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The Greening Garden: Equality Rights Under the Canadian Constitution

D. Geoffrey Cowper, Q.C.*

I. SUMMARY

In the 2003 term the Supreme Court of Canada pronounced two unanimous judgments finding that section 15 equality rights had been violated. In both cases, the Court applied the *Law v. Canada (Minister of Employment and Immigration)*¹ analysis and did not retreat from the features of its section 15 jurisprudence which have previously attracted criticism in this and other venues. This paper provides a review of these two recent cases with a view to assessing whether they represent an emerging consensus and, particularly, with a view to where they suggest future controversy.

II. 2003 DEVELOPMENTS — OVERVIEW

The Court pronounced unanimous judgments in *Trociuk v. British Columbia (Attorney General)*² and *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*.³ In *Trociuk*,⁴ the Court overturned sections of the *Vital Statistics Act*⁵ which permitted a mother who did not acknowledge the father to select and register the child's name, and to omit the father's particulars on the basis the statute unconstitutionally excluded participation of the

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¹ [1999] 1 S.C.R. 497, [1999] S.C.J. No. 12.

² [2003] 1 S.C.R. 835, [2003] S.C.J. No. 32.

³ [2003] 2 S.C.R. 504, [2003] S.C.J. No. 54.

⁴ *Trociuk*, *supra*, note 2, at para. 47.

⁵ R.S.B.C. 1996, c. 479, ss. 3(1)(b), 4(1)(a) and 3(6)(b).

biological father in the registration and naming process on the basis of sex.

In *Martin*,⁶ the Court held that Nova Scotia's *Workers' Compensation Regulations*,⁷ which excluded chronic pain from the reach of regular compensation and provided in lieu a functional restoration program, constituted an unconstitutional exclusion of benefits on the grounds of physical disability.

III. ANALYTIC OVERVIEW

The Court's jurisprudence in section 15 has been criticized as being vague and incapable of ready application. The divisions within the Court in equality cases have been criticized as indicative of a lack of consensus and institutional leadership from the Court.⁸ The unanimous judgment in *Law* has been criticized as a compromise of several different concepts that fails to provide ready guidance to the lower Courts. Despite these criticisms, these two unanimous judgments make it clear that the Court is holding to the *Law* test.⁹

1. The *Law* Test

In upholding the *Law*¹⁰ test, the Court has also reaffirmed the central role of human dignity in its reasoning:

The sole remaining question under the *Law* test is whether, from the perspective of the reasonable claimant, the present differential effects constitute a violation of dignity...¹¹

⁶ *Martin*, *supra*, note 3, preamble.

⁷ *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, s. 10B — Functional Restoration (Multi-Faceted Pain Services) Program Regulations, N.S. Reg. 57/96.

⁸ S. Lawrence, "Section 15(1) at the Supreme Court 2001-2002: Caution and Conflict in Defining 'The Most Difficult Right'" (2002) 16 Sup. Ct. L. Rev. (2d) 103; C.D. Bredt and A. Dodek, "Breaking the Law's Grip on Equality: A New Paradigm for Section 15" (2003) 20 Sup. Ct. L. Rev. (2d) 33.

⁹ *Law*, *supra*, note 1, at para. 88.

¹⁰ *Law*, *supra*, note 1.

¹¹ *Trociuk*, *supra*, note 2, at para. 13.

Further, from *Martin*:¹²

On the contrary the denial of the reality of the pain suffered by the affected workers reinforces widespread negative assumptions held by employers, compensation officials and some members of the medical profession, and demeans the essential human dignity of chronic pain sufferers. The challenged provisions clearly violate s. 15(1) of the *Charter*.¹³

It remains unclear, however, what analytical role human dignity plays in the reasoning of the Court. In both cases, it may be said that offending human dignity compendiously describes the conclusion of the discrimination analysis rather than serving as an element in the analytical framework.

2. Perspective

The Court has also held steadfast to adopting a claimant's reasonable perspective. As has been noted by the Court, this approach marries both objective and subjective elements. The Court clearly is concerned not to adopt a purely subjective perspective, but also wishes to realize the remedial goals of section 15 by viewing the impact of legislative distinctions from the claimant's viewpoint. Once again, however, the analytical role this element plays is unclear. The subjective/objective blend offers a dominant influence to either the subjective element of perspective, or the objective element of reasonableness depending on the case. If the Court concludes a distinction is reasonable, then a claimant would be unreasonable in refusing to acknowledge this from his or her perspective. On the other hand, adopting the perspective of a claimant appears to be no more than paying due regard to the impact of the distinction on those adversely affected — something for which a subjective analysis is arguably unnecessary.

¹² *Martin, supra*, note 3, at para. 66.

¹³ *Martin, supra*, note 3, at para. 5.

3. Levels of Scrutiny

The Court has consistently rejected the notion of incorporating the American jurisprudence respecting differing levels of scrutiny depending upon the ground of distinction. Nevertheless, the Court is developing a jurisprudence in which different concerns apply to different categories. For example, the cases suggest that claims based on age discrimination attract less initial scepticism and are permitted a more rough and ready usage than distinctions based upon race or disability. Although the Court is not developing levels of scrutiny as expressly differential tests, it appears that as cases are decided, other cases involving the same ground of distinction may be of greater importance rather than the general concept of human dignity. Certainly, the *Martin*¹⁴ case evidences the Court's concern that particular attention be had to the requirements of substantive equality and accommodation where physical or mental disability is at issue.

