of the intestine. Medical reports following the surgery indicated that the complainant was "in good health and that, as he is asymptomatic, the complainant is able to perform the short and medium term duties of a police officer".[30] Despite these reports, Boisbriand terminated his employment maintaining that it was concerned about his potential risk of higher absenteeism. In the third case, Jean-Marc Hamon was not hired as a police officer by the City of Montreal because of anomalies to his spinal column. The Court noted that "Hamon's condition is asymptomatic and the employer admits that the complainant does not have any resulting discomfort, disability or limitation."[31] Thus, all three cases raised the question of whether the prohibition on discrimination on the basis of "handicap" in s. 10 of the *Quebec Charter of Human Rights and Freedoms* protects individuals with physical anomalies that do not result in any functional limitations.

In commencing its analysis, the Court emphasized the importance of a large and liberal approach to the interpretation of human rights statutes given their quasi-constitutional status. The Court also noted at the outset that interpretation is a contextual exercise. The meaning of the words of the statute cannot be discerned from dictionary definitions; nor can a strictly grammatical approach provide the answers to the interpretive puzzles of human rights litigation. Rather the meaning of human rights laws is to be gleaned in light of the underlying purposes of human rights provisions and the particular context in which the allegations of discrimination arise. L'Heureux-Dubé J. endorsed what has been called an "organic and flexible" approach.[32] As Ruth Sullivan writes "[t]he key provisions of the legislation are adapted not only to changing social conditions but also to evolving conceptions of human rights."[33]

To identify the central purposes of the *Quebec Charter,* the Court turned to its preamble which highlights the importance of human dignity and equality. The Court then reasoned that protecting individuals against discrimination based on the subjective perception that they were "handicapped", regardless of whether or not they actually were "handicapped" was necessary to achieve the underlying purposes of the *Quebec Charter.*

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[30] *Ibid.*

[31] *Ibid.*

[32] *Ibid.* at para. 29, citing R. Sullivan, *Dreidger on the Construction of Statutes*, 3rd ed., (Toronto: Butterworths, 1994) at 383-84.

[33] Sullivan, *ibid.*

> The objectives of the *Charter*, namely the right to equality and protection against discrimination, cannot be achieved unless we recognize that discriminatory acts may be based as much on perception and myths and stereotypes as on the existence of actual functional limitations. ... Functional limitations often exist only in the mind of other people, in this case that of the employer.[34]

> Thus, a "handicap" may be the result of a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all of these factors. Indeed, it is the combined effect of all these circumstances that determines whether the individual has a "handicap" for the purposes of the *Charter*.[35]

> ... The fact remains that a "handicap" also includes persons who have overcome all functional limitations and who are limited in their everyday activities only by the prejudice or stereotypes that are associated with this ground.[36]

Beyond reviewing legislative intent and according the terminology of the *Quebec Charter* a large and liberal interpretation, the Court reinforced its conclusion by distinguishing the more open-ended legislative language of the *Quebec Charter* from the explicit and more limited definition of handicap set out in the *Act to Secure the handicapped in the exercise of their rights*.[37] permanently, from a physical or mental deficiency, or who regularly uses a prosthesis or an orthopedic device or any other means of palliating his handicap. Moreover, the Court reviewed the legislative history of amendments to the *Quebec Charter*, which revealed an intent to expand protection on the grounds of disability.[38] Finally, the Court examined the meaning of section 10 in light of other sections of the Québec *Charter* and concluded that an expansive interpretation was warranted.[39] Justice L'Heureux-Dubé concluded by noting that the purpose of human rights protection is to "put an end to the 'social phenomenon of handicapping'".[40]

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[34] *Supra* note 6 at para. 39.

[35] *Ibid.* at para. 79.

[36] *Ibid.* at para. 80, citing *British Columbia (Superintendent of Motor Vehicles)* v. *British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868, at para. 2.

[37] S.Q. 1978, c. 7 (now R.S.Q., c. E-20.1), s. 1 (g). Section 1(g) states: In this act, unless otherwise indicated by the context..."handicapped person", or "the handicapped" in the plural, means a person limited in the performance of normal activities who is suffering, significantly and

[38] Arguably the legislative intent is somewhat ambiguous. Brossard J. interpreted it differently in his judgment arguing: "Le législateur québécois n'a ni utilisé la notion d'invalidité, ni défini le handicap comme en étant un qu'il suffit de percevoir comme tel en l'absence de toute limitation fonctionnelle de sorte qu'il faut accorder à ce terme le sens dans lequel il est utilisé habituellement, c'est-à-dire l'usage courant, tout en privilégiant une interprétation téléologique de la Charte dont un objectif est l'intégration des personnes handicapées dans la vie en société." Brossard J. concluded that Mercier did not have a handicap because her disorder did not limit her abilities. See, *Commission des droits de la personne* c. *Ville de Montreal (Mercier)*, [1995] JTDPQ No. 4 at para. 27.

