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CASE COMMENTARY

Human Dignity and Economic Integrity for Persons with Disabilities: A Commentary on the Supreme Court’s Decisions in Granovsky and Martin

ENA CHADHA* AND LAURA SCHATZ**

RéSUMÉ
Dans cet article, les auteurs examinent, à travers une loupe du modèle d’invalidité économique, deux récentes décisions prononcées par la Cour suprême du Canada relatives à la section 15 de la Charte. Les auteurs soutiennent que le modèle d’invalidité économique est fondé sur un stéréotype qui présente dépendance, charité et pauvreté comme des normes des personnes handicapées. Conséquemment, ce modèle contribue à perpétuer les inégalités économiques qui pèsent sur les personnes handicapées. Il est malheureux que ces stéréotypes négatifs continuent à exercer une influence sur la jurisprudence de la Charte. Les auteurs commencent par expliquer comment le modèle économique est un concept théorique d’invalidité; puis, ils donnent un aperçu de comment la méthodologie de la section 15 utilisée dans le cas Law – tout spécialement l’«analyse essentielle de la dignité humaine» – contribue à perpétuer le modèle économique. Les auteurs analysent ensuite l’application et l’impact du cas Law dans deux causes importantes de discrimination fondée sur l’invalidité: Martin et Granovsky. Bien que, d’une part, Granovsky présente une interprétation évolutive de l’invalidité et que de l’autre, Martin contribue à faire avancer les droits des personnes handicapées garanties sous la Charte, les auteurs sont d’avis que les deux causes sont des exemples typiques de comment le test de la «dignité humaine essentielle» contient en soi un entendement économique de l’invalidité et, partant, perpétue l’inégalité économique des personnes handicapées. Les auteurs tirent la conclusion qu’il reste encore beaucoup à faire pour que l’intégrité économique des personnes handicapées soit reconnue comme un élément de la dignité humaine et du droit à l’égalité. L’article appelle à une meilleure compréhension des inégalités économiques insidieuses que vivent les personnes handicapées.

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INTRODUCTION

Over 20 years ago, disability activists vigorously advocated for the inclusion of mental and physical disability as protected grounds of discrimination in section 15 of the Canadian Charter of Rights and Freedoms. They believed that, by constitutionally guaranteeing a right to equality for persons with disabilities, the Charter could be used to radically and positively transform Canadian society for persons with disabilities.

Now, more than 20 years later, disability advocates have reason to question these early assumptions about the effectiveness of Charter challenges in disability cases because of the intensifying hold of the “essential human dignity” test in equality rights jurisprudence.

In 1999, the Supreme Court of Canada rendered an important decision on the interpretation of the equality rights guarantee in section 15(1) of the Charter. In Law v. Canada (Minister of Employment and Immigration), the Supreme Court unanimously adopted a three-pronged test for determining whether the section 15(1) right to equality has been infringed. Integral to this test is an evaluation of whether the alleged discriminatory treatment was detrimental to the claimant’s “essential human dignity”. The following year, the Supreme Court applied this new Law test in a disability case: Granovsky v. Canada (Minister of Employment and Immigration).

Regrettably, in Granovsky, the Supreme Court arrived at a restrictive interpretation of “essential human dignity” with respect to persons with disabilities, which hinged, in part, on an “economic model” of understanding disability. While there was hope that an expansive and more progressive interpretation of human dignity for persons with disabilities would be offered in the recently decided Martin case, that judgment reveals that the Supreme Court remains under the influence of the “essential human dignity” paradigm. Although the final outcome of the Martin decision was favourable


3. Section 15(1) of the Charter provides as follows: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on ... mental or physical disability.”


for persons with disabilities, few real changes were made to the "essential human dignity" analysis and its reliance on an economic understanding of disability.

Given that the Supreme Court of Canada continues to endorse a circumscribed view of human dignity for persons with disabilities, advocates are left to question the utility of pursuing Charter challenges in disability cases. This paper begins by explaining the "economic model" as a theoretical conception of disability. The paper then outlines the section 15 methodology advanced in the Law decision and examines how the new "essential human dignity" criterion is used by the Supreme Court in assessing whether discrimination has occurred. The paper goes on to analyze the application and impact of the Law framework, in particular the problematic "essential human dignity" analysis, in two important disability discrimination cases: Granovsky and Martin. The paper argues that the Granovsky and Martin decisions are clear examples of how the "essential human dignity" test, as reflected in this current Charter jurisprudence, embodies an economic understanding of disability and hence perpetuates the economic inequality of persons with disabilities. The paper urges that greater attention must be accorded to protecting the economic integrity of persons with disabilities in equality rights litigation.

MODELS OF DISABILITY

The emergence of the disability rights movement in the latter half of the twentieth century generated significant discussion about the various ways in which disability and disablement have been conceptualized and understood throughout history. Contributing to this critical disability scholarship in Canada is the work of leading disability theorist Jerome E. Bickenbach. In his authoritative text Physical Disability and Social Policy, Bickenbach identified three perspectives of disability that operate in, and can be used to analyze, Canadian social policy: biomedical, economic, and socio-political.7

While complex and interrelated, these three theoretical frameworks of disability are largely explained and understood by their labels. The biomedical model of disability is premised on the historical and outdated view that a disability is a physiological or psychological deficiency or dysfunction that must be cured. Similarly, in the economic model of disability (described below), the disabled are not only viewed as abnormal because they live with an impairment, but their value is further discounted because they are perceived as incapable of contributing to the labour market and pose a financial burden on society. In contrast, the socio-political model, considered to be the more progressive and human-rights positive theory, examines disability through the social, political, physical, and cultural arrangements created by society that give rise to barriers. The socio-political model shifts the focus of the problem from the

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individual's impairment and, instead, posits that the true disadvantage is the deeply entrenched systemic discrimination that exists in society.

