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A Professional Comedian's Fundamental Right to Publicly Bully a Child Because of His Disability? Scrutinizing *Ward v. Quebec Human Rights Commission* Through a Disability Lens

David Lepofsky*

I. INTRODUCTION

In his comedy performance, Ward, a well-known Quebec comedian, thought it would be funny to publicly ridicule and humiliate Jérémy, an adolescent with a disability known in Quebec for his singing.[1] Ward's blistering vilification, unleashed when Jérémy was 13 years old, mocked his disability and joked about drowning him.[2]

The combined audience of Ward's 230 performances exceeded 100,000 people. Over 7,500 DVDs were sold. Video clips reached others on the Internet.[3]

Unsurprisingly, Ward's attack reached Jérémy's schoolyard peers. They repeated and amplified it.[4] Jérémy was driven to isolate himself from his peers, "questioned whether his life had any value," and contemplated suicide.[5] In an interview, Ward

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[1] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43, 2021 SCC 43 at paras 9, 12 (S.C.C.).

[2] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43, 2021 SCC 43 at paras. 123, 125, 173 (S.C.C.).

[3] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43, 2021 SCC 43 at paras. 124, 172 (S.C.C.).

[4] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43, 2021 SCC 43 at para. 14 (S.C.C.).

[5] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43, 2021 SCC 43 at paras. 117, 125, 177 (S.C.C.).

conceded that his conduct constituted bullying.[6]

Cruel teasing and bullying of children and youth with disabilities is a recurring blight, impeding children and youth with disabilities from fully participating in and fully benefiting from an accessible, inclusive society.[7] Quebec's Human Rights Tribunal found that Ward violated Jérémy's statutory right to be free from disability discrimination in relation to the right to dignity, guaranteed by section 4 of the Quebec *Charter of Human Rights and Freedoms*.[8]

A majority of the Quebec Court of Appeal affirmed that ruling.[9] A five-justice majority of a sharply-split Supreme Court of Canada ("the Court") overturned the award,[10] leaving Ward free to repeat his bullying.

Ward's Supreme Court majority extended problematic legal protection to extreme, widely disseminated public taunting and bullying of a child with a disability. It treated Ward, a professional comedian, as deserving extra legal protection while engaging in comedy. It treated the young Jérémy as a less protected target because he was a "public figure."

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[6] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43, 2021 SCC 43 at para. 126 (S.C.C.).

[7] See, for example, K. Bills, "Helping children with disabilities combat negative socio-emotional outcomes caused by bullying through extracurricular activities" (2020) 30:5 Journal of Human Behavior in the Social Environment at 573-574. See also the *Ward* dissent's commentary, *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43, 2021 SCC 43 at para 195 (S.C.C.).

[8] Quebec *Charter of Human Rights and Freedoms*, CQLR, c. C-12 [hereinafter "Quebec Charter"]. See the Quebec Human Rights Tribunal decision, *Commission des droits de la personne et des droits de la jeunesse (Gabriel et autres) v. Ward*, [2016] Q.H.R.T.J. no 18, 35 C.C.L.T. (4th) 258, 84 C.H.R.R. D/155, (Que. Human Rights Trib.). For reference, see also the Quebec Charter, ss. 3, 4 and 10. Section 3 of the Quebec Charter reads "[e]very person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association." Section 4 reads "[e]very person has a right to the safeguard of his dignity, honour and reputation." Section 10 reads

> Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, gender identity or expression, 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. Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

[9] *Ward c. Commission des droits de la personne et des droits de la jeunesse (Gabriel et autres)*, [2019] J.Q. no 10380, 2019 QCCA 2042 (Que. C.A.).

[10] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43, 2021 SCC 43 (S.C.C.).

Resolving Ward's case in a principled way is far from easy. This article explores the *Ward* decision's deficiencies. Whatever outcome is the most defensible, the Supreme Court majority's mental gymnastics, producing Ward's win, are seriously erroneous. This article explores major errors in the majority decision beyond those in the compelling four-justice *Ward* dissent.[11]

In its leading authority on the *Canadian Charter of Rights and Freedoms*[12] guarantee of freedom of expression, *Irwin Toy Ltd. v. Québec (Attorney General)*, the Court held that children under age 13 can be legislatively protected from advertising aimed at them.[13] In contrast, the Court held in *Ward* that children with disabilities are open to a comedian's deliberate, public bullying, dressed up as comedy. In the Prostitution Reference, Dickson C.J.C. held that offering the sale of sex for money does not lie at or near the core of Charter section 2(b)'s values.[14] Assuming *arguendo* that it is appropriate for judges to decide whether a speakers message lies near to or far from section 2(b) values, it is hard to see why Ward's vilification and taunting of Jérémy can be differently characterized than the speech in issue in the Prostitution Reference.[15]

Scrutinized through a disability lens (focusing on its impact on the equality rights of people with disabilities), the *Ward* majority decision reflects a stunning lack of understanding of, and devaluation of, equality for people with disabilities.[16] It rests

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[11] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43 at paras. 115-224, 2021 SCC 43 (S.C.C.). On this issue, the majority and dissent, which is composed of Abella, Karakatsanis, Martin and Kasirer JJ., take somewhat different approaches.

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

[13] *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 (S.C.C.).

[14] *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123 at para. 5 (S.C.C.).

[15] I have elsewhere argued that it is erroneous for courts, assessing freedom of expression claims under s. 2(b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, to try to evaluate a speaker's specific message, in order to conclude how closely linked it is to s. 2(b)'s purposes or values. See M.D. Lepofsky, "The Supreme Court's Approach to Freedom of Expression – *Irwin Toy v. Quebec (Attorney General)* – And the Illusion of Section 2(b) Liberalism" (1993) 3:1 National Journal of Constitutional Law at 96. I present this article's analysis on the assumption that despite my earlier objections, courts will continue to undertake that analysis.

[16] A sampling of explorations of the meaning and context of disability rights can be found in Lepofsky, M. D., "Federal Court of Appeal De-Rails Equality Rights for Persons with Disabilities - Via Rail v. Canadian Transportation Agency and the Important Duty Not to Create New Barriers to Accessibility" (2006) 18 National Journal of Constitutional Law,

on bogus, unsupported judge-made psychology. It employs a harmful hierarchical approach to equality rights which deprioritizes disability equality. Some of *Ward*'s errors are rooted in problematic principles that the Supreme Court earlier established. Others are the *Ward* majority's own innovations.