[39] The Court examined s. 20 and s. 20.1 of the *Quebec Charter* in this regard.

[40] *Supra* note 6 at para. 83, citing J. E. Bickenbach, *Physical Disability and Social Policy* (Toronto: Univ. of Toronto Press, 1993) at 14. L'Heureux-Dubé J. did note that the definition had limits, writing, "As the emphasis is on obstacles to full participation in

The Court's analysis is particularly important because of its recognition of the fluidity of identity and its sensitivity to how meaning is constructed in context. The Court recognizes that the problem of discrimination is not located in the individual labelled different, but is embedded in a process of social construction.[41] Indeed, in these cases, the individuals labelled "handicapped" were excluded from the workplace on the basis of perceived disabilities, despite evidence of their functional ability to perform their employment.

IV. *Legislative Intent and Human Rights Values: Intentionalism or Pragmatism*

> The judiciary always has a mediating role in the actualization of law...[42]

> The pragmatic account of statutory interpretation is often resisted because it is thought to give too much discretion to unelected judges, contrary to both democratic principle and the rule of law. But in truth, pragmatism does not "give" judges additional discretion; it merely acknowledges the discretion they have, and must have, to resolve interpretation disputes. [43]

The above examples illustrate a willingness on the part of the judiciary to interpret the grounds of discrimination generously. Where legislative intent is unknown or consistent with a broad and liberal interpretation, it can be relied upon by those seeking an inclusive interpretation of human rights laws. The interpretive exercise is more complex, however, if the legislative record indicates very clearly that the legislators did not intend to provide human rights protection to particular groups while the language of the grounds of discrimination is malleable enough to allow for an expansive interpretation. Should tribunals limit the language of human

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society rather than on the condition or state of the individual, ailments (a cold, for example) or personal characteristics (such as eye colour) will necessarily be excluded from the scope of "handicap", although they may be discriminatory for other reasons". *Ibid.* at para. 82.

[41] M. Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (Ithica: Cornell U. Press, 1990); C. Sheppard, "Recognition of the Disadvantaging of Women: *Andrews* v. *Law Society of British Columbia*" (1989) 35 McGill L.J. 206 .

[42] *Per* Gonthier J., in *R.* v. *Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 641, cited in Ruth Sullivan, "Statutory Interpretation in the Supreme Court of Canada" (1998) 30 Ottawa L.Rev. 175 at 187.

[43] Sullivan, *ibid* at 227. Sullivan develops her conclusion in reliance on *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 at 247 & 256. Her article provides an excellent discussion of statutory interpretation, including a review of three key approaches: textualism, intentionalism and pragmatism. See also, W. N. Eskridge, Jr. *Dynamic Statutory Interpretation* (Cambridge, Mass: Harvard Univ. Press, 1994); P. Mitchell, "Just Do It! Eskridges's Critical Pragmatic Theory of Statutory Interpretation" (1996) 41 McGill L.J. 713; B. Langille, "Judicial Review, Judicial Revisionism and Judicial Responsibility" (1986) 17 R.G.D. 169.

rights statutes to conform to legislative intent, where such intent can be discerned? Or should adjudicators defy legislative intent where they believe human rights values require them to do so? It is to this inquiry that we now turn.

To explore this question, it is helpful to review the case of *Canada (Attorney-General)* v. *Mossop.*[44] The complainant, a translator with the federal government, alleged discrimination on the basis of family status when he was denied bereavement leave pay for the time he took off work to attend the funeral of the father of his same-sex spouse. At the time, the *Canadian Human Rights Act* (*CHRA*)[45] did not include sexual orientation in its list of prohibited grounds of discrimination. A majority of the Supreme Court of Canada denied Mossop's claim for redress. Lamer J. concluded that the legislative amendment process indicated that Parliament did not intend to provide protection against discrimination on the basis of sexual orientation when it added "family status" to the list of prohibited grounds. It had in fact expressly rejected suggestions to add "sexual orientation" to the list of prohibited grounds.

> .... I find that Parliament's clear intent throughout the *CHRA*, before and at the time of the amendment of 1983, was to not extend to anyone protection from discrimination based on sexual orientation.
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> Absent a *Charter* challenge of its constitutionality, when Parliamentary intent is clear, courts and administrative tribunals are not empowered to do anything else but to apply the law. If there is some ambiguity as to its meaning or scope, then the courts should, using the usual rules of interpretation, seek out the purpose of the legislation and if more than one reasonable interpretation consistent with that purpose is available, that which is more in conformity with the *Charter* should prevail.[46]

Justice La Forest, in a concurring judgment, went further explaining that the words used in legislation should be accorded their "usual and ordinary sense having regard to their context and to the purpose of the statute."[47] In this case, La Forest concluded that the term "family" meant the "traditional family":

> The appellant here argues that "family status" should cover a relationship dependent on a same-sex living arrangement. While some may refer to such a relationship as a "family", I do not think it has yet reached that status in the ordinary use of language. Still less was it the case when the statute was enacted.[48]

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[44] [1993] 1 S.C.R. 554. For a detailed review of the case, see Eaton, *supra* note 10.