One of the contextual factors identified in *Law* raises the varying impact of categories by recognizing that the nature of the distinction is important in assessing whether its use is discriminatory. In *Andrews v. Law Society of British Columbia*¹⁵ McIntyre J. identified the level of scrutiny analysis as taking place largely within section 1, and contrasted that express provision with the judicially created superstructure in U.S. jurisprudence: see also *R. v. Chaulk*.¹⁶ Nevertheless, the result in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*¹⁷ and the right to vote cases suggest that a strict approach has been taken to cases involving an individual's right to an effective vote.

The practical collision in the United States between the strict scrutiny analysis adopted for racial distinctions and the desire for innovation in affirmative action programs has been avoided expressly through section 15(2) of the Charter. Certainly the U.S. jurisprudence also has come under similar criticism as failing to provide a predictable or certain

¹⁴ *Martin*, *supra*, note 3.

¹⁵ [1989] 1 S.C.R. 143, [1989] S.C.J. No. 6.

¹⁶ [1990] 3 S.C.R. 1303, at para. 168, [1990] S.C.J. No. 139.

¹⁷ [1999] 2 S.C.R. 203, [1999] S.C.J. No. 24.

analytical framework for equality cases.¹⁸ Difficulties of theory and application are not confined to Canadian issues.

IV. *TROCIUK V. BRITISH COLUMBIA (ATTORNEY GENERAL)*

1. Reasoning in the Courts

This case concerned a claim arising from a paternity suit commenced by an unacknowledged father for, amongst other relief, an order that the birth registry include his particulars and that the surname of the triplets reflect both parents' surnames in hyphenated fashion. In the result the Court ordered the father's particulars included, and referred the question of the children's surname to the lower Court to be determined in accordance with the amended legislation and the best interests of the children. This case is one of the shortest decisions authored by the Court in recent years and disposes of the entire case in 47 paragraphs. The reasoning is admirably clear and readily followed. Finally, the result seems to flow from a philosophical premise that few would dispute: the social value of both fathers and mothers being involved in significant ways with their children whether or not parental conflict exists.

Nevertheless, more is troubling about the reasoning in *Trociuk*¹⁹ than reassuring. The Court unanimously overturns the majority judgment in the Court of Appeal. The majority of that Court considered the specific interests affected by the statute had far less of a human rights dimension than appears to have been the conclusion in the Supreme Court. Nevertheless, the Supreme Court's statement of the parental interests affected fails, in my view, to persuasively connect the general policy of parental involvement with an unreasonable distinction made by the statutory framework.

The *Vital Statistics Act*²⁰ of British Columbia provided a biological mother with the ability to submit a Statement of Live Birth on her own and to choose whether to acknowledge the biological father. Under the *Vital Statistics Act*,²¹ where the father is unacknowledged by or unknown

¹⁸ Peter Rubin, "Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After *Adarand* and *Shaw*" (2000) 149 U. Pa. L. Rev. 1.

¹⁹ *Trociuk*, *supra*, note 2.

²⁰ *Vital Statistics Act*, *supra*, note 5.

²¹ *Id.*

to the mother, she has the statutory responsibility to file a statement and to give a surname to the child. If a statement was registered by the putative father, the Director was required to alter the registration of birth on the application of a mother if she did not acknowledge the father. In *Trociuk*,²² the father and mother were estranged and she gave birth to triplets. Various court orders for access, custody and support were obtained by the father and the mother.

The trial judge dismissed the claim.²³ The majority in the Court of Appeal in two separate reasons dismissed the claim, with Prowse, J.A. dissenting.²⁴

The two statutory points at issue concerned:

1. the father's particulars on the birth registry; and
2. the unilateral selection of a surname by the biological mother.

The father maintained in the Courts below that he had sedulously done what he could to maintain his relationship with his children, to respect their mother, and to participate fully in their lives.²⁵

The material filed by the Director indicated that five per cent of births at the time of trial did not include the father's particulars. The impression deposed to by the Director was that this was most commonly the product of the absence of any relationship with the father, as well as births associated with sexual assault, incest and more than one possible father.²⁶

Justice Southin in the Court of Appeal dedicated the bulk of her reasons to an interesting history of the custom, common law and statutory history of British Columbia and other jurisdictions in relation to naming. The most interesting for present purposes is her observation that at common law there was no lawful restraint (aside from fraud) in adopting whatever name one wished. Before the 14th century, surnames were

²² *T. (D.W.) v. British Columbia (Attorney General)* (1999), 67 B.C.L.R. (3d) 389, [1999] B.C.J. No. 1146 (S.C.) [hereinafter "*Trociuk*, B.C.S.C."]; aff'd (2001), 200 D.L.R. (4th) 685, 90 B.C.L.R. (3d) 1, [2001] B.C.J. No. 1052 (C.A.).

²³ *Id.*

²⁴ *T. (D.W.) v. British Columbia (Attorney General)*, [2001] B.C.J. No. 1052, 90 B.C.L.R. (3d) 1 [hereinafter "*Trociuk*, B.C.C.A."]

²⁵ *Trociuk*, B.C.S.C., *supra*, note 22, at para. 6.

²⁶ *Trociuk*, B.C.S.C., *supra*, note 22, at para. 18.

unknown, and people were known by their given name and place, *i.e.*, Thomas of Ottawa.²⁷ Halsbury's *Laws of England* notes that at common law an illegitimate child was not entitled to a surname by right of inheritance but could acquire one by reputation.²⁸

Justice Prowse noted that a mother's exclusive right to register the child's birth was only provided for in 1962.²⁹

After 1987 it was a joint responsibility except where the father was unacknowledged, unknown or incapable.