Operating in tandem, the biomedical and economic models of disablement view persons with disabilities as defective, look to medical treatments for solutions, underestimate the ability of persons with disabilities to participate in the labour market while inflating the costs of disability-related accommodation, and tend to have a “charity or needs-based normative”.

Alternatively, the socio-political model seeks to challenge the discriminatory systems and structures present in the surrounding social and political environment. Unfortunately, as will be argued in this paper, recent equality-rights jurisprudence in Canada continues to be rooted in the prejudicial economic notions of disability.

**Economic Model of Disability**

The economic construction of disability has been explained most cogently in the works of Michael Oliver, a prominent disability-rights scholar from Britain. In this model, disability is framed as a product of liberal economic ideology, which normalizes wealth maximization and individualism.

Oliver holds that the oppression experienced by persons with disabilities is rooted in the economic and social structures of capitalism. The focus for this model is on the individual's repertoire of productive skills and capacities to collect capital through an economic process. Oliver contends that the systemic exclusion of persons with disabilities from the mainstream world of work is caused by their identity as “non-productive” members, an underclass of society that is marginalized, isolated, and devalued as a liability on the state and taxpayers.

Adopting Oliver's thesis, this paper argues that Canadian society espouses an economic concept of personhood, which is premised on the importance of maximizing

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9. Michael Oliver, *The Politics of Disablement: A Sociological Approach* (New York: St. Martin’s Press, 1990). Oliver explains that “[t]he economy, through both the operation of the labour market and the social organisation of work, plays a key role in producing the category of disability and in determining societal responses to disabled people.” Along with Oliver and Bickenbach, other authors have commented on the powerful influence of the economic model of disability. See, for example, Marta Russell and Ravi Malhotra, who “take the view that disability is a socially-created category derived from labour relations, a product of the exploitative economic structure of capitalist society: one which creates (and then oppresses) the so-called ‘dis-abled’ body as one of the conditions that allow the capitalist class to accumulate wealth.” “The Political Economy of Disablement: Advances and Contradictions” in Leo Panitch & Colin Leys, eds., 2002: *A World of Contradictions*, online: <http://www.yorku.ca/socreg/RusMal.htm>.

10. In this article, the expression “liberal economic theory” is used to refer to an ideology espousing diminished state regulation, *laissez-faire* capitalism, accelerated industrialism, and competition. Facilitating the autonomy of private actors and maximizing labour and capital are considered dominant goals in this ideology.

capital and insists on a robust level of participation in the labour market. Our identity is defined by our role in the economy, which values production and wealth, and in so doing creates the social category of disabled persons in response to economic and social forces of capitalism. The liberal economic perspective holds as fundamental and ideal the qualities of productivity, competitiveness, and profitability. Under this theory of efficient allocation of resources to promote the accumulation of capital, the commodification of individuals is based on their relationship to the labour market and the economy. Consequently, a person's inability to compete in the collection of capital defines that person as inefficient and an economic reject.

In the economic model, an individual with a disability is seen as a person who embodies a cost and, thus, poses an economic liability on the state. Since this cost must be factored into society-wide public policy decisions on resource allocation, disability becomes a socially created category of dependency. In the liberal economic ideal of a society composed of private, autonomous actors, such public dependency is a negative trait, and reliance on state assistance is reserved for those seen as most helpless. As such, a pervasive stereotype operating in the economic model of disability is that only those with profound and severe impairments deserve the benevolence of state support, or, in other words, are the "truly needy." Only those persons who are so disabled that they are unable to participate in the liberal, free-market economy are entitled to public assistance. Thus, the emphasis is on community pity and charity operates as a normative response to disability under the economic model of disability. The economic model interprets charity as a corollary of disability, which, in turn, gives rise to a convergence between eligibility for state assistance and severity of disability. Under this theory, government expenditures and disablement policy can properly be directed only at providing social security and support programs for those who are severely disabled.

One Canadian scholar, writing about legal rights for persons with disabilities, notes that the economic model of disability underlies all of our major programs for persons with disabilities, including workers' compensation, social security, and vocational rehabilitation. Ian McKenna describes these programs as "pillars of contemporary Canadian disablement policy" and further notes that such programs "focus on the economic efficiency of assisting persons with impairments and disabilities to make the

12. Supra note 7 at 13, see also 93-134.
13. For a recent examination of the issue of negative attitudes towards disability and dependency, see F. Samson, "Globalization and Inequality of Women with Disabilities" (2003) 2 J.L. & Equality 16 at 27. In her article, Sampson explores the disadvantage experienced by persons with disabilities, especially women, in a society that "blames individuals who live in a state of economic dependency rather than understanding the condition as a result of systemic dysfunctions" of a mainstream society built on ablest assumptions of normalcy.
14. Supra note 7 at 94.
adjustments necessary to allow them to participate in the labour force."\(^1\) The thesis of this paper is that in order to qualify for these types of income support programs, the disabled individual must prove that he or she is severely or profoundly disabled, compared to the able-bodied claimants who access parallel income support programs.\(^2\) Essentially, liberal economic theory imposes an "all or nothing" standard of eligibility for persons with disabilities under these programs: the individual must be perceived to be entirely disabled to receive state support. As a result, judicial treatment of these programs is implicitly grounded in an economic model of disability and therefore perpetuates the long-standing belief that in order to receive some form of state assistance, persons with disabilities must be totally and seriously disabled. This position, in turn, reinforces the prevailing myth that persons with disabilities are not valuable contributors to society.