[45] R.S.C. 1985, c. H-6, s. 3(1) [repl. 1996, c. 14, s.2].

[46] *Supra* note 44 at 581-582.

[47] *Ibid.* at 585.

[48] *Ibid.* at 586.

It was only in the dissenting reasons of L'Heureux-Dubé J.[49] that one finds a willingness to provide protection to Mossop under the rubric of the family status ground of discrimination. Of particular note is the different approach taken to the interpretation of legislative intent. While Justice Lamer concluded that Parliament's intent was unambiguous and clear, Justice L'Heureux-Dubé took the view that the specific choice made by Parliament not to define the term "family status" revealed a legislative intent to leave open the possibility of its meaning changing over time.

> Though the members of Parliament may perhaps not at that precise moment have envisaged that "family status" would be interpreted by the Tribunal so as to extend to same-sex couples, the decision to leave the term undefined is evidence of clear legislative intent that the meaning of "family status", like the meaning of other undefined concepts in the Act, be left for the Commission and its tribunals to define. In my view, if the legislative record helps here in the search for legislative intent, it rather supports the Tribunal's wide and broad discretion in the interpretation of the provisions of its own Act.[50]

L'Heureux-Dubé J. went further and emphasized that unless constrained by the clear words of the statute, adjudicators should adopt a "living tree" approach to the interpretation of human rights laws.

> Even if Parliament had in mind a specific idea of the scope of "family status", in the absence of a definition in the Act which embodies this scope, concepts of equality and liberty which appear in human rights documents are not bounded by the precise understanding of those who drafted them. Human rights codes are documents that embody fundamental principles, but which permit the understanding and application of these principles to change over time. These codes leave ample scope for interpretation by those charged with that task. The "living-tree" doctrine, well understood and accepted as a principle of constitutional interpretation, is particularly well suited to human rights legislation. The enumerated grounds of discrimination must be examined in the context of contemporary values, and not in a vacuum..... the meaning of the enumerated grounds ... is not "frozen in time" and the scope of each ground may evolve.[51]

Justice L'Heureux-Dubé's approach to statutory interpretation has been referred to as "pragmatic."[52] Professor Sullivan suggests that pragmatism constitutes a third approach to statutory interpretation that can be contrasted to the more traditional approaches of textualism and intentionalism. Whereas textualism focuses on the meaning of the words and phrases of the statute itself and intentionalism looks to legislative intent as the key source of interpretation, pragmatism emphasizes "solving the interpretive problem

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[49] Cory, McLachlin JJ. concurring.

[50] *Supra* note 44 at 620-21.

[51] *Ibid.* at 621-22.

[52] Sullivan, *supra* note 42.

facing the court in an appropriate and acceptable way."[53] A judicial interpretation is considered appropriate and acceptable provided it is in basic conformity with the legislative text, carries out the legislature's intent, and produces a result that is just, reasonable, and in tune with important public values.[54] Justice L'Heureux-Dubé's decision in the *Mossop* case illustrates a willingness to interpret the language of the statute broadly , a belief that the intent of the drafters is often ambiguous and should not be the only binding source of interpretation, and a significant concern for ensuring the emerging public values of fairness and justice to non-traditional families.

V. *Constitutional Checks on Inclusivity: Analogous Grounds*

Despite the potential for a broad and inclusive interpretation of human rights statutes, the passage of the *Canadian Charter* opened up new avenues for seeking expanded human rights protection. In the face of limited textual protection and/or clear evidence of legislative intent to exclude protection of certain groups in society from the scope of human rights legislation, human rights advocates turned to the *Canadian Charter*. Unlike human rights legislation, which enumerates a limited number of prohibited grounds, the *Charter* provides protection against discrimination on the basis of enumerated grounds and any additional analogous grounds.[55] The open-ended list of prohibited grounds of discrimination means that the interpretive and advocacy process need not focus exclusively on the creative interpretation of the existing enumerated grounds. The potential to provide protection against discrimination on the basis of analogous grounds provides a mechanism for inclusivity in the face of new problems of inequality. *Charter* jurisprudence reveals a willingness on the part of the judiciary to extend equality rights on the basis of the analogous grounds.[56]

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[53] *Ibid.* at 178. As Sullivan comments: "Pragmatism explains and justifies the current practice of Canadian courts without resort to linguistic or to legal fictions. Textualism works as a theory of interpretation only if one accepts the false metaphor of language as a conduit. Intentionalism works only if one accepts the doctrine of presumed intent under which judicial values and choices are deemed to have been intended by the legislature. The chief virtue of pragmatism is that it recognizes the limitations of text and intention as determinants of outcomes in statutory interpretation cases and it reconciles the resulting judicial activism with democracy and the rule of law." *Ibid.* at 220.