Curiously, the mother maintained that she had refused to acknowledge the father because he insisted the children bear his surname only. In the Supreme Court he asked that an order be made giving them the hyphenated name of both parents.³⁰

The Supreme Court found that both interests were important means of participating in the life of a child. As to the father's particulars:

Including one's particulars in a birth registration is an important means in participating in the life of a child. A birth registration is not only an instrument of prompt recording, it evidences the biological ties between parent and child and including one's particulars on the registration is a means of affirming these ties.³¹

The Court noted that in the absence of particulars being included, a father might not qualify for notice under the *Adoption Act*.³² However, the statute provided that upon proof of paternity or if a man was the subject of orders for access, custody or support that he would thereafter be entitled to notice under the *Adoption Act*.³³

Second, participating in the process of determining a child's surname was found to be a significant right:

Contribution to the process of determining a child's surname is another significant mode of participation in the life of a child. For many in our society, the act of naming a child holds great significance. As Prowse,

²⁷ *Trociuk*, B.C.C.A., *supra*, note 24, at paras. 33-35.

²⁸ Halsbury's *Laws of England*, 3d, Vol. 3, (London: Butterworth & Co. (Publishers) Ltd., 1953), at para. 161, citing *Co. Litt.* 3b.

²⁹ *Trociuk*, B.C.C.A., *supra*, note 24, at para. 105.

³⁰ *Trociuk*, B.C.S.C., *supra*, note 22, at para. 1.

³¹ *Trociuk*, [2003] S.C.J. No. 32, [2003] 1 S.C.R. 835, headnote.

³² R.S.B.C. 1996, c. 5.

³³ *Id.*, at s. 13(2)(c).

J.A. notes, naming is often the occasion for celebration and the surname itself symbolizes for many, familial bonds across generations (paras. 138-39).³⁴

The Court concluded that arbitrary exclusion of the father from these means of participation constituted adverse statutory distinctions which required the Court to analyze whether a reasonable claimant would view these as demeaning to his dignity.

The Court dismissed the argument that because the father was not a member of a historically disadvantaged group, he could not bring a section 15 claim. Quite rightly, the Court pointed out that the legislature was declaring that a father's relationship with his children was being unequally treated in the circumstances of the legislation. For that reason, the Court concluded:

a reasonable claimant would perceive the message to be a negative judgement of his worth as a human being.³⁵

The Court then proceeded to deal with a less obvious effect of the legislation. The Court held that excluding the claimant from participation associated him with two other categories of fathers: fathers unacknowledged for valid reasons and fathers incapable or unknown. The association with these other categories of what might be termed "deadbeat dads" was concluded to be pejorative.

Further, the Court found that the association with these other fathers communicated a stereotype or prejudice on the basis of being male.

The Court concluded that the absence of any redress for arbitrary exclusion with respect to particulars and surnames was disrespectful to fathers wishing to participate in their children's lives. Before the Supreme Court of Canada's judgment, the *Vital Statistics Act*³⁶ had been amended to provide a mechanism for participation by unacknowledged fathers as to the father's particulars, but not as to surname.

The provisions under the *Adoption Act*³⁷ referred to in the Court of Appeal and the Supreme Court of Canada providing for a father's right

³⁴ *Trociuk, supra*, note 31, at para. 17.

³⁵ *Id.*, at para. 21.

³⁶ *Vital Statistics Act*, R.S.B.C. 1996, c. 479, ss. 3(6)(d) and (6.1), as am. *Health Planning Statutes Amendment Act, 2002*, S.B.C. 2002, c. 15, s. 23.

³⁷ *Adoption Act, supra*, note 32, ss. 13(1)(c), 13(2)(a).

to notice expressly incorporated the right of a father to register himself as the biological father, and to be given notice of a proposed adoption. Indeed, the right to notice expressly included the plaintiff, who was entitled by reason of section 13(2)(c) of the *Adoption Act*³⁸ to have his consent required to any adoption by reason of his paternity order and access and custody order.

Curiously, the *Vital Statistics Act*³⁹ provided the “casting vote” in the event of a disagreement between two known parents with respect to surname by providing that children shall be named by hyphenated name with their parents’ names organized in alphabetical order. To avoid the growth of hyphenated names, the Act provided that a parent’s hyphenated name only qualifies for the child’s hyphenated name as to one of the two and again in alphabetical order. Mr. Trociuk was not entitled to demand that his children be named as proposed by him to the court because he had not filed a birth registration under the Act. Nevertheless, the *Name Act*⁴⁰ then provided that any custodial parent could apply for a change of name and required the other parent’s consent only if that parent wished to change the surname over to the other parent’s name. Otherwise, a change of name could be had over the objection of the other parent if that parent’s consent was withheld unreasonably.

Finally, the Court rejected the suggestion that there was an ameliorative purpose to permitting women alone to register births in those circumstances so as to encourage registration and reduce parental conflict. The Court found that arbitrary exclusion of the father from the activity of naming a child and registering particulars of the birth was not in the best interests of a child.

With respect to section 1 justification, the Court found that the existence of alternative statutory mechanisms such as the amended regime demonstrated that the father’s rights were not impaired as little as possible by the previous statutory regime. The amended regime permitted a father to require his particulars be included, but left the mother’s initial power to unacknowledge and unilaterally put a name in place.

³⁸ *Id.*

³⁹ *Vital Statistics Act*, *supra*, note 5, s. 4.1(2).

⁴⁰ *Name Act*, R.S.B.C. 1996, c. 328.