The persistent operation of such pejorative stereotypes regarding persons with disabilities in Canadian society was recognized by the Supreme Court in *Eldridge v. British Columbia (Attorney General)*.\(^3\) In *Eldridge*, the claimants, who were deaf, asserted that their section 15 Charter rights were violated because they were denied sign language interpretation when seeking access to hospital services. The Supreme Court held that the failure to provide sign language interpretation when it is needed for effective communication in the delivery of health care services violated the section 15 rights of deaf persons and ordered the British Columbia government to pay for sign language interpreters to ensure equal treatment for deaf patients in health care services. The *Eldridge* judgment is considered a leading case for advancing substantive equality and affirming state responsibility to provide services to accommodate disability-related needs under section 15 of the Charter.\(^4\) LaForest, writing for the Court in this seminal equality rights decision noted,

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\(^{16}\) McKenna, *supra* note 14.

\(^{17}\) For example, to receive a retirement pension under the Canada Pension Plan (CPP) after the age of 60 and prior to age 65 (the latter being the age when a retirement pension normally starts), the claimant must simply stop working or earn less than the current monthly maximum CPP retirement pension payment ($814.17 in 2004). In contrast, to receive a disability pension under the CPP, an individual must prove that he or she lives with a physical or mental disability that is *severe* and *prolonged* (lasting at least one year or likely to result in death) and renders an individual incapable of regularly pursuing any substantially gainful occupation. See Canada Pension Plan General Information, Social Development Canada, online: <http://www.sdc.gc.ca/en/gateways/topics/cpr-gxr.shtml>. Similarly, to be eligible for social assistance under the Ontario Disability Support Program, the claimant must have a substantial physical or mental impairment that is continuous or recurrent for at least one year that results in a substantial restriction of the person's ability to attend to his or her own care or function in the community or in the workplace.


\(^{19}\) A number of scholars have commented upon the importance of the *Eldridge* decision, including D. Pothier, "*Eldridge v. British Columbia (Attorney General)*: How the Deaf Were Heard in the Supreme Court of Canada" (1998) 9 N.I.C.L. 263; J. Keene, "Claiming the Protection of the
Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institutions.... This historical disadvantage has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw. As a result, disabled persons have not generally been afforded the “equal concern, respect and consideration” that s. 15(1) of the Charter demands. Instead, they have been subjected to paternalistic attitudes of pity and charity, and their entrance into the social mainstream has been conditional upon their emulation of able-bodied norms.... One consequence of these attitudes is the persistent social and economic disadvantage faced by the disabled, described by statistical information to be that persons with disabilities, in comparison to non-disabled persons, have less education, are more likely to be outside the labour force, face much higher unemployment rates, and are concentrated at the lower end of the pay scale while employed.\textsuperscript{20}

Two years after rendering the groundbreaking Eldridge judgment, the Supreme Court released its decision in Law, wherein the Court introduced the requirement of proof of harm to a claimant’s “essential human dignity” as a necessary component of a successful section 15 challenge. Unfortunately, the disturbing stereotypes recognized by the Court in Eldridge have since made their way into the “essential human dignity” analysis propounded in Law, and now appear to firmly entrench an “economic model” of disability in equality rights jurisprudence.

**THE NEW SECTION 15 FRAMEWORK**

**Summary of the Law Decision**

On 25 March 1999, the Supreme Court of Canada rendered a unanimous decision in Law v. Canada,\textsuperscript{21} sending equality rights jurisprudence down the turbulent path of “essential human dignity”. The Law case involved a section 15 Charter challenge to the age restrictions contained in the Canada Pension Plan (CPP) for payment of survivor benefits. The claimant, Nancy Law, was a 30-year-old widow who, due to the fact that she was childless and under the age 45 at the time of her spouse’s death, was not eligible for survivor benefits. Under the CPP, surviving spouses between the ages of 35 and 45 received benefits on a reduced scale, and specifically those under the age of 35 who are

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\textsuperscript{20} Supra note 17 at para. 56.

\textsuperscript{21} Law v. Canada, supra note 4, J. Iacobucci for the Supreme Court.
able-bodied and without dependent children were entirely precluded from receiving survivor benefits until attaining the age of 65.\textsuperscript{22}

Nancy Law alleged that these distinctions discriminated against her on the basis of age and violated her right to equality, contrary to section 15 of the \textit{Charter}. However, the Supreme Court held that the group with which Nancy Law identified herself as a member – namely adults under the age of 45 – were not consistently and routinely subjected to discrimination and, as such, it was difficult for the Court to conclude that the impugned legislative distinctions violated her essential human dignity. In rejecting Nancy Law's claim, the Supreme Court formulated a new methodology for determining whether discrimination had occurred by introducing the criterion of "essential human dignity" as a central consideration in the section 15 analysis.

\textbf{Law Introduces Essential Human Dignity}

The \textit{Law} decision sets out the Supreme Court of Canada's current approach for analyzing an alleged equality rights violation under section 15 of the \textit{Charter}. While reaffirming a commitment to the notion of substantive equality, this judgment significantly complicated the Court's earlier and more straightforward approach to section 15 by inserting an additional step of demonstrating injury to the claimant's human dignity as a critical ingredient to proving an equality rights violation.