Because the majority explicitly decided this appeal on a single dispositive ground (one which I show is erroneous), the rest of its reasons are the *obiter* of a closely split Court. That *obiter* should not be followed because it unjustifiably undermines important settled principles.

II. *WARD* MAJORITY FAILED TO EXPLORE THE MEANING OF EQUALITY FOR PEOPLE WITH DISABILITIES

The *Ward* case is all about equality for people with disabilities. For almost four decades, when the Supreme Court has grappled with the meaning and application of fundamental rights under the Charter, human rights legislation or otherwise, including when it is balancing conflicting rights, it explored those rights' purposes, importance and social context.[17]

This case cried out for the Court to do the same here. In *Ward*, a comedian vilified

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169-203; D. Lepofsky, "A Report Card on the Charter's Guarantee of Equality to Persons with Disabilities after 10 Years — What Progress? What Prospects?" (1997) 7:3 National Journal of Constitutional Law; D. Lepofsky, "People with Disabilities Need Lawyers Too! A Ready-To-Use Plan for Law Schools to Educate Law Students to Effectively Serve the Legal Needs of Clients with Disabilities, As Well As Clients Without Disabilities" (2022) Windsor Yearbook on Access to Justice, especially at 4-15; M.D. Lepofsky, "The Duty to Accommodate: A Purposive Approach" (1993) 1 Can. Lab. L.J. 1, especially at 5-10; P. Blanck & E. Flynn, *Routledge Handbook of Disability Law and Human Rights* (Abingdon-on-Thames, Oxon: Routledge, 2020); L. Jacobs, *Law and Disability in Canada: Cases and Materials* (LexisNexis Canada, 2021); T. Shakespeare, *Disability Rights and Wrongs Revisited*, 2d ed. (Abingdon-on-Thames, Oxon: Routledge, 2013), especially at 12-21; D. Pothier, D. Devlin & R. Devlin, *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law*" (Vancouver: University of British Columbia Press, 2014), especially at 47-59; A. Levesque & R. Malhotra, "The Dawning of the Social Model? Applying a Disability Lens to Recent Developments in the Law of Negligence" (2019) 13:1 McGill J.L. & Health 1, at 11-14; R. Malhotra, "Has the Charter Made a Difference for People with Disabilities?: Reflections and Strategies for the 21st Century" (2012) 58:10 S.C.L.R. 273, especially at 273-277; *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624 at paras. 56-58 (S.C.C.); *Moore v. British Columbia (Education)*, [2012] S.C.J. No. 61, 2012 SCC 6 at paras. 26-32 (S.C.C).

[17] See, for example, *Canada (Combines Investigation Acts, Director of Investigation and Research) v. Southam Inc*., [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145 at 155 (S.C.C.); *R. v. Big M Drug Mart Ltd*., [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 at paras. 116-118, 123 (S.C.C.); *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 at paras. 52-53 (S.C.C.); *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712 at paras. 56-57 (S.C.C.); *R. v. Stillman*, [2019] S.C.J. No. 40, 2019 SCC 40 at para. 21 (S.C.C.).

a child with a disability, because of his disability. *Ward*'s majority spoke in compelling terms about freedom of expression's importance and purposes.[18] However, it said not a word about the purposes for or importance of equality for people with disabilities, and particularly, of children with disabilities. It spoke in general terms about the importance of the right to dignity,[19] but without tying that discussion to the context of people with disabilities, and especially of children with disabilities.

Jérémy claimed Ward violated his right to freedom from discrimination based on his disability in relation to his right to dignity. The Court needed to consider the purposes of the guarantee of equality to people with disabilities, and the inequalities that people with disabilities have experienced for decades.

This omission constitutes a dramatic failure to employ the purposive approach that the Court requires for the Charter,[20] and which should fully apply to the Quebec Charter. That failure results in a substantial disconnect between the majority's reasons and the need for equality for people with disabilities.

III. *WARD* MAJORITY CONTRADICTED LONGSTANDING HUMAN RIGHTS PRINCIPLES

The *Ward* majority erroneously held that Jérémy's claim fails because, according to a Tribunal finding, Ward did not choose to target him because of his disability, but instead because he was a public figure. By that view, Jérémy lost without the majority needing to consider whether it would violate Ward's freedom of expression had Jérémy won. The majority held:

> In summary, we are of the view that Mr. Gabriel was made subject to a distinction by being targeted by Mr. Ward's comments. However, in light of the Tribunal's finding that Mr. Ward [TRANSLATION] "did not choose Jérémy because of his handicap" but rather "because he was a public personality" (Tribunal reasons, at para. 86), it must be concluded that the distinction was not based on a prohibited ground. This conclusion on its own is sufficient to dispose of the appeal.[21]

Yet Ward's blistering attacks overtly ridiculed Jérémy's disability. A person can be both a public figure, and have a disability. Jérémy being a public figure does not make his disability vanish, any more than it makes vilification about his disability transform into comments that have nothing to do with his disability.

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[18] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43, 2021 SCC 43 at paras. 59-60 (S.C.C.).

[19] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43, 2021 SCC 43 at paras. 48, 56-58 (S.C.C.).

[20] *Canada (Combines Investigation Acts, Director of Investigation and Research) v. Southam Inc*., [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145 at 156-157 (S.C.C.).

[21] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43, 2021 SCC 43 at para. 91 (S.C.C.).

One hypothetical reveals the deep flaw in the majority's approach. Imagine a speaker publicly unleashes a horrific anti-black racist tirade at Barack Obama, invoking the ugliest racial stereotypes. Would the *Ward* majority say that those racist statements have nothing to do with Obama's race, because he is a public figure?[22] This distorts beyond recognition the adage: "If you can't stand the heat, stay out of the kitchen." Neither the Charter nor the Quebec Charter make the "kitchen" an equality-free zone for racism or other unlawful discrimination against public figures.

The majority wrongly conflated the factual issue of *why* Ward chose to attack Jérémy on the one hand, and *what* Ward said about Jérémy on the other. Even if Ward chose Jérémy because he was a public figure, his impugned statements about Jérémy were made because of his disability, and were about his disability. There is no suggestion that Ward would have said what he said about Jérémy, if Jérémy had no disability. There similarly can be no suggestion that what Ward said was not about Jérémy's disability.