2. Remedy

The Court determined that an immediate declaration of invalidity might harm mothers who might reasonably want to unacknowledge fathers for legitimate reasons. Accordingly a suspension of the declaration of validity for 12 months was granted. Second, the Court declined to determine the surname of the children or to agree with the father that the surname reflects the hyphenated name of both parents. The Court concluded:

The amended legislation provides a procedure at which Mr. Trociuk can apply to have his particulars included on the birth registration ... this Court is not in a position to determine whether the asked-for change of surname is in the best interests of the children and, absent the consent of both parents, this surely must be considered before an order to change the surname can be made.⁴¹

The Court concluded by saying that any adequate legislative response must account for the variety of interests discussed by the Court:

including the legitimate interests of the mother, the right of the father not to be discriminated against on the basis of his sex and the best interests of the child.⁴²

3. Commentary

The other members of the Court clearly had no difficulty signing on to this brief and lucid determination of unconstitutionality. The Court's reasons, however, are open, in my respectful view, to serious criticism.

One of the central criticisms of the concept of human dignity is that it is vague, general, and malleable and does not play any genuine analytical role in shaping or influencing the analysis in any given case. Certainly in *Trociuk*⁴³ the use of the term human dignity associated with the interests identified does not add to the persuasiveness of the analysis.

⁴¹ *Trociuk, supra*, note 31, at para. 44.

⁴² *Trociuk, supra*, note 31, at para. 45.

⁴³ *Trociuk, supra*, note 31.

What is most helpful is that the Court is extremely clear in identifying the interests which it says are offended as a matter of an equality analysis. Are those interests, however, persuasively engaged?

The essence of the earlier statutory policy appeared to be that all births have to be registered. Where a mother did not acknowledge a father she was permitted to (and indeed required to) register the birth and name independently of the biological father.

This function appears to be primarily administrative and understandable. Given that births should be registered within 30 days it does not appear sensible to require a judicial process associated with the form of registration. In circumstances where the father is present but unacknowledged, any form of registration of his particulars would require a determination of paternity which is provided for under different statutory procedures. In this case, the mother did not acknowledge the plaintiff's paternity, which had to be proved by DNA testing.

This observation appears to have been borne out by subsequent legislative changes. The province of British Columbia in response to the judgment of the Supreme Court of Canada on May 20, 2004 pronounced into force an amended regime which provides that the court may, in declaring a child's parentage, make an order that the registration of a child's name be changed and empowering the court to select the surname of either parent or a surname consisting of a hyphenated or combined name of both parents' surnames. On the application, the legislation provides that the court must consider the child's best interests if the child is 12 years or younger and otherwise have the child's written consent. On this order being made, the registration of birth is amended to reflect the order and any birth certificate is thereafter issued "as if the original registration had contained that name".⁴⁴ This statutory fiction addresses the original exclusion by, in effect, erasing the official history.

In effect, the previous power of a custodial parent to apply to change a child's name has now been broadened to include any parent on a successful paternity action based on the child's best interests. It certainly appears that the court's desire for participation by both mother and father on an equal basis in the ultimate naming of a child has been accomplished in the amended legislation. However, that equal participation is at the well of the court contending for the court's favour. It has,

⁴⁴ *Vital Statistics Act*, *supra*, note 5, s. 4.1.

in effect, transferred a unilateral power in one parent to an adjudicative power in the court. We have no experience with how this Solomonic power will be administered, but there are few obvious anchors in reason to dictate a surname in the best interests of a child.

In the dissent in the Court of Appeal and now the Supreme Court of Canada the fact that the father whose particulars are registered must receive statutory notice of a proposed adoption was emphasized as representing a real statutory significance to appearing on the particulars on the registry. However, once paternity is established, then statutory notice of an adoption had to be provided anyway under the principal Act. This statutory distinction does not appear to have had any real significance.

As an aspect of ascertaining disputed paternity, any regime which permits a father to intervene for the purpose of having his particulars noted on the registry must accommodate the necessity of proof of paternity. In any event however, can it be suggested persuasively that it is unconstitutional to require an unacknowledged father to pursue proof of paternity prior to being entitled to notice of a purported adoption? Any alternative must somehow cope with women who refuse to acknowledge the father of the child, and the necessity of proving paternity.

Justice Newbury in the Court of Appeal noted that the mother had agreed prior to the Court of Appeal hearing to have the father's particulars included in the registration.⁴⁵ Accordingly, the only relief specific to the parties granted by the Supreme Court (*i.e.*, including the father's particulars) had not been in issue between the parties since prior to the Court of Appeal hearing.

On this point, Newbury J.A.'s reasons concurring in the result in the Court of Appeal seem preferable. She identifies the purposes of the statute under consideration relating to the registration of births, and distinguishes it from the other statutes which govern paternity and the rights and obligations arising from paternity. She carefully addresses the question of whether the *Vital Statistics Act*⁴⁶ has the purpose or effect of offending unacknowledged fathers and concludes that to the degree it

⁴⁵ *Trociuk*, B.C.C.A., *supra*, note 24, at para. 172.

⁴⁶ *Vital Statistics Act*, *supra*, note 36.

does it arises from a rational balancing of the interests involved and not any discriminatory purpose or effect.⁴⁷

It could well be that the Charter has had its most salutary effects on previously unnoticed injustices. Its application to this relatively unnoticed indignity does appear, however, to have more symbolic than real justice about it. The fact that the mother had previously agreed to change the particulars and that no real relief was granted in respect of the children's surnames supports the sense that despite being a unanimous application of section 15(1) that it will soon be more curiosity than precedent.