In \textit{Andrews v. Law Society of British Columbia,}\textsuperscript{23} the previous leading section 15 case,\textsuperscript{24} the Supreme Court posed two questions in determining whether section 15 was infringed: (1) was there differential treatment based on a protected or analogous ground of discrimination, and (2) was a consequence or effect of the differential treatment to impose a burden or withhold a benefit compared to others?\textsuperscript{25} \textit{Andrews}

\textsuperscript{22} The claimant can receive benefits before the age of 65 if the claimant remarries and is re-widowed, or if the claimant applies for early retirement or is disabled.

\textsuperscript{23} \textit{Andrews v. Law Society of British Columbia} [1989] 1 S.C.R. 143 [Andrews]. Andrews was the first equality rights challenge decided by the Supreme Court. The claimant in Andrews alleged that his section 15 rights were violated by the mandatory citizenship status required for licensing under the \textit{Barrister and Solicitors Act} in British Columbia.

\textsuperscript{24} It is important to note that, up until the \textit{Law} decision, there was great division within the Supreme Court on the correct interpretative approach to section 15. The \textit{Andrews} case was the core decision of a trilogy (the other two cases being \textit{Reference re Workers' Compensation Act}, 1983 (Newfoundland), [1989] 1 S.C.R. 922, and \textit{R. v. Turpin}, [1989] 1 S.C.R. 1296) that provided the first point of consensus on section 15 interpretation prior to \textit{Law}. However, that consensus ultimately failed six years later with the 1995 trilogy of \textit{Egan v. Canada}, [1995] 2 S.C.R. 513; \textit{Miron v. Trudel}, [1995] 2 S.C.R 418; and \textit{Thibaudeau v. R.}, [1995] 2 S.C.R 627. These cases resulted in three different judicial interpretations of the correct approach to discrimination, and no single interpretation was agreed upon by a majority of the Supreme Court. After over a decade of disagreement, the \textit{Law} decision facilitated a consensus on the proper approach to section 15 among the Court by offering a synthesized version of the various section 15 tests.

\textsuperscript{25} \textit{Andrews, supra} note 22 at 175, 182, and 183.
emphasized the importance of examining the impact and the effect of the impugned law or practice so as to fully comprehend the nature and scope of the discrimination to ensure that substantive equality is achieved.

In developing a new test for assessing whether an impugned law or practice constituted discrimination, the Supreme Court in Law focused on interpreting the purpose of the right to equality as guaranteed in section 15. It was here, within the purpose of section 15, that the Court traced the criterion of “essential human dignity” as the core feature of the right to equality and identified the fundamental purpose of section 15 as the promotion of “essential human dignity”:

It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.... Alternatively, differential treatment will not likely constitute discrimination within the purpose of s. 15(1) where it does not violate the human dignity or freedom of a person or group in this way, and in particular where the differential treatment also assists in ameliorating the position of the disadvantaged within Canadian society.26

While recognizing that no single word or phrase could capture the content and purpose of section 15, the Court nevertheless fixed the focus of the Charter right to equality on the notion of “essential human dignity”. The Court elaborated on its understanding of the concept of human dignity as it operates within section 15 as follows:

What is human dignity? There can be different conceptions of what human dignity means.... Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law.27

Based on this articulation of the objective of section 15, the Supreme Court reasoned that, in order to properly decide an equality rights claim, there must be an inquiry to assess whether the differential treatment constitutes discrimination in the “substantive sense”. In order to determine whether there is substantive discrimination, Justice

27. Ibid. at para. 53.
Iacobucci, for the unanimous Court, conceived a new test for section 15, which focused on the following three key issues:

1. whether a law imposes differential treatment between the claimant and others in purpose or effect by drawing a formal distinction or failing to take into account the claimant's already disadvantaged position within society;
2. whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and
3. whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.

In explaining this third requirement, Justice Iacobucci proposed four “contextual factors” that would help ascertain whether the challenged governmental law or practice implicated the claimant’s human dignity and thereby engaged section 15:

1. whether there is any pre-existing disadvantage experienced by the claimant group;
2. whether the impugned law takes into account the actual needs, capacity, or circumstances of the claimant group;
3. whether the law has any ameliorative purpose; and
4. what the interests are that are affected.

While the Court in Law indicated that these four contextual factors were not an exhaustive list of potential considerations, the Court noted that such factors would serve to support an objective assessment of whether the claimant’s human dignity was demeaned. The Court stressed that, in considering these four contextual factors, human dignity should always serve as the “point of reference” for evaluating the effect of the impugned law:

The questions, to take up the dignity-related concerns discussed above, may be put in the following terms. Do the impugned CPP provisions, in purpose or effect, violate essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice? Does the law, in purpose or effect, conform to a society in which all persons enjoy equal recognition as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect, and consideration?

Having defined the fundamental purpose of section 15 as the promotion of “essential human dignity”, the Court concluded that, in order for there to be a finding of discrimination, a conflict must exist between the purpose or effect of an impugned law and this human dignity objective of section 15. This conflict must also have a deleterious impact on the claimant’s “essential human dignity” before it can be found.

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28. Ibid. at para. 53.
30. Ibid. at para. 99.
31. Ibid. at paras. 41.
to constitute an infringement of the right to equality. Consequently, under the new Law methodology, a claimant will not be able to satisfy a court that he or she has been discriminated against unless it can be shown that his or her “essential human dignity” has been seriously harmed or offended by the challenged law.