The majority's erroneous approach contradicts decades of human rights doctrine, without justifying or even acknowledging it. Long-standing case law makes discriminatory conduct actionable if it was driven by multiple reasons, only one of which is a prohibited ground of discrimination.[23] If an employer refuses to hire a job applicant both because of their race *and* because they lack a required job qualification, the employer is liable for racial discrimination. This is because among the employer's mixed reasons was a prohibited ground of discrimination. That job applicant cannot win an order requiring them to be hired if they are unqualified for the job. However, they can recover general damages for racial discrimination.[24]

What the majority focused upon was Ward's underlying motive. Repeatedly affirmed human rights principles hold that it is the impact of discriminatory conduct that is decisive, not the underlying intent or motive.[25]

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[22] President Obama was the target of racist speech during and after his time serving as U.S. President. In presenting this argument, I don't assume that the law has served effectively to vanquish racism, nor do I seek to measure the relative severity of racist speech on the one hand and speech that vilified Jérémy on the other.

[23] *Stewart v. Elk Valley Coal Corp*., [2017] S.C.J. No. 30, [2017] 1 S.C.R. 591 at paras. 24, 46 (S.C.C.); *Moore v. British Columbia (Education)*, [2012] S.C.J. No. 61, 2012 SCC 61 at para. 33 (S.C.C.); *L. (J.) (Litigation guardian of) v. Empower Simcoe*, [2021] O.H.R.T.D. No. 217, 2021 HRTO 222 at paras. 57-58, 61, 76-77 (Ont. H.R.T.).

[24] Cases which exemplify this include: *Abdolalipour v. Allied Chemical Canada Ltd.*, [1996] O.H.R.B.I.D. No. 31 at paras. 188, 205-206 (Ont. H.R.T.); *Hartling v. Timmins (City) Commissioners of Police* (1981), 2 CHRR D/487 (Ont. Bd. Inq.) at paras. 159-162; *Chidley v. Clowe's Ambulance Service*, [2010] N.L.H.R.B.I.D. No. 2 at paras. 68-73 (N.B. Human Rights Comm. Bd.).

[25] *Law Society British Columbia v. Andrews*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143 at para. 37 (S.C.C.); *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociau*x, [2018] S.C.J. No. 17, 2018 SCC 17 at paras.

IV. *WARD* MAJORITY SWAYED BY A DEFAMATION RED HERRING

A red herring tainting the majority's reasoning was its emphasis on the fact that Jérémy did not sue for defamation:

> "A discrimination claim is not, and must not become, an action in defamation. The two are governed by different considerations and have different purposes."[26]

This error was central to the majority's reasons, when it applied the law to the facts:

In light of its finding that Mr. Gabriel had been targeted by Mr. Ward's comments because of his fame and not because of his disability, the Tribunal had no choice but to conclude that the second element of discrimination had not been established. In disregarding its own finding of fact, the Tribunal overlooked the specific nature of the claim before it. It confined itself to the message and the harm, and it conducted its analysis as it would in an action for defamation, where the plaintiff is not required to prove either differential treatment or a connection to a prohibited ground of discrimination.[27]

The *Ward* majority sought to prevent the imaginary danger of human rights claims wrongfully becoming defamation claims. It erroneously acted as if there are two watertight compartments, defamation claims and discrimination claims. Never the twain shall overlap, lest there be untoward contamination or distraction from proper legal analysis. Yet, a public statement can be both civilly or criminally actionable as defamation, and also actionable under anti-discrimination legislation as unlawful discrimination. Whether it is the former is not dispositive or even important for assessing if it is the latter.

Much unlawful discrimination takes the form of pure speech. "We won't hire you because we want a man for this job." "This club doesn't admit Jews." This does not exempt it from being actionable under human rights legislation. Actionable sexual harassment in the workplace can take the form of pure speech, *e.g.*, a boss telling a subordinate that their future promotions depend on their receptiveness to sexual solicitations.

Actionable violations of human rights legislation can injure a victim's reputation. Long standing principles for human rights general damages assess losses that are inextricable from injury to one's reputation.[28] If an employer fired an employee because of their race, stating publicly that members of that race are inferior

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28, 32, 76 (S.C.C.); *Vriend v. Alberta*, [1998] S.C.J. No. 29 at para. 93, [1998] 1 S.C.R. 493 (S.C.C.).

[26] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43, 2021 SCC 43 at para. 30 (S.C.C.).

[27] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43, 2021 SCC 43 at para. 100 (S.C.C.).

[28] For example, *Attaran v. Assn. of Professors of the University of Ottawa*, [2021] O.H.R.T.D. No. 1025, 2021 HRTO 980 at paras. 92, 101 (Ont. H.R.T.); *Insang v. 2249191 (c.o.b. Innovative Content Solutions Inc.)*, [2017] O.H.R.T.D. No. 205, 2017 HRTO 208 at

employees, this obviously is employment discrimination. The injury to the fired employee's reputation exacerbates recoverable damages.

No legal principle excludes such injury to reputation from monetary compensation on the grounds that the complainant should instead have sued in defamation.

V. *WARD* MAJORITY WRONGLY ENTITLES A COMEDIAN'S COMEDY TO SPECIAL PROTECTION

The majority erroneously found that the bar is substantially higher when trying to prove that statements that are part of comedy or a comedian's performance constitute unlawful discrimination in connection with the right to dignity, holding:

> First, expression that attacks or ridicules people may inspire feelings of disdain or superiority in relation to them, but it generally does not encourage the denial of their humanity or their marginalization in the eyes of the majority . . . . It is true that ridicule, if pushed to the limit, could cross this line, but it will do so only in extreme and unusual circumstances.
>
> Second, humour, whether in good or in bad taste, rarely has [TRANSLATION] "the spillover effect needed to give rise to an attitude of hatred and discrimination among third parties" . . . . It involves well-known methods such as [TRANSLATION] "exaggeration, over-generalization, provocation and distortion of reality" . . . . The audience is able to identify these methods, when they are clear, and must be acknowledged to be discerning enough not to take everything said at face value . . . . This is all the more true where the expression comes from a person publicly known for their particular type of humour . . . or where it targets a public figure whose fame exposes them to such commentary . . . . Other than in exceptional cases, it would be surprising if expression in such circumstances had enough motivating force to lead to discriminatory treatment.
>
> These clarifications must not be interpreted as resulting in a form of impunity for comedians or as diminishing the protection given by the law to public figures. There is less of a risk that expression will lead to discrimination where it involves supposedly humorous comments that are made by a well-known comedian or that concern a person known to the public. And in the absence of a sufficiently serious risk, the claim must fail.[29]

This is unfounded and unprincipled judge-made psychology. It makes appellate factual findings (dressed up as legal principle) about a statement's impact on an audience, when it is framed as comedy as opposed to some other context. The *Ward* majority offered no expert evidence on patterns of human behaviour to support these findings.[30]

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paras. 50-53, 59, 61 (Ont. H.R.T.); *Devaney v. ZRV Holdings Ltd.*, [2012] O.H.R.T.D. No. 1571, 2012 HRTO 1590 at paras. 214-219 (Ont. H.R.T.).