Fathers have in western cultures placed some stock in having a dominant influence in the selection of the surname of their children. I suspect that naming has largely been culturally governed by the relevant rules and customs of the particular society by means of paternal, maternal or other association. In most western systems, the paternal system of naming was reflected in the automatic assignment of a father's surname to any children born to a lawful marriage.⁴⁸

Where a child was born outside of a lawful marriage, the multiple burdens placed upon single mothers were the source of much anguish. In the absence of a conclusion of paternity and judicial findings of paternal responsibility a natural legislative choice with respect to surnames would appear to be to permit that surname to be selected by the biological mother.

Was this exclusion of an unacknowledged father arbitrary? It appears to follow from the natural distance between a father and child where the father is not acknowledged. Although that distance may not be wholly the father's doing, it is a product of a social failure: the absence of a relationship that would at least sustain a conversation about the child's name! The Court saves its clearest concern for the interests of unjustifiably unacknowledged fathers without reference to the traditional concern: any father who had a child out of wedlock carried at least some responsibility for the absence of a family to be born into.

The rising portion of the Canadian population who choose not to marry before having children, or who choose to have children outside of marriage, likely made a different legislative regime necessary. Mr. Trociuk's claims

⁴⁷ *Trociuk*, B.C.C.A., *supra*, note 24, at paras. 176-87.

⁴⁸ *Halsbury's*, *supra*, note 28.

(although dismissed at the time) appear to have been the cause for the initial amendments to the British Columbia legislation which permitted a father to file an Order of the Court declaring the child's paternity with the consequence that his particulars would then be included in the registration of birth.

However, in circumstances of parental conflict (even in many cases where there is no such conflict) the selection of a name requires a casting vote. In the present case the Court determined that it would not find what was in the best interests of the child but that it would declare the present regime to be invalid and require that any further regime take account of the best interests of the child as well as the father's interests.

With respect, it does not appear to this writer that the exclusion of unacknowledged fathers from the Act represented an arbitrary exclusion and that the analysis of section 15 merely replaced the Court's policy judgment as to how to resolve the obvious conflict (by judicial or independent determination of a child's best interests) in substitution for giving responsibility for making that choice of the child's best interests to the biological mother, or the custodial parent under the *Name Act*.⁴⁹

With respect, it is telling that the reasons offer no content to the child's best interests in this context. What are the child's best interests in the circumstance such as that found in the case itself? It appears that the parents had a fractured relationship resulting in the circumstance where the father had to obtain judicial orders to prove his paternity and to obtain access. How are the children's best interests then to be determined? Their names could be changed if the father succeeded in establishing that it was in the best interests of the child for the mother not to be the custodial parent. As a starting measure, however, surely it is a reasonable policy to conclude that it is in the best interests of children where the mother does not acknowledge the father for her to be entitled to register their birth and select their names. Is the court in a better position to determine a child's best interests than the mother or custodial parent? Is the child's best interests sufficiently ascertainable by judicial method or even clear enough to support a legislative judicial decision? This is a case where requiring the legislature to address the individual interests irrespective of sex appears to be more symbolic than real and without any compelling addition to the justice of the legislative regime.

⁴⁹ *Name Act*, *supra*, note 40.

A final irony is that the revised regime endorses hyphenated surnames (ordered alphabetically), which equally preserves and distances children by name from their parents.

V. *NOVA SCOTIA (WORKERS' COMPENSATION BOARD) V. MARTIN*

In *Martin*⁵⁰ the Court unanimously found that the exclusion of chronic pain sufferers from a general compensation structure was an unconstitutional discrimination on the basis of disability.

The two central questions arising from the case are whether it is consistent with previous jurisprudence and whether it represents a human rights debate rather than a disagreement over a matter of legislative tools and policy.

1. Reasoning

The legislative regime at issue arose from the difficulty of Workers' Compensation systems addressing the circumstances of occult, chronic pain. Rather than continuing to deal with chronic pain complaints on an individual basis, a regulation was passed which, as noted by Cromwell J.A. in the Court of Appeal, constituted:

...legislative judgment ... that for Workers' Compensation purposes, the loss of earnings or permanent impairment flowing from chronic pain are not reasonably attributed to the injury⁵¹

The Regulation defined chronic pain as follows:

The FRP Regulations and s. 10A of the Act define "chronic pain" as "pain":

- (a) continuing beyond the normal recovery time for the type of personal injury that precipitated, triggered or otherwise predated the pain; or
- (b) disproportionate to the type of personal injury that precipitated, triggered or otherwise predated the pain,

⁵⁰ *Martin*, *supra*, note 3.

⁵¹ (2001), 192 D.L.R. (4th) 611, at 50, at para. 181.

and includes chronic pain syndrome, fibromyalgia, myofascial pain syndrome, and all other like or related conditions, but does not include pain supported by significant, objective, physical findings at the site of the injury which indicate that the injury has not healed.

The Court of Appeal had found that chronic pain sufferers were not members of a group suffering historical disadvantage or stereotyping and that the interests affected by the denial of benefits were merely economic in nature and that the legislative regime was a response to the reality of the complex circumstances of chronic pain in the context of Workers' Compensation benefits and did not demean the human dignity of the claimants.

The legislative response identified by the Court of Appeal and arising from the terms of the regulation included the fact that expert advice appeared to support the view that chronic pain treatment was best delivered by encouraging an early return to work and that the statutory definition of chronic pain included an element of mystery with respect to the persistence of the pain itself. The regulation appears to have defined chronic pain sufferers not merely as those suffering long-term pain, but those suffering long-term pain where the original injury did not appear to afford an explanation for the persistence of symptoms and there was no objective medical evidence supporting the ongoing experience of debilitating pain.⁵²

In *Martin*,⁵³ Gonthier J., writing for the Court, justified the conclusion in clear and reasonably brief reasons. The two most compelling points in the Court's reasoning appear to be: (1) the statute adopted a regime in which persons were excluded from compensation benefits by express reference to their disability; (2) unlike previous judgments of the Court, the claimant was not challenging the WCB system, but rather seeking to participate on equal terms with those suffering other forms of disability.