The Supreme Court of Canada asserted that this new three-prong, human dignity focused section 15 analysis was preferable to the previous Andrews-type test because this framework offered “a purposive and contextual approach to discrimination analysis... to permit the realization of the strong remedial purpose of the equality guarantee.”32 However, belying the Supreme Court’s optimism, many human rights advocates and legal academics observe significant negative implications from this new labyrinth formulation of section 15.33 The chief complaint of critics is that the guidelines lack sufficient clarity and are too convoluted to work as a template for enduring constitutional analysis. One scholar has summed up the criticism against the “essential human dignity” criteria as follows: “Dignity is said to be vague to the point of vacuous and, therefore, too easily usable to dress up decisions based on nothing more than conservative gut reaction or excessive deference to Parliament.”34

Bolstering the concern that this new section 15 test is too malleable are the number of section 15 challenges, released subsequent to Law, from various levels of court, that have failed, and many conspicuously defeated under the third branch of the Law guidelines as lacking the requisite degree of harm to human dignity.35 A recent

32. Ibid. at para. 88.
statistical analysis of all section 15 decisions rendered by the Supreme Court since the Law decision confirms this worrisome trend in finding that “the human dignity stage of the Law analysis has posed a formidable barrier to equality claimants, accounting for the dismissal of the claim in almost two thirds (7/11) of the unsuccessful s.15 cases in the past five years.” As discussed below, both Granovsky and Martin reflect this worrisome trend: Granovsky in its finding that economic inequality does not offend human dignity, and Martin in its reinforcement of the problematic third branch of the Law test.

**The Granovsky Decision**

While the Supreme Court may have heralded the new human dignity approach as embracing a contextual and purposive spirit, human rights practitioners are of the view that the Granovsky decision reveals the risks and difficulties of proceeding with such a subjective analysis in equality rights cases. In Granovsky, the first disability-related decision since the new section 15 approach, the Supreme Court unanimously ruled that the claimant's Charter challenge failed because it did not satisfy the “essential human dignity” threshold.

**Summary of Granovsky**

The Granovsky case challenged the constitutional validity of the Canada Pension Plan [CPP]. The CPP plan is a compulsory, contributory, earnings-based social insurance program that provides income benefits in the case of retirement, disability, or death. In order to qualify for CPP disability benefits, in addition to demonstrating that he or she is severely and permanently disabled, a claimant must have paid sufficient earnings contributions (known as minimum contributions) into the plan for a minimum period of time (known as the recency test).
Following a work-related accident in 1980, Mr. Granovsky was diagnosed with a degenerative back condition and was assessed by workers' compensation as "temporarily totally disabled". At the time of the accident, Mr. Granovsky had made CPP contributions for six of the ten previous years. However, following the accident, Mr. Granovsky was employed only intermittently as a result of his deteriorating back condition, and consequently made limited CPP contributions payments. In 1993, Mr. Granovsky applied for a CPP disability pension as he was no longer able to work because of his back condition. Mr. Granovsky's CPP application was denied because he had paid only the minimum amount of contributions in one year of the relevant CPP ten-year contribution period. Furthermore, Mr. Granovsky did not qualify for the "dropout" provision (available to claimants with severe and permanent disabilities) under which periods of permanent disability causing absence from employment are not counted in the contribution calculation.

Mr. Granovsky appealed, claiming that his right to equality was violated because, as a person with a "temporary" disability, he worked irregularly as a result of the episodic nature of his condition, and therefore was unable to regularly pay into the plan as compared to able-bodied persons. Mr. Granovsky alleged that the CPP discriminated against him by insisting on the same rules of recent contribution imposed on more able-bodied workers, which he could not satisfy because of his temporary disability, and further denying him the equivalent "dropout" privileges allowed to the permanently disabled. The Pensions Appeal Board and the Federal Court of Appeal refused Mr. Granovsky's application. He was similarly unsuccessful in his Charter argument.

41. Currently, to be eligible for a CPP disability benefit, the claimant must have paid sufficient CPP contributions of at least $3,900 in income (for 2004) in at least four of the last six years worked. The claimant must also prove a "severe" and "prolonged" disability, that being a condition that is long, continued, and of indefinite duration that prevents the claimant from regularly pursuing any substantially gainful occupation.

42. Granovsky v. Canada, supra note 5 at para. 10. The claimant had to establish that he had paid the set minimum amount of contributions for the minimum qualifying period, specifically at the time of Mr. Granovsky's CPP application, five of the last ten years or two of the last three years. The Court referred to this standard as the "recency of contributions" test, which the Court indicated was based upon the rationale that the CPP presupposes that in order to receive pension benefits the claimant must prove a recent attachment to a workplace.

43. The "dropout" provisions allow certain claimants (a parent with child-rearing responsibilities or a person with severe and permanent disability) to exempt periods of low earnings from the contributory calculations. Mr. Granovsky was not entitled to the "dropout" exceptions because he was neither a parent, who was out of the workforce as a result of child-rearing responsibilities, nor permanently and severely disabled when he experienced his period of low earnings.

44. Granovsky v. Canada, supra note 5 at para. 8. Mr. Granovsky alleged that the CPP formula failed to take into account the fact that persons with temporary disabilities may not be able to satisfy the minimum years plus minimum contributions formula because the unstable nature of the disability causes irregular or fractured work histories. Mr. Granovsky claimed that, as is the case for persons with permanent disabilities, the CPP contribution formula should not include the time that he was unable to work as a result of his degenerative back disability.
before the Supreme Court of Canada. While the Supreme Court accepted that the concept of “temporary disability” came within the purview of section 15, the Court rejected the proposition that the disadvantage experienced by Mr. Granovsky in being denied a disability pension was tantamount to discrimination, contrary to section 15 of the Charter.