[29] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43, 2021 SCC 43 at paras. 88-90 (S.C.C.) [citations omitted].

[30] Similarly questionable judge-made psychology is found in *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] S.C.J. No. 11, [2013] 1 S.C.R. 467 at paras. 87-95

I dispute those gross generalizations about human behaviour. Comical ridicule is among the most powerful modes of human persuasion. It is a potent weapon in my advocacy arsenal. As fans of Stephen Colbert, Seth Meyers, Samantha Bee or John Stewart late night television know, comedians have become influential political commentators, unleashing comical ridicule with searing effectiveness.

Many of those with disabilities know firsthand that school yard bullies' belittling ridicule of their victims for their disability can be devastating, and painfully memorable for many years. Any claim that a virulently racist, sexist, homophobic or ableist attack is less likely to lead others to dehumanize their target, if voiced as comical ridicule, is laughable.

VI. *WARD* MAJORITY WRONGLY TREATED PUBLIC FIGURES AS HAVING REDUCED PROTECTION FROM DISCRIMINATION ON GROUNDS LIKE THEIR DISABILITY

It is erroneous and painfully ironic that the *Ward* majority in effect treated public figures as having lesser protection from virulently disability-discriminatory attacks, than are enjoyed by more private individuals. This came to its most troubling light near the end of the majority opinion, when, applying the law to the facts, it held:

> In our view, the Tribunal erred when it continued its analysis by focusing on Mr. Ward's actual comments to determine whether they were related to Mr. Gabriel's disability, despite its finding that [TRANSLATION] "[Mr.] Ward's decision to make jokes about [Mr. Gabriel] was not in itself discriminatory" (para. 87 (emphasis added)).[31]

This creates a *per se* immunity for the most vicious racist, sexist, ableist or homophobic comments imaginable if targeted at a public figure, so long as the speaker chose to attack their target because they are a public figure.

The *Ward* majority in effect erroneously imported into Canadian human rights analysis a feature of U.S. defamation law, most notably established in *New York Times v. Sullivan*.[32] That case held that public figures are fair game for defamatory public statements, unless a plaintiff proves that they were uttered with actual malice, knowing the statements are false, or having reckless disregard to their probable falsity. If human rights principles must not be conflated with defamation cases, as the *Ward* majority asserted, it was contradictory for it to in effect import that aspect of U.S. defamation law into Canadian anti-discrimination law. Amplifying the

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(S.C.C.), holding that ridicule based on a ground protected by a human rights code is only constitutionally actionable where it produces hatred. Hatred is not the only devastating and dehumanizing consequence that severe ridicule of one's disability can produce, as this case exemplifies. Of course, the *Ward* Court was not asked to rule on the constitutionality of the Quebec Charter, as is further addressed below.

[31] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43 at para. 98, 2021 SCC 43 (S.C.C.).

[32] *New York Times v. Sullivan*, 376 U.S. 254 (1964), No. 39, (U.S.S.C.).

cruelty of this irony, the Supreme Court has repeatedly rejected efforts to have *New York Times v. Sullivan* imported into Canada's actual defamation law.[33]

There are additional major flaws with creating any reduced protection here for so-called public figures. The *Ward* majority's all-or-nothing approach to public figures, if ever justified, is dramatically overbroad.

Here, the public figure was a child, and later a youth. Even if a public figure exemption or reduction in protection would be justified for adults who choose to enter the public arena, the same is not justified for a child or teenager. Similarly, this cannot be justified for those who involuntarily become public figures, *e.g*., a private person who is publicized because they were the victim of a notorious crime. In both instances, the target did not freely assume the risk of this exposure through their own voluntary adult judgment.

VII. EQUALITY IS NOT ABOUT DRAWING DISTINCTIONS

Ward is the latest in a long line of Supreme Court cases that assesses whether a person's equality rights were violated and whether they were subject to discrimination, by asking if a distinction was drawn against them on protected grounds such as disability.[34] This erroneous "drawing distinctions" formulation has for years misdirected the equality/discrimination analysis.

People with disabilities do not experience discrimination as a government or private actor "drawing a distinction" against them. When the Toronto Transit Commission refused to reliably announce each bus or subway stop for the benefit of blind passengers like me, we did not decry: "TTC drew a distinction against me."[35] This is instead experienced as a denial of a right or opportunity, as subjection to a burden, or as encountering a barrier to full participation and full benefit.

I am not being picky about wording. From a student's first week in law school, they learn about distinguishing cases, as they struggle to understand *stare decisis*.

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[33] See *Hill v. Church of Scientology of Toronto*, [1995] S.C.J. No. 64, [1995] 2 S.C.R. 1130 at para. 137 (S.C.C.); *Grant v. Torstar Corp*., [2009] S.C.J. No. 61 at paras. 45-46, 2009 SCC 61 (S.C.C.).

[34] See *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43, 2021 SCC 43 at paras. 92-102 (S.C.C.); *M. v. H*., [1999] S.C.J. No. 23, [1999] 2 S.C.R. 3 at paras. 48, 53, 62 (S.C.C.); *Egan v. Canada*, [1995] S.C.J. No. 43, [1995] 2 S.C.R. 513 at paras. 8-9 (S.C.C.); *Miron v. Trudel*, [1995] S.C.J. No. 44, [1995] 2 S.C.R. 418 at paras. 12-14 (S.C.C.); *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 at paras. 26-28, 39 (S.C.C.); *Law Society British Columbia v. Andrews*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143 at paras. 16, 19, 28, 30 (S.C.C.); *R. v. Turpin*, [1989] S.C.J. No. 47, [1989] 1 S.C.R. 1296 at paras. 49-50, 55 (S.C.C.).

[35] *Lepofsky v. Toronto Transit Commission*, [2005] O.H.R.T.D. No. 36, 2005 HRTO 36 (Ont. H.R.T.); *Lepofsky v. Toronto Transit Commission*, [2007] O.H.R.T.D. No. 23, 2007 HRTO 23 (Ont. H.R.T.).