To a greater degree than in *Trociuk*,⁵⁴ the court reviewed the particular elements in the *Law*⁵⁵ test. The Court determined that differential

⁵² Functional Restoration (Multi-Faceted Pain Services) Program Regulations, N.S. Reg. 57/96, ss. 2(b)(i)(iii); 3(1)-(2); 4; 5(a)(b); 6; 7(1)-(2); 8(1)-(4).

⁵³ *Martin*, *supra*, note 50.

⁵⁴ *Trociuk*, *supra*, note 31.

⁵⁵ *Law*, [1999] 1 S.C.R. 497, [1999] S.C.J. No. 12.

treatment had been established on the basis of comparison with the group of workers under the Act who did not have chronic pain and are eligible for compensation.⁵⁶ In reviewing the relevant ground of discrimination, the Court rejected the argument that since both members of the claimant's group and the comparative group suffer from physical disabilities, there was no differential treatment on the basis of physical disability. It held that it is sufficient that "...ascribing to an individual a group characteristic is one factor in the treatment of that individual".⁵⁷

The Court identified the existence or absence of proof that the differential treatment is discriminatory in the substantive sense as critical to the inquiry. In reviewing the four contextual factors identified in *Law*⁵⁸ to be used in determining whether discrimination has been established, the Court made it clear that not all factors will be relevant in each case. Accordingly, the fact that chronic pain sufferers could establish no history of invidious stereotypes was unimportant if they could establish a lack of correspondence between the differential treatment imposed by the Act and the true needs and circumstances of the claimant's group. In reviewing the second contextual factor of the degree of correspondence with the needs and circumstances of the claimants, the Court again identified the importance of determining the overall purpose of the legislative scheme at issue and how it responds to the actual needs, capacity or circumstances of those in the claimant group having regard to their value as human beings and as members of Canadian society, in short their essential human dignity as individuals.⁵⁹

As already mentioned, at the core of the result was the Court's conclusion that the provisions of the Act which exempted those suffering from chronic pain as defined by the Regulations from the general provisions of the Act and restricting them to functional restoration program and cut-off of benefits was a blanket exclusion on the basis of physical disability. In effect, the Court found that the reality of the claimant group is that:

[frequent pain] frequently evolves into a permanent and debilitating condition. Yet, under the Act and the FRP Regulations, injured workers

⁵⁶ *Martin, supra*, note 50, at para. 71.

⁵⁷ *Id.*, at para. 76.

⁵⁸ *Law, supra*, note 55.

⁵⁹ *Martin, supra*, note 50, at paras. 92 and 94.

who develop such permanent impairment as a result of the chronic pain may be left with nothing: no medical aid, no permanent impairment or income replacement benefits, and no capacity to earn a living on their own. This cannot be consistent with the purpose of the Act or with the essential human dignity of these workers.⁶⁰

Despite acknowledging that “classification and standardization are in many cases necessary evils”,⁶¹ the Court concluded that:

On the contrary, the treatment of injured workers suffering from chronic pain under the Act is not based on an evaluation of their individual situations, but rather on the indefensible assumption that their needs are identical. In effect, the Act stamps them all with the “chronic pain” label, deprives them of a personalized evaluation of their needs and circumstances, and restricts the benefits they can receive to a uniform and strictly limited program.⁶²

Dealing with the other two contextual factors, the Court concluded that the ameliorative purpose of the Workers’ Compensation systems generally cannot shield “an outright failure to recognize the actual needs of an entire category of injured workers...”.⁶³ Finally, it held that the interests in receiving Workers’ Compensation benefits went beyond the economic level, and that the exclusion from benefits reinforces the stereotype that chronic pain is not “real” and does not warrant individual assessment or adequate compensation.

2. Section 1 Analysis

The Court was able to dismiss the section 1 justification offered by the province briefly on the basis that the central point that the regulations appear to be aimed at ensuring that the resources of the compensation scheme are directed to workers who are genuinely unable to work. While acknowledging that the Act and regulations were rationally connected to that objective, the fact that the blanket exclusion applied to all claims connected to chronic pain, in the words of the Court, “... makes

⁶⁰ *Id.*, at para. 97.

⁶¹ *Id.*, at para. 93.

⁶² *Id.*, at para. 99.

⁶³ *Id.*, at para. 102.

it patently obvious that the challenged provisions do not minimally impair the equality rights of chronic pain sufferers”.⁶⁴

In essence, it held that a blanket exclusion did not evidence a principled response to chronic pain.

As in *Trociuk*⁶⁵ the Court identified the “message” being sent by the legislative structure. In *Martin*⁶⁶ the message was that chronic pain sufferers as a whole were malingerers and not suffering genuine injury like other WCB claimants.

The reasoning of the Court gives rise to at least three significant concerns:

1. The regulation did not appear to (notwithstanding the labelling) exclude all persons suffering from chronic pain, but rather only those suffering from chronic pain where their initial injury did not appear to explain its persistence and where no objective evidence supported its ongoing reality.

While there can be no doubt that a suspicion of malingering surrounds these cases, are they as a distinct body of persons suffering a similar disability, or do they represent instead a population of Workers’ Compensation claimants whose benefits were restricted by reason of the character of the evidence in support of their claim? Would it be unconstitutional to confine compensation to objectively verifiable injuries?