With respect to the first branch of the Law inquiry, the Supreme Court acknowledged that the CPP program did, in fact, differentiate amongst claimants based on “temporary” disability. However, with regards to the second branch, the Supreme Court rejected the “able-bodied” as the proper comparator group, despite the fact the Court had previously stated that a Charter claimant’s identification of a comparator group should be respected. The Court held that, rather than being compared to able-bodied CPP claimants (the group selected by Mr. Granovsky), Mr. Granovsky should be compared to the category of permanently disabled CPP claimants, who received disability benefits pursuant to a reduced standard of contributions.

Turning to the third branch of the Law framework, the Supreme Court concluded that Mr. Granovsky failed to clear the “essential human dignity” hurdle. The Court reasoned that Mr. Granovsky did not successfully demonstrate, when compared to the more severely disabled CPP claimant, that the statutory distinctions caused harm to his human dignity:

While I have every sympathy for the appellant’s injured back and the problematic employment history to which it may have contributed, I do not believe that a reasonably objective person, standing in his shoes and taking into account the context of the CPP and its method of financing through contributions, would consider that the greater allowance made for persons with greater disabilities in terms of CPP contributions “marginalized” or “stigmatized” him or demeaned his sense of worth and dignity as a human being.

Thus, although the Supreme Court expressly acknowledged that Mr. Granovsky was treated differently because of his disability and that he had suffered “the deprivation of a financial benefit”, the Court nevertheless held that the deprivation of a financial benefit was not compelling enough to constitute discrimination under the Charter. The Court was not satisfied that the loss of a disability pension harmed the claimant’s human dignity and found Mr. Granovsky was “more fortunate” than permanently

45. The Granovsky decision is important for its progressive interpretation of disability, which is discussed below.

46. While a number of writers have commented in general on the problems of using a comparator group approach in equality rights analysis, we point out that the comparator group exercise poses particular concerns for persons with disabilities. Because there is an infinite range and multiple subgroups of disabilities, the use of comparators as a means to assess the differential treatment runs the risk of pitting one disadvantaged group of persons with disabilities against the another, without a proper evaluation of the overarching systemic discrimination.

47. Granovsky v. Canada, supra note 5 at para. 81.

48. Ibid. at para. 58.
disabled claimants. The Court required that Mr. Granovsky show that the greater allowance made for the less fortunate, permanently disabled claimant caused Mr. Granovsky to be marginalized or stigmatized. The Court held that Mr. Granovsky failed to demonstrate that the financial deprivation derogated from his “essential human dignity” by fostering a view that persons with temporary disabilities are “less capable or less worthy of recognition or value as human beings.” The Court concluded that, since Mr. Granovsky was unable to show that the CPP program cast doubt on his worthiness as a human being, he had failed to demonstrate “a convincing human rights dimension to his complaint.”

How Granovsky Advances Disability Rights

It is important to recognize that the Granovsky decision promotes disability rights in one major respect. The decision is significant for its progressive definition and interpretation of disability. Relying on the reasoning first advanced by the Supreme Court in the Mercier case, Justice Binnie, for the unanimous Court in Granovsky, recognized that “disability” may be temporary or permanent and can constitute any combination of impairments, functional limitations, or socially constructed handicaps. Adopting the Mercier approach of distinguishing the various facets of disability, the Granovsky decision demarcates three separate dimensions of disability: physical or mental impairment (first aspect), which may or may not give rise to functional limitations (second aspect), and the socially constructed handicap (third aspect).

49. Ibid. at para. 79.
50. Ibid. at para. 58.
51. Ibid. at para. 70.
52. Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City), [2000] 1 S.C.R. 665 [Mercier]. We have commented elsewhere that Mercier is an important case for disability rights jurisprudence because in that decision the Supreme Court explained that disability must be interpreted to include a subjective component to the disability, or in other words what one perceives to be the disabling condition, since disability discrimination can be based as much on myths and stereotyping, as it is on actual functional limitations. See E. Chadha, “The Social Phenomenon of Handicapping” in Adding Feminism to Law: The Contributions of Justice Claire L’Heureux-Dubé (Toronto: Irwin Law, 2004) 209.
Case Commentary

The *Granovsky* decision suggests that in disability discrimination cases the judiciary should concentrate on this third aspect – the socially constructed handicap. The Court reasoned that the foremost consideration in disability claims is society’s response to the disability, accompanied by careful scrutiny of whether this response pays too much or too little attention to functional limitations:

> What s. 15 of the Charter can do, and it is a role of immense importance, is address the way in which the state responds to people with disabilities. Section 15(1) ensures that governments may not, intentionally or through a failure of appropriate accommodation, stigmatize the underlying physical or mental impairment, or attribute functional limitations to the individual that the underlying physical or mental impairment does not entail, or fail to recognize the added burdens which persons with disabilities may encounter in achieving self-fulfillment in a world relentlessly oriented to the able-bodied.\(^\text{55}\)

Although Justice Binnie enunciates a socio-political model of disability by suggesting that the proper focus for the section 15 analysis in disability claims is the state’s response to the disability rather than the disability itself, the Court’s ultimate stance towards Mr. Granovsky’s dilemma appears to merely pay lip service to this theory. The Court fails to recognize that the economic model of disability, born of a distributive, capitalist philosophy, underpins the eligibility criteria of the CPP program. A review of the “essential human dignity” analysis employed by the Court in the *Granovsky* decision reveals that judicial interpretation of the CPP program is premised on able-bodied norms and stereotypical notions of persons with disabilities.