The drawing of distinctions is not what equality in Charter section 15 or its Quebec Charter counterpart are about.

VIII. *WARD* MAJORITY INVOKED A TROUBLING CONCLUSORY APPROACH TO DISCRIMINATION

The *Ward* majority expressed a fundamental concern that:

> "A discrimination claim must be limited to expression whose effects are truly discriminatory."[36]

Two problems arise. First, what is not "truly discriminatory" about what Ward said to mock Jérémy's disability? Second, what makes a statement or action "truly discriminatory"?

Ward is just the latest Supreme Court decision to espouse core rights-based doctrine in unhelpful circular maxims. How does a Human Rights Tribunal or court decide whether an action is "truly discriminatory" instead of something less than "truly discriminatory"?

This is no more helpful than Lamer J., in the landmark case of *Reference re Motor Vehicle Act (British Columbia) s 94(2)*, holding that Charter section 7's principles of fundamental justice are violated if a person is convicted of an offence "who has not really done anything wrong."[37] It is reminiscent of case law holding that Charter section 7 principles of fundamental justice are violated if a law provides for the conviction of the "morally innocent."[38] "Truly discriminatory," "really wrong" and "morally innocent," are useless criteria. Without more, they fail to fulfil the duty to give reasons, while purporting to fulfil it.

IX. *WARD* MAJORITY ASSESSED THE RIGHT TO DIGNITY, DIVORCED FROM THE PIVOTAL FEATURE OF EQUALITY FOR PEOPLE WITH DISABILITIES

Relying and expanding on earlier problematic case law, the majority took an erroneous approach to the Quebec Charter's guarantee of equality in connection with the right to dignity. It in effect failed to treat this as an equality claim.[39]

Drawing on earlier case law, the majority explored the question of whether the

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[36] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43 at para. 30, 2021 SCC 43 (S.C.C.).

[37] *Reference re Motor Vehicle Act (British Columbia)* s. 94(2), [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 at para. 1 (S.C.C.).

[38] For instance, see *R. v. Hess; R. v. Nguyen*, [1990] S.C.J. No. 91, [1990] 2 S.C.R. 906 at paras. 8-10, 69 (S.C.C.); *R. v. Maybin*, [2012] S.C.J. No. 24, [2012] 2 S.C.R. 30 at para. 16 (S.C.C.); *R. v. Bernard*, [1988] S.C.J. No. 96, [1988] 2 S.C.R. 833 at paras. 78, 94 (S.C.C.).

[39] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43, 2021 SCC 43 at paras. 48-51 (S.C.C.).

Quebec Charter creates a free-standing or independent right to equality *per se*.[40] It concluded instead:

> Unlike the *Canadian Charter of Rights and Freedoms* ("*Canadian Charter*"), the *Quebec Charter* does not protect equality per se. The right to equality set out in s. 10 is protected only in the recognition and exercise of the other rights and freedoms guaranteed by the *Quebec Charter* . . . . In this sense, s. 10 does not establish an independent right to equality but rather strengthens the protection of those other rights and freedoms . . ..[41]

This artificial debate is entirely divorced from legal and practical reality. No right to equality in any law is free-standing or a *per se* right. It is a right in relation to some activity. Section 15 of the Charter guarantees equality in relation to the protection and benefit of the law.[42] Human Rights statutes guarantee equality in relation to employment, accommodations, services, facilities, *etc*. The Quebec Charter guarantees equality in relation to the rights in it, such as the right to dignity. Dignity is very broad, much broader than employment. However, the protection and benefit of the law, in relation to which the Canadian Charter of Rights guarantees equality, is also very broad.

The *Ward* majority made this analytical chaos worse, when it erroneously distanced the dignity analysis from its disability equality context, concluding:

> ". . . the conflict is not between the right to equality and freedom of expression, but rather between the complainant's right to the safeguard of his dignity and the defendant's right to freedom of expression."[43]

This was made even more confusing after the majority later went on to recognize the core anti-discrimination purpose of the right to dignity in section 10 of the Quebec Charter:

> "The purpose of s. 10 is to eliminate discrimination in the recognition and exercise of human rights and freedoms."[44]

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[40] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43, 2021 SCC 43 at paras. 35, 40 (S.C.C.). The majority drew on the earlier cases of *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, [2015] S.C.J. No. 39, [2015] 2 S.C.R. 789 at para. 54 (S.C.C.); *Devine v. Québec (Attorney General)*, [1988] S.C.J. No. 89, [1988] 2 S.C.R. 790 at para. 30 (S.C.C.).

[41] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43, 2021 SCC 43 at para. 35 (S.C.C.) [citations omitted].

[42] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11, s. 15.

[43] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43, 2021 SCC 43 at para. 43 (S.C.C.).

[44] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43, 2021 SCC 43 at para. 84 (S.C.C.).

The essence of Ward's violation of Jérémy's dignity was vilification and humiliation because of his disability, which violates his equality rights. Had the *Ward* majority instead spoken throughout about balancing equality as it relates to the right to dignity on the one hand, and the freedom of expression on the other, its task could have been less daunting and more focused on the case's reality.

The majority went further awry. It contended that what the respondent sought and what the Human Rights Tribunal did went beyond the Legislature's intent, by asserting a right to equality *per se*, comparable to Charter section 15.[45] Yet the majority's objection rests on the distinction without a difference, disproven above, that there is a difference between a right to equality *per se*, and a right to equality with respect to the right to dignity.[46]

The *Ward* majority conceded that a violation of equality more or less always violates one's dignity.[47] That is strong proof that this is exactly what the legislature intended. It also proves that this is a very broad provision (one of which the *Ward* majority evidently disapproves).

The majority's purely abstract, decontextualized exposition of the right to dignity, is the antithesis of the highly-grounded contextual approach to the analysis of fundamental rights in the Charter that the Supreme Court mandated over three decades ago.[48] This deficiency contradicts the *Ward* majority later holding, when discussing an element of the Tribunal's reasons it impugned, that ". . . the courts must adopt an approach that takes the context into account."[49]

X. WARD MAJORITY ABSTRACTS AND FURTHER DISTORTED THE RIGHT TO DIGNITY

After wrongly leaving disability equality out of its analysis of the right to dignity,

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[45] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43, 2021 SCC 43 at paras. 52-54 (S.C.C.).

[46] The Supreme Court of Canada has identified a close nexus between equality and dignity, see, for example, *Miron v. Trudel*, [1995] S.C.J. No. 44, [1995] 2 S.C.R. 418 at paras. 51, 67, and 76 (S.C.C.); *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 at paras. 47-52, 70, 72 (S.C.C.).