[54] *Ibid.* at 184.

[55] Section 15(1) provides:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[56] See, for example, *Corbiere* v. *Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, where "Aboriginality-residence" was found to be an analogous

The pathbreaking case of *Vriend* v. *Alberta*[57] revealed a willingness on the part of the Supreme Court of Canada to rely on the inclusive possibilities of the *Canadian Charter* to extend protection in human rights legislation, despite explicit legislative intent to deny protection. The appellant, Delwin Vriend, worked as a laboratory coordinator for a college in Alberta. Despite positive work evaluations, promotions and salary increases during his job tenure, he was dismissed after disclosing that he was a homosexual. When Vriend endeavoured to file a human rights complaint, the Commission told him that the human rights legislation provided no protection for discrimination on the basis of sexual orientation.[58] Vriend then challenged the constitutionality of the human rights legislation for its failure to protect individuals confronted with discrimination on the basis of sexual orientation. In his decision in favour of Vriend's claim, Cory J. wrote:

> The denial of access to remedial procedures for discrimination on the ground of sexual orientation must have dire and demeaning consequences for those affected. This result is exacerbated both because the option of a civil remedy for discrimination is precluded and by the lack of success that lesbian women and gay men have had in attempting to obtain a remedy for discrimination on the ground of sexual orientation by complaining on other grounds such as sex or marital status.[59]

The remedial implications of the Court's conclusions are potentially far-reaching. As Cory J. himself recognized, "...the omission of one of the enumerated or analogous grounds from key provisions in comprehensive human rights legislation would always be vulnerable to constitutional challenge".[60] In the *Vriend* case, the Supreme Court remedied the constitutional violation caused by the legislative omission by reading sexual orientation into the Alberta human rights legislation, effectively extending the list of prohibited grounds of discrimination.

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ground under s. 15(1). See also, *Miron* v. *Trudel*, [1995] 2 S.C.R. 418; *Egan*, *supra* note 27 where "marital status" and "sexual orientation", respectively, were held to be analogous grounds. In *Miron* v. *Trudel*, McLachlin J. explained how to identify an analogous ground at para. 147: "...in determining whether a particular group characteristic is an analogous ground, the fundamental consideration is whether the characteristic may serve as an irrelevant basis of exclusion and a denial of essential human dignity in the human rights tradition. In other words, may it serve as a basis for unequal treatment based on stereotypical attributes ascribed to the group, rather than on the true worth and ability or circumstances of the individual?"

[57] *Supra* note 8. See also, *Haig* v. *Canada* (1992), 94 D.L.R. (4th) 1 (Ont. C.A.)

[58] The Commission did not argue that sex discrimination should be interpreted broadly to include discrimination on the basis of sexual orientation.

[59] *Supra* note 8 at para. 97.

[60] *Ibid.* at para. 106.

VI. *Symmetry and Asymmetry in Legal Protection: Grounds versus Groups*

A further dimension of the law on the prohibited grounds of discrimination is the tension between grounds and groups. Anti-discrimination law relies on an analysis of grounds of discrimination enumerated for the most part in ways that obscure the historical and continuing realities of inequality facing the subordinated group or groups within each ground. Thus, in terms of the formal language of anti-discrimination law, discrimination on the basis of sex extends parallel, symmetrical protection to both men and women. Discrimination on the basis of race protects both minority and majority racial groups. It is only in the case of disability that one finds an assymmetrical, more contextual and historicized articulation of the protection.

Beginning with *Andrews* v. *Law Society of British Columbia*,[61] the Supreme Court of Canada began to acknowledge the idea that not all grounds-based distinctions constitute discrimination.[62] Discrimination, from a legal perspective, means more. It requires harm, subordination, prejudice, or disadvantage as a result of the distinction. Justice Wilson elaborated on this theme in her judgment in *McKinney* v. *University of Guelph*[63] inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage. A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.", which addressed the question of an age-based distinction.