2. The Court appears to have accepted that the consensus of expert evidence is that persons suffering chronic pain without objective underlying conditions are best treated by being encouraged to return to work and hence being removed from the compensation system, or at least its benefits. This raises the difficult tension between the traditional suspicion of malingering and the more generous, but nevertheless similar concern, that the existence of ongoing disability payments may in fact interfere with a person returning to a full life, as well as result in an unjustified drain on the compensation fund.

⁶⁴ *Id.*, at para. 112.

⁶⁵ *Trociuk*, [2003] 1 S.C.R. 835, [2003] S.C.J. No. 32.

⁶⁶ *Martin*, *supra*, note 50.

3. Is this a debate in which a human rights dimension is truly raised? The arbitrary character of Workers' Compensation systems arose very early in the section 15 jurisprudence when widows complained about their exclusion from the tort recovery system without regard to their particular circumstances. Those complaints were dismissed without counsel for the respondents or government intervenors being called upon in the Nova Scotia Workers' Compensation reference in 1989: *Reference re Workers' Compensation Act 1983 (Nfld.)*.⁶⁷ However, this previous analysis was based explicitly on an analogous grounds analysis which stated that survivors of workers killed in the workplace were not a disadvantaged group suffering historical disadvantage or stereotype.

More recently, the necessity for blunt (if not arbitrary) legislative distinctions in any compensation system was addressed by the Court in *Granovsky v. Canada (Minister of Employment and Immigration)*⁶⁸ where the Court unanimously dismissed a complaint based upon the differing qualification periods for disability as between those suffering permanent disability and those suffering periods of temporary disability. In that case, persons suffering permanent disability were entitled to claim the benefit of dropout provisions which relieved them of having to pay into the compensation system for the same period as others. Nevertheless, persons suffering serial temporary disabilities were not entitled to claim the benefit of the same dropout provisions. The Court unanimously found that there was no human rights dimension to this type of distinction and that government needed to be allowed to manage a compensation scheme (particularly one having insurance-like components) embodying periods of qualification and the like that might embody differences between similarly situated groups.

Certainly it could be argued by persons suffering a number of periods of temporary disability that they are being treated as malingerers by not receiving similar dropout credits to those suffering more chronic disabilities.

⁶⁷ [1989] 1 S.C.R. 922, [1989] S.C.J. No. 35.

⁶⁸ [2000] 1 S.C.R. 703, [2000] S.C.J. No. 29.

COMMENTARY: The heart of the Court's reasoning in *Martin*⁶⁹ revolves around the obvious refusal of the legislature to take an individualized approach to the problem of chronic pain. In essence, the Court has held that in relation to selecting who may or may not participate in a comprehensive compensation scheme, as well as the various conditions of qualification and determination of benefits, the Court recognizes that legislatures must standardize and classify. However, within the scheme itself the Court has recognized a substantial role for section 15 to require a consistency of approach across all forms of disability. In essence, the Court has found that however uncomfortable and administratively difficult, genuinely disabled persons suffering from conditions which are difficult to diagnose and treat must be dealt with individually rather than by reference to their condition.

From an analytical point of view, the four contextual factors in *Law*⁷⁰ clearly shaped and framed the analysis in *Martin*⁷¹ in a way that was both appropriate and measured. The references to human dignity are conclusory rather than analytical but none the worse for being so. While the Court could certainly be convicted of having a robust view of the scope of judicial expertise, the matters touched on and debated in *Martin*⁷² are organically connected to the concerns of the individuals afflicted with physical or mental disability and affected by the actions of government.

Both the regimes in *Granovsky*⁷³ and *Martin*⁷⁴ appear to be blunt and over-broad in their impact on persons suffering a variety of disabilities. Indeed, are the two populations in *Granovsky*⁷⁵ and *Martin*⁷⁶ any different in character? In *Martin*,⁷⁷ only some chronic pain sufferers were

⁶⁹ *Martin, supra*, note 50.

⁷⁰ *Law, supra*, note 55.

⁷¹ *Martin, supra*, note 50.

⁷² *Id.*, note 50.

⁷³ *Granovsky, supra*, note 68.

⁷⁴ *Martin, supra*, note 50.

⁷⁵ *Granovsky, supra*, note 68.

⁷⁶ *Martin*, [2003] 2 S.C.R. 504, [2003] S.C.J. No. 54.

⁷⁷ *Id.*

excluded, albeit all those without objectively verifiable symptoms. In *Granovsky*,⁷⁸ only those with temporary disabilities as a result of back pain were excluded, but all such persons? Although the exclusion in *Martin*⁷⁹ was by reference to a disability, it was not solely on the basis of disability, but rather other relevant concerns coupled with the presentation of that type of disability.

One obvious effect of *Martin*⁸⁰ is a clear statement by the Court that in certain circumstances the identification of the claimant as a member of a historically disadvantaged group will be of little or no impact in an equality analysis. The same could also be said of *Trociuk*.⁸¹

As recognized by the Court, the messages contained within these legislative distinctions were each anchored in means which were relevant to the purposes of the legislation. The fact that a mother does not acknowledge the father of her children at their birth appears to the writer to constitute a relevant fact in how one requires her to register the births over the next 30 days and who one allows to select their initial surname? The legislative preference of biological mothers and custodial parents in the naming of young children may be wrong, but does not seem discriminatory.