[47] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43, 2021 SCC 43 at para. 53 (S.C.C.).

[48] *Edmonton Journal v. Alberta (Attorney General)*, [1989] S.C.J. No. 124, [1989] 2 S.C.R. 1326 at paras. 51-52 (S.C.C.), *per* Wilson J.; *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 at paras. 40, 46, 83 (S.C.C.), *per* Dickson C.J.C.; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] S.C.J. No. 65, [1990] 2 S.C.R. 232 at paras. 15, 28 (S.C.C.); *Committee for the Commonwealth of Canada v. Canada*, [1991] S.C.J. No. 3, [1991] 1 S.C.R. 139 at para. 120 (S.C.C.), *per* L'Heureux-Dubé J.; *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020] S.C.J. No. 32, 2020 SCC 32 at para. 7 (S.C.C.).

[49] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43, 2021 SCC 43 at para. 99 (S.C.C.).

the majority reached a series of additional problematic conclusions regarding the right to dignity.

The *Ward* majority ruled that to violate one's right to dignity:

> ". . . conduct must reach a high level of gravity that does not trivialize this very meaningful concept."[50]

This strongly implies that Jérémy's claim trivializes the right to dignity. The majority's implication itself trivializes the life experience of people with disabilities, and the crushing injury that such public vilification causes to a child or youth with a disability. The aftermath of Ward's attack not only injured Jérémy's social life and academics, but also his sense of purpose and ability to enjoy life.[51]

By using an objective test for a dignity infringement, the majority wrenched Jérémy's highly-individualized right to dignity from him, holding:

> "Such conduct cannot be assessed in a purely subjective manner. An objective analysis is required, because dignity [TRANSLATION] "is aimed at protecting not a particular person or even a class of persons, but humanity in general" (Fabre-Magnan, at p. 21)."[52]

This transforms violations of dignity into the judge's assessment of what society determines that dignity is. It creates the legal fiction of a reasonable person's assessment of dignity. Yet there is no justiciable "reasonable person's dignity standard" or yardstick.

The majority's approach gives judges an unbridled plenary policy discretion. The "reasonable person" standard deployed here is not the traditional tort negligence measure of a commonly accepted business or medical professional's practice. It is simply a judge or group of judges deciding that they, as self-declared reasonable people, have decided that it is so.

If the right to dignity is as open-ended and amorphous as the *Ward* majority feared, there is no reason to believe that a judge or panel of judges will be any more principled in applying it. It disguises judicial subjectivity as legal objectivity.

> Another confounding distinction without a difference is found in the majority's holding: "What s. 4 confers is not a right to dignity but, more precisely, a right to the safeguard of dignity."[53]

When one views fundamental rights through the lens of the impact on the rights

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[50] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43, 2021 SCC 43 at para. 57 (S.C.C.).

[51] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43, 2021 SCC 43 at paras. 117, 125, 177 (S.C.C.).

[52] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43, 2021 SCC 43 at para. 57 (S.C.C.).

[53] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43, 2021 SCC 43 at para. 58 (S.C.C.).

holder, which is central to the Charter case law,[54] then this distinction makes no difference. Either one's dignity was violated, or it was not. One cannot readily imagine Jérémy saying: "Ward's conduct took away my dignity, but not in a way where my dignity was not safeguarded."

The majority ultimately adopted a high community standard for assessing what constitutes a dignity violation:

> Where a person is stripped of their humanity by being subjected to treatment that debases, subjugates, objectifies, humiliates or degrades them, there is no question that their dignity is violated. In this sense, the right to the safeguard of dignity is a shield against this type of interference that does no less than outrage the conscience of society.[55]

This community standard flies in the face of the majority's own reasoning. It had found that the right to dignity traces its origins to the horrors of World War II.[56] Yet, in Nazi Germany, many of the horrors inflicted on the Jews were committed in public, with public support, and did not shock the community. By the *Ward* majority's approach, that raging anti-Semitic oppression would not then have violated the right to dignity of Jewish individuals. Other egregious dignity violations were met with sweeping public support at the time, such as decades of institutionalized anti-Black racism leading to the U.S. civil rights movement, and opposition to same sex marriage.

There is a double standard in the majority's approach. When it comes to the right to dignity, there must be a degree of community consensus before a dignity violation may be found, one which will "outrage the conscience of society . . . ."[57] In contrast, freedom of expression guarantees the expression of all opinions, not just those which muster community consensus. I fully agree with the latter. However, a double-standard, one which does not require an objective standard for freedom of expression but which does for the right to dignity, clearly skews the scales in any balancing.

XI. *WARD* MAJORITY TAKES PROBLEMATIC APPROACH TO HIERARCHIES OF RIGHTS

The *Ward* case faced a recurring issue: is there any rank ordering or hierarchy

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[54] See *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] S.C.J. No. 41, [1991] 2 S.C.R. 22 at para. 43 (S.C.C.); *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519 at paras. 46-47 (S.C.C.); *R. v. Seaboyer; R. v. Gayme*, [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577 at para. 20 (S.C.C.).

[55] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43, 2021 SCC 43 at para. 58 (S.C.C.).

[56] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43, 2021 SCC 43 at para. 57 (S.C.C.).

[57] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43, 2021 SCC 43 at para. 58 (S.C.C.).

among basic human rights and fundamental freedoms, such as those guaranteed in the Charter or the Quebec Charter? The Supreme Court's oft-cited principle, enunciated in *Dagenais v. Canadian Broadcasting Corp.*,[58] is that there is no hierarchy among Charter rights:

> A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the Charter and when developing the common law. When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, Charter principles require a balance to be achieved that fully respects the importance of both sets of rights.[59]

Although the *Ward* majority did not cite *Dagenais*, it enunciated a similar approach, holding:

> The Quebec Charter does not establish any hierarchy between the right to the safeguard of dignity, guaranteed by s. 4, and the freedom of expression protected by s. 3. When these rights are in conflict, the proper approach is to interpret them so that both are exercised with "a proper regard for democratic values, public order and the general well-being of the citizens of Quebec" (*Ford*, at p. 770).[60]

These sentiments are laudable. However, they mask what *Dagenais* and the *Ward* majority did.