> The grounds enumerated in s. 15 represent some blatant examples of discrimination which society has at last come to recognize as such... The listing of sex, age and race, for example, is not meant to suggest that any distinction drawn on these grounds is *per se* discriminatory. Their enumeration is intended rather to assist in the recognition of prejudice when it exists...
>
> It follows, in my opinion, that the mere fact that the distinction drawn in this case has been drawn on the basis of age does not automatically lead to some kind of irrebutable presumption of prejudice. Rather it compels one to ask the question: is there prejudice? Is the mandatory retirement policy a reflection of the stereotype of old age? Is there an element of human dignity at issue?[64]

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[61] [1989] 1 S.C.R. 143.

[62] The language of the *Quebec Charter* signals the importance of disadvantage as a component of discrimination. See, C. Sheppard, "Equality, Ideology and Oppression: Women and the *Canadian Charter of Rights and Freedoms*" (1986) 10:2 Dal. L.J. 195.

[63] [1990] 3 S.C.R. 229, cited with approval in *Egan*, *supra* note 27 at para. 51 . See also, *R.* v. *Turpin*, [1989] 1 S.C.R. 1296 at 1331-32, where Wilson J. held: "Accordingly, it is only by examining the larger context that a court can determine whether differential treatment results in

[64] *Ibid.* at 392-93.

In her judgment in *Egan*, L'Heureux-Dubé J. suggested that the Court should focus more on the effects of discrimination on particular groups rather than the more abstract analogous grounds approach:

> We will never address the problem of discrimination completely, or ferret it out in all its forms, if we continue to focus on abstract categories and generalizations rather than on specific effects. By looking at the grounds for the distinction instead of at the impact of the distinction on particular groups, we risk undertaking an analysis that is distanced and desensitized from real people's real experiences:[65]

According to L'Heureux-Dubé J., a group-based approach was more consistent with the legacy of the *Andrews* case, which emphasized a contextual appreciation of whether a distinction on the basis of a particular ground caused prejudice, harm or disadvantage.

> The shortcomings of relying upon "grounds of distinction" are becoming increasingly evident — we are coming to realize more and more that some "grounds" may give rise to discrimination in some contexts and not in others. In reality, it is no longer the "grounds" that are dispositive of the question of whether discrimination exists, but the *social context* of the distinction that matters.[66]

L'Heureux-Dubé J.'s rejection of the "analogous grounds" criterion was not accepted by a majority of the Court. From the splintered and multiple judgments in the *Egan, Miron* and *Thibaudeau*[67] trilogy, there emerged a consensus approach to s. 15(1) in the *Law*[68] decision. In its emphasis on the social context of group-based disadvantage, it resonates with many of L'Heureux-Dubé J.'s concerns.

Most notably, the *Law* decision set out a three part test for identifying s. 15(1) violations.

First, 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?" If so, there is differential treatment for the purpose of s. 15(1). Second, was the claimant subject to differential treatment based on one or more enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage? The second

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65 *Egan, supra* note 27 at para 53 [emphasis in original].

66 *Ibid.* at para. 82 [emphasis in original].

67 *Egan, ibid.*; *Miron* v. *Trudel*, supra note 56; *Thibaudeau* v. *Canada*, [1995] 2 S.C.R. 627.

68 *Law* v. *Canada (MEI)*, [1999] 1 S.C.R. 497.

and third inquiries are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1).[69]

The first and second component of this test require the identification of a distinction (either direct or indirect) on the basis of "personal characteristics" that correspond to enumerated or analogous grounds. While the identification of a distinction contemplates consideration of the disadvantaged position of individuals and groups in society, it is predominantly in assessing the third part of the test that the assymmetrical realities of inequality are acknowledged by the Court. In determining whether a grounds-based distinction discriminates in the substantive sense, Iacobucci J. outlines a number of "contextual factors" to assist adjudicators.

The first contextual factor identified by the Court is "pre-existing personal disadvantage". As Iacobucci J. explains it:

> As has been consistently recognized throughout this Court's jurisprudence, probably the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory will be, where it exists, pre-existing disadvantage, vulnerability, stereotyping, or prejudice experienced by the individual or group...[70]

This contextual factor counters the discourse of abstraction, neutrality and symmetry in anti-discrimination law and instead recognizes the underlying larger purpose of equality rights in terms of redressing the historical disadvantage and prejudices experienced by certain groups in society. Though not rejecting the pertinence of "grounds" *per se*, the Court goes some way toward historicizing its legal analysis. Nevertheless, Iacobucci J. is careful to clarify that mere membership in a disadvantaged group is not dispositive of the presence or absence of discrimination. Nor is membership in a socially advantaged group a bar to making a potentially successful equality claim.[71] Thus, although the human rights jurisprudence continues to extend protection to individuals from historically advantaged or privileged groups in conformity with the express language of human rights laws, there appears to be a growing recognition that the claims of historically disadvantaged groups are particularly deserving of protection in the domain of human rights.[72] In *Law,* the Court ultimately decided that despite the

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

[70] *Law, ibid.* at para 63. On this point, the Court cites *Andrews, supra,* note 61 at 151-53, *per* Wilson J., at 183, *per* McIntyre J., at 195-97, *per* La Forest J.; *Turpin, supra* note 63, at 1331-33; *R* v. *Swain,* [1991] 1 S.C.R. 933 at 992, *per* Lamer C.J.; *Miron, supra* note 56 at paras. 147-48, *per* McLachlin J.; *Eaton* v. *Brant County Board of Education,* [1997] 1 S.C.R. 241 at para. 66.