In relation to the regime in *Martin* the analysis seems strained when it strives to view the legislative distinction as based upon a stereotype relating to chronic pain sufferers. The Court's conclusion seems just as strong when it criticizes the absence of a correlation between the legislative goal and those people affected by its chosen means of distinction. In this sense a stereotype is condemned because of just such a discrepancy, but newly realized means of discrimination may be just as deserving of censure without having any historical stereotype associated with them. What is surely required is a persuasive criticism of the means chosen by the legislature: in *Martin* that effort seems much more developed and sound than in *Trociuk*.

⁷⁸ *Granovsky, supra*, note 68.

⁷⁹ *Martin, supra*, note 76.

⁸⁰ *Martin, supra*, note 68, at para. 88.

⁸¹ *Trociuk, supra*, note 65.

VI. CONCLUSION

Equality remains an elusive concept. There is a necessary variation in the impact on the analysis of the ground of distinction and the character of legislative treatment of that distinction. We cannot reasonably hope for a formulaic answer which will satisfy all concerned. While *Law*⁸² can be criticized for excluding little, it has the advantage of including all that may be valuable in a discrimination analysis.

The heart of the matter nevertheless remains obscure. When is an over-inclusive distinction involving an enumerated ground discriminatory? When is a poor or out-of-date law as a result unconstitutional? It is unclear whether the essential human dignity sought to be preserved by the Court is being accurately measured in these judgments.

The identification of the statutory policy in *Martin*⁸³ seems preferable to that in *Trociuk*.⁸⁴ Furthermore, it is easy to comprehend a fair and more individualized system of compensation for chronic pain than that under review in *Martin*.⁸⁵ On the other hand, the legislative choice relating to the selecting and changing of surnames in the British Columbia legislation appears to have been supplanted by a judicial adjudication of the child's best interests. It is certainly not clear to this writer that the judicial system is preferable to that selected by the legislature.

The court is not deaf to the risk that the application of section 15 might be corrosive of its public acceptance. In dismissing the section 15 claims in *R. v. Malmo-Levine*; *R. v. Caine* based upon discrimination against the class of recreational marijuana users, Iacobucci J. stated:

...To uphold Malmo-Levine's argument for recreational choice (or lifestyle protection) on the basis of s. 15 of the Charter would simply be to create a parody of a noble purpose.⁸⁶

What does seem to be occurring, however, is that the Court is gradually developing a jurisprudence where in a common-law-like fashion legislators are learning what kinds of distinctions will survive constitutional scrutiny and which will not. Blunt legislative exclusions

⁸² *Law, supra*, note 55.

⁸³ *Martin, supra*, note 76.

⁸⁴ *Trociuk, supra*, note 65.

⁸⁵ *Martin, supra*, note 76.

⁸⁶ [2003] 3 S.C.R. 571, at para. 185, [2003] S.C.J. No. 79.

which can be characterized as arbitrary when founded upon enumerated or analogous grounds represent legislative choices that must be approached carefully by legislators.

The Court is obviously committed to taking section 15(1)'s express reference to physical and mental disability seriously. This being said the challenges of applying the *Law*⁸⁷ analysis to a broadly defined sense of disability in relation to the crafting of government programs is likely to create great and difficult problems. Part of the problem is identifying people with any recognizably different medical condition as suffering a physical disability: so the two populations of back injury sufferers in *Granovsky*⁸⁸ are entitled to have their treatment under the benefits regime compared under a section 15(1) analysis. Similarly, the population of chronic pain sufferers is treated as a distinct population in *Martin*.⁸⁹ The other part of the challenge is that determining whether discrimination has been proven is made more complex when the principal demand on government is for accommodation, as was the case in *Eldridge v. British Columbia (Attorney General)*.⁹⁰

These cases can be reconciled. *Eldridge*⁹¹ required the provision of deaf translators for access to hospital services and is a case of accommodating access to the general medical system. *Martin*⁹² is a case of arbitrary and blanket exclusion by express reference to a particular disability. *Granovsky*⁹³ is simply a case of differing benefits being crafted to deal with different conditions.

This may be too easy. No evidence for a clear need for publicly funded translators for deaf people using medical services is referred to in *Eldridge*.⁹⁴ The unfairness of someone suffering repeated disabilities from back injury losing their qualification for public benefits when someone having a more chronic condition benefits from a relief from qualification is a type that is a common feature of benefit programs, but that makes it no less real. Beneath the surface of the arbitrary exclusion

⁸⁷ *Law, supra*, note 55.

⁸⁸ *Granovsky, supra*, note 68.

⁸⁹ *Martin, supra*, note 76.

⁹⁰ [1997] 3 S.C.R. 624, [1997] S.C.J. No. 86.

⁹¹ *Id.*

⁹² *Martin, supra*, note 76.

⁹³ *Granovsky, supra*, note 68.

⁹⁴ *Eldridge, supra*, note 90.

in *Martin*⁹⁵ appear to be very real differences in the conditions being considered by the legislation.

In the 2004 term, the Court heard arguments in the *Auton (Guardian ad Litem of) v. British Columbia (Attorney General)*⁹⁶ case from British Columbia. In that case, the Courts below found that the province's refusal to extend public funding for intensive behavioural therapy for autistic children constituted a violation of section 15(1). The case involves a challenge to the design of the publicly funded medical system, which does not include behavioural therapy in its funded services. It also concerns a controversial and expensive therapy that is considered critical by those caring for children suffering from autism. This case will no doubt give the Court the opportunity to clarify and advance our understanding of section 15(1) in perhaps its most challenging context to date.

⁹⁵ *Martin*, *supra*, note 76.

⁹⁶ [2002] B.C.J. No. 2258, 2002 BCCA 538.