Dagenais reviewed the constitutionality of a publication ban on the broadcasting of a docu-drama about child sex abuse in a church-run residential school, to protect the fair trial rights of a person charged with child abuse. It rejected a common law rule that automatically gave priority to fair trial rights over freedom of expression. However, it replaced that common law rule with a new hierarchical approach. In it, freedom of expression is presumed to prevail. Fair trial rights only win out if proven to warrant this, but are presumed not to prevail.[61]

Dagenais replaced an old hierarchy with a new hierarchy, despite the Supreme Court claiming to reject any hierarchy at all. The danger in such an approach is that it leaves the Court feeling as if it is taking a non-hierarchical approach to rights, while violating that very principle.

In the Court's defence, it can be argued that this is the way Charter analysis is structured. If a publication ban is shown to violate the freedom of expression in Charter section 2(b), then the limit on that constitutional right must be justified under Charter section 1. At least in the cases of challenges to legislation and action

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[58] *Dagenais v. Canadian Broadcasting Corp.*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835 (S.C.C.) [hereinafter "*Dagenais*"].

[59] *Dagenais v. Canadian Broadcasting Corp.*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835 at para. 72 (S.C.C.).

[60] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43, 2021 SCC 43 at para. 46 (S.C.C.).

[61] *Dagenais v. Canadian Broadcasting Corp.*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835 (S.C.C.).

that public officials take under legislation, the presumption under section 1 is that the limit on Charter rights is not reasonable.

Ward again exemplifies a clash between what the Court says, and what it does, when it comes to potentially conflicting rights. The *Ward* majority clearly gives precedence to Ward's freedom of expression over Jérémy's freedom from disability discrimination. It did so while claiming to eschew a hierarchical approach to rights.

When juxtaposing *Ward* with other Supreme Court cases that address clashes between freedom of expression and equality, the picture becomes even more troubling. Two important lines of Supreme Court authority consider circumstances where Charter section 2(b) collided with equality rights during Charter section 1 analysis. In both situations, equality rights prevailed, unlike in *Ward*.

First, in the Court's hate propaganda cases starting with *R. v. Keegstra*, the Court decided that when there is such a clash, the equality rights of racialized and religious minorities prevail. That is so even without a burden to prove that a speaker's impugned speech actually caused the individualized harm alleged.[62]

Second, in the Court's pornography cases, starting with *R. v. Butler*, the Court gave substantial priority to gender-based equality over freedom of expression, while diluting the section 1 rational connection requirement to a virtual triviality, without evidence to prove the harm asserted.[63]

Ward is the first case in which the Supreme Court considers a clash between freedom of expression and disability-based equality rights. In *Ward*, the harm to Jérémy was clearly demonstrated. Nevertheless, the *Ward* majority gave freedom of expression a decisive priority over disability equality. Racial, religious and sex equality won when they clashed with freedom of expression, even absent proof that the impugned speech caused the harm alleged. Disability equality on the other hand, lost decisively.

Viewing Canadian legal history through a disability lens, the majority's approach to this hierarchy of rights falls squarely within a disturbing pattern in which equality for people with disabilities has too often gotten short shrift. Equality for people with disabilities has repeatedly been left out of, or downgraded in priority, in a number of major Canadian efforts at promoting and ensuring equality in Canada. Here are some examples:

When the Charter was first introduced into Parliament for debate in October 1980,

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[62] *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 at paras. 80, 114 (S.C.C.); *Canada (Human Rights Commission) v. Taylor*, [1990] S.C.J. No. 129, [1990] 3 S.C.R. 892 at paras. 36, 45, 60 (S.C.C); *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] S.C.J. No. 11, [2013] 1 S.C.R. 467 at paras. 47-48, 128-135, 151 (S.C.C.).

[63] *R. v. Butler*, [1992] S.C.J. No. 15, [1992] 1 S.C.R. 452 at paras. 88, 103-108 (S.C.C.); *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] S.C.J. No. 66, [2000] 2 S.C.R. 1120 at paras. 58, 67-68, 148, 152 (S.C.C.); *R. v. Sharpe*, [2001] S.C.J. No. 3, [2001] 1 S.C.R. 45 at paras. 85, 88-89, 94 (S.C.C.).

disability was entirely left out of section 15 equality rights as a prohibited ground of discrimination.[64] It took grassroots advocacy, of which I was a part, to get disability added to section 15 during those debates.[65] The constitutional right to equality for people with a physical or mental disability was the only right eventually added to the Charter during the 1980-82 constitutional patriation debates.

During 1980 Parliamentary hearings on the proposed Charter, while people with disabilities were campaigning to get disability equality added to section 15, they confronted one community advocacy effort that sought the entrenchment of a hierarchy of rights in section 15. In this hierarchy, disability equality would only receive reduced protection. The National Organization of Women and the Law urged Parliament to include disability in section 15, but with a lower level of judicial scrutiny than would apply to grounds such as discrimination based on sex.[66]

Parliament did not accede to that specific request, but in another way, it did adopt a hierarchical approach to equality in the Charter. Under it, all claims of discrimination under section 15 can be overridden by a Charter section 33 legislative override, with one exception. Charter section 28 was meant to preclude a Charter section 33 "notwithstanding clause" from exempting legislation from a section 15 claim of sex discrimination.

When the innovation of employment equity emerged in the 1980s, some organizations did not include people with disabilities as a target group. They aimed their employment equity programs only at women, or at women and racialized persons. Some others included disability in their employment equity as a target group on paper, but primarily focused their efforts on women and racialized persons. In the case of the Ontario Public Service, where the latter occurred, a result was that people with disabilities and Indigenous persons actually lost ground in that workplace, an issue on which I was directly involved in advocacy efforts.

In the Supreme Court's earliest disability case under section 15 of the Charter, *Eaton v. Brant County Board of Education*,[67] the Court overturned the most principled and effective deployment of section 15 to protect people with disabilities

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[64] See the 1980 proposed *Canadian Charter of Rights and Freedoms*, Part I of *The Canadian Constitution 1980: Proposed Resolution respecting the Constitution of Canada*, 1980, s. 15(1).

[65] See David Lepofsky's online lecture, "Fight to Amend Canadian Charter of Rights to Protect Disability Equality", Osgoode Hall Law School (January 22, 2014), online: http://www.youtube.com/watch?v=XrYzAAKXOrc&list=PLDGgB77j2ZYrl_rtpe32nSjOXfrDAGvnn&feature=share&index=1.

[66] Canada, Parliament, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 32nd Parl., 1st Sess., No. 9 (November 20, 1980) at 127-129, 146-147, 151.