[71] *Ibid.* at paragraphs 65-68.

[72] See, for example, *Re Granovsky* v. *Canada (Minister of Employment and Immigration),* [2000] 1.S.C.R. 703. The *Granovsky* case, *Law, supra* note 68, and most recently *Lovelace v. Ontario* [2000] 1.S.C.R. 950 (20 July 2000), suggest that there is a risk that the Court is making the threshold for identifying prejudice, harm and the denial of human dignity unduly difficult to cross.

presence of an age-based distinction, there had been no affront to Nancy Law's human dignity. The distinction was not therefore considered to be discriminatory.[73]

VII. *Identities that Defy Legal Categories*

While the above discussion reveals the legal trend towards expanding the number of prohibited grounds, it is also important to assess human rights laws in terms of the extent to which it recognizes complex, multiple identities that do not correspond to the traditional categories of anti-discrimination law. The enumeration of prohibited grounds results in what some scholars have called a "categorical" approach to human rights protection that fails to capture the lived reality of membership in multiple groups or self-identification in terms not contemplated by the law.[74] For example, Patricia Monture writes, "I am a Mohawk woman.....It is out of my race that my identity as a woman develops. I cannot and will not separate the two. They are inseparable."[75] And yet, human rights law tends to require individuals to prove how the discrimination experienced corresponds to a particular ground or grounds of discrimination. It requires individuals to isolate and highlight one aspect of their identity as the explanation for the discriminatory treatment.

In her pathbreaking article, Kimberlé Crenshaw named the experience of membership in more than one group traditionally protected in human rights law as one of "intersectionality".[76] She clarified that intersectionality refers not simply to the quantitative addition of discrimination on the basis of more than one ground of discrimination (e.g. sex discrimination plus race discrimination). Rather, intersectionality captures the idea that the discrimination faced by women of colour, for example, is qualitatively rather than simply quantitatively different. Monture explains the same idea:

> This whole idea of double discrimination, that is race and gender, just does not work. I mean look at me. I do not separate that way. My race and my gender are all in one package. My race does not come apart from my woman... Once it is understood that I do not come apart, the entire discussion of "double"

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[73] *Law*, *supra*, note 68 at paragraphs 99-110.

[74] N. Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19 Queen's L.J. 179 at 184-5.

[75] P. Monture, "The Violence We Women Do: A First Nations View" in C. Backhouse and D. Flaherty, *Challenging Times - The Women's Movement in Canada and the United States* (Montreal: McGill & Queen's University Press, 1992) 193 at 194.

[76] Crenshaw, "Demarginalizing", *supra* note 10. For a discussion of intersectionality in the Quebec context, see Marie-Claire Belleau, "La dichotomie droit privé/droit public dans le contexte québécois et canadien et l'intersectionnalité identitaire" (1998) 39 C. de D. 177.

> discrimination must be understood to fail. I cannot trace the discrimination I live to one source — race or gender. It is better described as "discrimination within discrimination." It is complex and certainly not linear.[77]

Crenshaw's research on Black women in the United States revealed that the categories of discrimination law did not resonate with their lived experiences of inequality, resulting in the failure of the law to remedy or recognize the specificity of the discrimination they confronted. She emphasized the need to "demarginalize the intersection of race and sex" so that the focus of anti-discrimination law would not be limited to the most privileged group members (*i.e.* white women and black men).

> ... the paradigm of sex discrimination tends to be based on the experiences of white women; the model of race discrimination tends to be based on the experiences of the most privileged Blacks. Notions of what constitutes race and sex discrimination are, as a result, narrowly tailored to embrace only a small set of circumstances, none of which include discrimination against Black women.[78]

Nitya Duclos examined Crenshaw's thesis in the Canadian human rights context, and came to similar conclusions.[79] Duclos uses the example of *Alexander* v. *British Columbia*,[80] to illustrate the single category tendencies of anti-discrimination law.