**Human Dignity and Economic Integrity in Granovsky**

We argue that the human dignity analysis of the *Granovsky* decision is particularly suspect and distressing because the Supreme Court’s reasons function by stereotype. In *Granovsky*, we see the Court moving in the worrisome direction of excluding financial security for persons with disabilities from the concept of human dignity. Imported into the Court’s human dignity analysis is the “only the severely disabled are the truly needy” stereotype implicit in the economic model of disability. The strong influence of this negative stereotype is apparent in the case through the Supreme Court’s restrictive interpretation of the objectives of the CPP program. In finding Mr. Granovsky undeserving of relief, the Court relies heavily upon the rationale that the CPP is a self-funded, contributory scheme. In so doing, the Supreme Court appears to simply apply the adage that “one reaps the fruits of one’s own labour” to the CPP program, without placing the onset of Mr. Granovsky’s disability in the context of his work history and his years of contributions to the plan.

\(^{54}\) For example, where a person is deaf, the auditory system anomaly would be the physical impairment, while lack of hearing or hearing loss would be the functional limitation. An example of a socially constructed handicap would be the failure of the medical system to provide sign language interpretation to facilitate communication with a deaf patient.

\(^{55}\) *Granovsky v. Canada*, supra note 5 at para. 33.
Had the Court given due consideration to the fact that Mr. Granovsky regularly paid into the CPP program prior to being injured and the resultant disability, the Court would have readily discerned the discriminatory, adverse effects of the "recency of contributions" calculations on persons with temporary or degenerative disabilities. The Supreme Court failed to fully scrutinize how the CPP "dropout" exemptions operated in conjunction with the contributions formula to adversely affect and exclude persons with temporary disabilities, and instead merely invoked the severely disabled claimant as the more deserving of pension entitlement. The fact that the Court strictly applies the recency test, and thereby permits the adverse effects discrimination experienced by persons with degenerative disabilities to go unchallenged, is particularly troubling, given the dictum of the Court in Eldridge, where Justice La Forest, on behalf of the unanimous Court, recognized that "[a]dverse effects discrimination is especially relevant in the case of disability."56

The Granovsky decision is grounded primarily in the economic model of disability where the Supreme Court articulates a narrow equality right for persons with disabilities that dissociates financial security from human dignity. The influence of the "essential human dignity" standard compels the Court to consider whether the human dignity involved in being denied a disability pension is, in the Court's opinion, "essential" enough to be violated. Unfortunately, contrary to Mr. Granovsky's claim, the Court does not agree that Mr. Granovsky's dignity was sufficiently violated. Nowhere in the analysis are the claimant's actual feelings on the subject given significant, if any, weight. The Court's conclusion that the mere deprivation of a financial benefit will not engage the human dignity of a person with a disability appears engendered from a privileged perspective and further appears oblivious to the harsh reality of poverty and isolation that is often part of living with a disability.

Clearly missing from the Court's section 15 analysis is recognition of one of the most oppressive forms of discrimination as experienced by persons with disabilities: economic inequality. As previously noted, the Eldridge decision highlighted the fact that persons with disabilities have been and continue to be routinely excluded from mainstream educational, economic, and cultural opportunities, and persons with disabilities are among the poorest and most marginalized in Canadian society. It is a well-recognized and unfortunate fact that many working-age persons with disabilities in Canada lack the education to participate fully in today's economy.57 Moreover, as is the case with their poor educational status, persons with disabilities have significantly less success in finding and keeping work.58 Recent statistics confirm the disproportionately disadvantaged economic status of persons with disabilities in Canada: in

56. Supra note 17, at para. 64.


58. Ibid.
2001, 80% of women with disabilities and 63% of men with disabilities reported income of less than $30,000. The average annual income of working-age persons with disabilities was just $21,545, meaning that working-age adults with disabilities are twice as likely as their able-bodied counterparts to subsist close to or at the poverty level. The Court’s strict adherence in Granovsky to the recency formula is especially disconcerting when considering that research shows that persons with disabilities often have more difficulty maintaining stable employment than the non-disabled population. Working-age adults with disabilities are half as likely to maintain full-year employment as their non-disabled peers. Notwithstanding the fact that these linkages between disability, unstable attachment to employment, and poverty are well established globally, the Court in Granovsky failed to consider or acknowledge economic inequality of persons with disabilities as a human rights issue.

Furthermore, the analysis of “essential” human dignity as developed in the Granovsky case divorces financial security from human dignity, in particular, for persons with cyclical, recurrent, or degenerative disabilities. This troublesome feature of the Granovsky decision can be gleaned from an examination of the case from the perspective of someone living with an episodic or progressive disability. The Court reinforces the economic model of disability where it implicitly penalizes Mr. Granovsky for not fitting the stereotypical mould of either the able-bodied or severely disabled claimant. Effectively, the Court regards Mr. Granovsky as culpable for not being able to overcome his temporary disability and improve his economic status by increasing his participation in the workforce. The Court failed to recognize the fundamental reality that many persons with disabilities, i.e. persons with mental health disabilities or persons living with certain degenerative diseases, are rarely continuously disabled, often have periods of ability and disability, and consequently may have sporadic or limited work histories.