[67] *Eaton v. Brant County Board of Education*, [1996] S.C.J. No. 98, [1997] 1 S.C.R. 241 (S.C.C.).

by any court in Canada, in the first decade that section 15 was in force. It did so through deeply deficient reasons that sought to differentiate in an erroneous and counterproductive way, between discrimination based on disability on the one hand, and certain other grounds of discrimination, such as race, on the other.[68] Fortunately, the damage to disability equality caused in that case has been superseded by the subsequent Court decision in *Eldridge v. British Columbia*.[69]

More recently, there is now a very commendable drive in Canada in the public and private sectors to give unprecedented emphasis to equity, diversity and inclusion ("EDI") initiatives in activities such as employment, education and public services. It is a positive development that these strategies aim at eliminating hierarchies.

Despite this, a major trend in EDI strategies is to focus predominantly, if not exclusively, on issues concerning racialized persons and Indigenous People. Those are much-needed efforts that must be continued and expanded. However, in the process, disability is either left out, or only given lip service. Here again, the result is not the elimination of harmful hierarchies, but is instead the replacement of an old hierarchy with a new one — one in which people with disabilities end up languishing at or near the bottom. Equity for some is equity for none, just as equality for some results in equality for none.

XII. CONCLUSION: *WARD* MAJORITY APPEARS TO HAVE A QUESTIONABLE BROADER AGENDA

It is difficult to imagine what more Ward would have had to say, and how much more Jérémy would have had to suffer, before the *Ward* majority would find for him. If nothing could have tipped the balance, then the majority's articulation of a test belies what it was really holding.

According to a well-established approach to legal advocacy, when one's case is weak on the facts, try to minimize any discussion of them, and keep them as general and abstract as possible. Keep the discussion of legal principles as lofty and amorphous as possible. The *Ward* majority's reasons exemplify this.

Unlike the dissent, the *Ward* majority says very little about the facts of what Ward said about Jérémy, and its devastating impact on Jérémy, including being driven to experience suicidal thoughts. Readers must largely turn to the dissent to discover these facts.[70]

The majority emphasizes legal principles that are as remote as possible from the actual experience of Jérémy, a child with a disability. Ward's conduct is assessed on

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[68] *Eaton v. Brant County Board of Education*, [1996] S.C.J. No. 98, [1997] 1 S.C.R. 241 at para. 69 (S.C.C.).

[69] *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624 (S.C.C.).

[70] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43, 2021 SCC 43 at paras. 117-177 (S.C.C.).

a purely objective standard of how a reasonable person would react to them, not on how his victim actually experienced them. Ward's subjective reasons for his conduct are dispositive. His conduct's actual impact on Jérémy is hardly if at all relevant.

The right to dignity is defined in a purely objective way, stripped of the core disability equality rights component that lies at the core of Jérémy's claim. It is difficult to see how much further this could be wrenched from the dignity and worth of Jérémy as a young human being with a disability.

Were the majority correct that Jérémy's case is fatally flawed simply because Ward chose to target him because he was a public figure, then it could and should have disposed of this entire appeal in a few short narrowly focused paragraphs. Instead, the majority ventured far beyond, into such troubling territory, and with such damaging impact. For the majority to have instead restrained itself would have been more appropriate, out of a respect for principles of judicial restraint. The fact that it did not do so points in the direction of the *Ward* majority having a bigger agenda.

The majority opinion makes it evident that its signatories felt a powerful need to rein in the reach of the Quebec Charter section 4's right to dignity. They used this case as their vehicle to do so. Right near the majority opinion's beginning, it stated:

> It is important to begin by noting that this question draws attention to a trend by the Commission and the Tribunal, in their decisions, to interpret their home statute, the Quebec Charter, as giving them jurisdiction over cases involving allegedly "discriminatory" comments made by individuals, either in private or in public. With respect, we are of the view that this trend deviates from this Court's jurisprudence and reflects a misinterpretation of the provisions at issue in this case, particularly ss. 4 and 10 of the Quebec Charter, which guarantee, respectively, the right to the safeguard of dignity and the equal recognition and exercise of human rights and freedoms, including in a context where expression is allegedly "discriminatory". It leads to the suppression of expression whose content is perceived to be discriminatory and to significant monetary awards against the speakers.
>
> It must be recognized at the outset that the Quebec Charter, which elevates freedom of expression to a fundamental freedom, was not enacted to encourage censorship. It follows that expression in the nature of rude remarks made by individuals does not in itself constitute discrimination under that statute. But this does not mean that the Quebec Charter can never apply to expression of this kind in very specific circumstances. In this appeal, we therefore wish to clarify the legal framework that applies to a discrimination claim in a context involving freedom of expression.[71]

As noted earlier, the Quebec Charter's right to dignity is exceedingly broad. In contrast, other provincial human rights codes focus on discrete areas of human activity, such as employment, residential accommodations and goods, services and facilities. However, Quebec's Legislative Assembly decided to confer this very

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[71] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021] S.C.J. No. 43 at paras. 4-5, 2021 SCC 43 (S.C.C.).

broad statutory right to dignity upon the public. A judge might not agree with the wisdom of that legislation. It does not follow that it is either their duty or their right to rein it in, while presenting this as an exercise in statutory interpretation.

The *Ward* majority expressed serious concerns about the fact that it is difficult to interpret the Quebec Charter's open-ended right to dignity. While it is true that this right poses obvious interpretive challenges, it was wrong for the majority to be so selective in its concerns. Many fundamental rights are similarly vague and potentially sweeping, such as the freedom of conscience and religion in Charter section 2(a) or the principles of fundamental justice in Charter section 7. The Charter's guarantee of freedom of expression in Charter section 2(b) is itself quite open-ended. The Supreme Court has taken that broad right, and made it substantially more broad and vague by the amorphous *Irwin Toy* test that it has maintained for that right for over three decades.

If the *Ward* majority wanted to support its conclusion as a matter of statutory interpretation, it needed to offer much more than it did. It reached a raw, unfettered judicial policy decision pure and simple, that what the Quebec Legislature enacted is simply too broad. If the majority had felt it was overbroad, it should have said so, and invited a constitutional challenge so that it could consider striking it down under the Charter. Rather, it erroneously called its complaint about the Quebec Human Rights Tribunal's decision under appeal as a failure to live up to the Legislature's intention.

Just as it was wrong for Ward to choose young Jérémy as his target, it was wrong for the *Ward* majority to choose Jérémy and his case to advance their larger judicial agenda.