> Isabel Alexander is a First Nations woman who is partially blind and has a motor impairment affecting her gait and speech. She was refused service in a liquor store because the male store manager thought she was drunk. He refused to believe Alexander's explanations of her condition and called the police. ... Alexander alleged discrimination on the basis of race, colour, ancestry, and/or physical disability. ...the tribunal ...asserted that the cause of the discrimination was her disability. The allegations of discrimination on the basis of her race, colour and ancestry were summarily rejected. [81]

While the above example did not result in no protection being afforded, the analysis did not capture the full complexity of the discrimination experienced. The tribunal focused on disability and did not address how being a First Nations woman affected her treatment. Other examples, however, illustrate how the failure to appreciate intersectionality results in an individual being denied protection pursuant to human rights law. For example, a landlord may discriminate against a Black man in rental accommodation, but not a white man nor a Black woman.[82] The

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[77] Monture, *supra* note 75 at 194-5, citing V. Kirkness, "Emerging Native Women", (1987) 2 C.J.W.L. 408.

[78] "Demarinalizing", *supra* note 10 at 151.

[79] See, N. Duclos, *supra* note 10.

[80] (1989), 10 C.H.R.R. D/5871.

[81] Duclos, *supra* note 10 at 44-45. In subsequent scholarship, Iyer analyzed the *Mossop* case from an intersectionality perspective: see Iyer, *supra* note 74.

[82] Duclos, *ibid* at 43.

discrimination would implicate both sex and race in a way that could not be reduced to the addition of two discrete types of discrimination. It is the combination that results in the discrimination.

Mary Eaton provides some further clarification on how we should name what she calls intersecting, compound and overlapping oppressions.[83] For Eaton, "[i]ntersectional oppression arises out of the combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination"[84] She describes "compound inequality" as resulting from the additive burdens of multiple discrimination (i.e. race plus sex discrimination).[85] "Overlapping" oppression arises when a situation could be "described or litigated under two or more prohibited grounds of discrimination."[86]

There have been some recent responses to the intersectionality critique in Canadian law. Amendments to the *Canadian Human Rights Act* in 1998 included a specific provision to recognize that a complaint could be based on multiple grounds of discrimination or the effects of a combination of grounds:

> 3.1 For greater certainty, as discriminatory practice includes a practice based on one or more prohibited grounds of discrimination, or on the effect of a combination of prohibited grounds.[87]

As reflected in the wording of the amendment, adjudicators had already begun to acknowledge problems of discrimination on the basis of multiple or intersecting grounds.[88]

The Supreme Court's jurisprudence also reflects an emerging appreciation of the intersectionality critique; however, its concrete application is rare. In Justice L'Heureux-Dubé's judgment in *Egan* v. *Canada*, for example, she explicitly recognizes the challenges of intersectionality, noting that "categories of discrimination cannot be reduced to watertight compartments, but rather will often overlap in significant measure."[89] She uses the example of discrimination against domestic

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[83] *Supra* note 10 at 226-37.

[84] *Ibid.* at 229. The landlord-tenant example, *supra* note 82 and accompanying text, would correspond to her conception of intersectionality.

[85] *Ibid.* at 231.

[86] *Ibid.* See, for example, *Alexander* v. *British Columbia*, *supra* note 80.

[87] S. C. 1998 c.9, s.11.

[88] See, for example, *Naqvi* v. *Canada (Employment and Immigration Commission)*, [1994]19 C.H.R.R. D/139.

[89] See *Egan*, *supra* note 27 at para. 80. Cites N. Iyer, "Categorical Denials Equality Rights and the Shaping of Social Identity" *supra*, note 74, and A. Bayefsky, "A Case Comment on the First Three Equality Rights Cases Under the *Canadian Charter of Rights and Freedoms*: *Andrews*, *Workers' Compensation Reference*, *Turpin*" (1990) 1 Supreme Court. L.R. (2d) 503 at para 78.

workers to illustrate the point. Rather than trying to fit the inequality they confront into enumerated or analogous categories, L'Heureux-Dubé J. emphasizes simply that "a significant majority of domestic workers are immigrant women, a subgroup that has historically been both exploited and marginalized in our society."[90]

In the *Law* case, the Supreme Court affirms briefly that an individual could base a claim of discrimination on a "confluence of grounds" or an "intersection of grounds".[91] Of most significance, however, is the Court's explicit discussion of the need to determine "the appropriate comparator" when assessing whether discrimination exists in a purposive sense.[92]

> Ultimately, a court must identify differential treatment as compared to one or more other persons or groups. Locating the appropriate comparator is necessary in identifying differential treatment and the grounds of the distinction. ...
>
> When identifying the relevant comparator, the natural starting point is to consider the claimant's view. It is the claimant who generally chooses the person, group, or groups with whom he or she wishes to be compared for the purpose of the discrimination inquiry, thus setting the parameters of the alleged differential treatment that he or she wishes to challenge. However, the claimant's characterization of the comparison may not always be sufficient. ... I would not close the door on the power of a court to refine the comparison presented by the claimant where warranted.[93]

As Crenshaw's research revealed, how a Court frames its understanding of the discrimination issues is critical to the outcome of a case, including the extent to which the intersectional experience of inequality is recognized.[94] The comparator group analysis tends to undermine the possibility of an appreciation of complex identities and the intersectionality of the experiences of inequality.

One of the implications of the intersectionality critique which emerges in L'Heureux-Dubé J.'s judgments is a move away from the rigidity of the traditional categories to recognize new analogous groups that involve a combination or confluence of categories. The "group-based" approach that L'Heureux-Dubé J. endorsed in *Egan* would make it unnecessary, for example, to fit the problems of discrimination faced by domestic workers into the categories of either sex or race discrimination or both. The existence of analogous grounds in the *Charter*, unlike the limited enumerated

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[90] *Ibid.* at para 80.

[91] *Law*, *supra* note 68 at paras. 93 & 94.

[92] *Ibid.* at paras. 56, 58 [Emphasis in original].

[93] *Ibid.*

[94] In the majority judgments in both *Thibaudeau*, *supra* note 67 and *Symes* v. *Canada*, [1993] 4 S.C.R. 695, the Court characterized the comparator group in such a way as to define away the problem of discrimination.

grounds in human rights statutes, seems to open up the possibility of fluid, specific and ever-changing categories that resonate with the complexity of multiple identities. The dissenting judgments of L'Heureux-Dubé and McLachlin JJ. in the *Thibaudeau* case also illustrate such an approach. Rather than analysing the discrimination against custodial parents through a gender lens as sex discrimination, a new analogous ground, "custodial parents", was acknowledged.[95] While this willingness to extend equality rights protection to groups, while respecting their specificity and uniqueness, is a positive development in some ways, it is troubling to the extent that it tends to obscure the gender, race, and class dimensions of the problem of inequality. One encounters here the feminist postmodern dilemma. It may be politically, strategically or rhetorically important to name a social phenomenon sexism, classism or racism, while acknowledging the limits of such categories in the same breath.[96]

VIII. *Conclusion*

The legal interpretation of the grounds of discrimination raises a number of complex and important questions about how human rights should address group-based problems of inequality and exclusion. This article has emphasized the importance of according a large and liberal interpretation to the enumerated grounds of discrimination in human rights documents. Such an expansive approach makes possible the recognition of problems of inequality not contemplated by legislatures by endorsing a pragmatic and "living tree" interpretive approach in the statutory human rights domain. It also brings to light the need to provide human rights protection in situations of discrimination based on both the perception and the reality of difference. There has been a recent appreciation of the idea that discrimination is a social construct whose origins do not lie in any biological or natural domain of difference. An expansive approach also endeavours to understand the complexity of multiple identity in assessing discrimination claims. And finally, such an approach is attentive to the contextual and historical realities of inequality faced by certain groups in society.

And yet, anti-discrimination law remains caught in the paradox of what some scholars have called the "dilemma of difference."[97] Discrimination law raises questions about the identity of individuals as members of groups.

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[95] See D. Pothier, "M'Aider, Mayday: Section 15 of the Charter in Distress" (1996) 6 N.J.C.L. 295 at 323-24.

[96] See L. Alcoff, "Cultural Feminism versus Poststructuralism: The Identity Crisis in Feminist Theory" (Spring 1988) 13 Signs 405; N. Fraser and L. J. Nicholson, "Social Criticism Without Philosophy: An Encounter Between Feminism and Post-Modernism" in L. J. Nicholson, ed. *Feminism/Post-Modernism* (New York: Routledge, 1990) at 19-38; P. Monture, *supra* note 75.

[97] M. Minow, *supra* note 41.

It touches fundamentally upon how individuals are categorized as "other" and demeaned, excluded, and harmed as a result. Socially disadvantaged groups are labelled "different" from the perspective of an unstated dominant norm.

Discrimination law also raises questions about whether it is possible to be categorized as "other" and affirmed, appreciated and assisted as a result. Or is the categorization process itself antithetical to the recognition of our shared humanity? And what about the important processes of claiming one's identity in opposition to dominant groups in society? In claiming identity, one finds resistance to assimilation — the possibility of inclusion in the face of difference. In claiming identity, what are the risks of essentialism[98] — of reducing groups to congealed caricatures that constrain individual lives? These are complex questions that are fundamental to our broader understanding of how the grounds of discrimination speak to group-based identifications and affiliations. They are critical to the larger project of substantive equality law with all of its contradictory efforts to recognize and suppress the relevance of group identities.

[98] A. Harris, "Race and Essentialism in Feminist Legal Theory" (1990) 42 Stan. L. Rev. 581.