59. Figures taken from A Profile of Disability in Canada 2001, online: Statistics Canada, <http://www.statcan.ca/english/freepub/89-577-XIE/index.htm>. In a 2001 report titled A Profile of Disability in Canada, Human Resources Development Canada notes that “PALS demonstrates the income challenges faced by all persons with disabilities, but especially by those of working-age and families of children with disabilities.” For example, working-age adults with disabilities are more likely to live in households with an income below Statistics Canada’s low income cut-off (27.9% compared to non-disabled at 12.7%), and approximately 26% of working-age persons with disabilities remain unemployed, see Statistics Canada, Education, Employment and Income of Adults with and without Disabilities – Tables (Ottawa: Statistics Canada, 2003) 40.

60. Supra note 56 at 38.

61. In “The Politics of Disability Rights Movement” (2001) 8:3 New Politics, Ravi Malhotra states, “Disabled people today remain among the most marginal of citizens in the United Sates, as well as in other leading Western industrialized countries. By every statistical measure known to sociologist, whether it is poverty levels, unemployment rates or levels of education, disabled people score very poorly. Even after years of a boom economy, disabled people remain disproportionately unemployed and impoverished.” Available online: <http://www.wpunj.edu/~new-pol/issue31/malhot31.htm>.
It is difficult to navigate the Granovsky case when one views it through a mental health lens, and similar pitfalls are apparent when considering relapsing and remitting conditions. According to the section 15 analysis in Granovsky, persons with psychiatric disabilities or degenerative diseases, who may be in and out of the workforce because of the variable nature of their condition, can be “legitimately” denied CPP benefits. Since the shifting or erratic character of these conditions does not satisfy the “severe and permanent” type of disability the CPP targets for aid through its “dropout” exemptions, the inability of a claimant to qualify for a pension becomes a seemingly “personal” problem, rather than institutionalized adverse effects discrimination. Notwithstanding the fact that such claimants may have made a lifetime of intermittent payments into the program, the differential treatment accorded to such “temporary” conditions does not amount to discrimination because these claimants are not disabled enough to merit the charity of the program. This interpretation, which is implicit in the Court’s reasons, underscores the vulnerability and disadvantage experienced by persons with disabilities who do not fit the stereotype of severe and profoundly disabled – the only category of disabled people deemed by the economic model as deserving access to state assistance.

The Court’s decision not only makes it difficult for persons with temporary, episodic, or progressive disabilities to qualify for CPP, but also clearly poses a systemic barrier for all persons with disabilities to advance Charter equality claims in general.62 Now, based on the reasoning in Granovsky, the fact that a person with a disability is a member of a historically disadvantaged group and has experienced differential treatment because of the disability is not sufficient to establish a section 15 claim. The claimant must also demonstrate injury to his or her “essential human dignity” other than a financial deprivation. Consequently, according to this legal paradigm, the financial integrity of certain communities of persons with disabilities is not worthy of protection because poverty and dependency are normative in the economic model of disability, and state assistance is reserved for those persons who are truly needy because, borrowing a phrase from Granovsky, of their “greater disabilities”.63

The centrality of the economic model of disability in the Granovsky decision clearly does not allow for an understanding of human dignity that includes economic integrity for persons with disabilities. The Granovsky case tells us that that we have serious worries if our involvement in the labour force is not seen as sufficiently committed, or our health condition does not merit the charity reserved for those who are perceived as severely and profoundly disabled. While recent jurisprudence appears to signal a growing respect for the differences of disability, the Granovsky decision unfortunately perpetuates a social characterization of disability premised on liberal economic ideology. The judicial treatment of disability discrimination cases from an implicit starting point of marketplace competition, efficiency, and productivity creates an

62. Supra note 36.
63. Granovsky v. Canada, supra note 5 at para. 81.
“acceptable” standard of poverty for persons with disabilities. As discussed below, this approach to the economic interests of persons with disabilities was modified in theory, but not so much in reality, in the recent Martin decision.

THE MARTIN DECISION

In October 2003, the Supreme Court of Canada released a unanimous decision in the case of Nova Scotia Workers' Compensation Board v. Martin and Laseur [Martin]. The Martin decision is only the second disability rights case to be decided by the Supreme Court since the introduction of the Law methodology.

Summary of Martin

The Martin case involved a section 15 Charter challenge to workers' compensation legislation in Nova Scotia. Although injured during the course of their employment and assessed as having valid compensation claims, Donald Martin and Ruth Laseur were both denied workers' compensation benefits upon being diagnosed with chronic pain disability arising from their work-related injuries. Mr. Martin's temporary benefits were discontinued within months of his injury. Ms. Laseur, after receiving temporary benefits for her work-related accident, was denied permanent partial disability benefits and vocational rehabilitation assistance. Both claimants appealed the denial of benefits on the ground that the Worker's Compensation Act [Act] and accompanying regulations violated section 15(1) of the Charter. They claimed that their right to equality was infringed because the Nova Scotia workers' compensation legislation discriminated against workers disabled by chronic pain by arbitrarily restricting or unfairly denying benefits for chronic pain disability.

The impugned provisions excluded chronic pain disability from the regular benefit compensation scheme. Instead of receiving benefits normally available to injured workers, workers diagnosed with chronic pain were (depending on date of injury) either cut off entirely from benefits or received limited benefits. For those injured workers who did receive compensation for chronic pain, they were required to participate in a four-week rehabilitation program, and their benefits were capped at one year beyond which no further benefits or treatment were available. The Workers' Compensation Appeals Tribunal found this scheme breached section 15 of the Charter and was not saved by section 1. The Nova Scotia Court of Appeal allowed the Workers' Compensation Board's appeal, finding that the Tribunal did not have jurisdiction to apply the Charter. However, regardless of jurisdictional issues, the Court of Appeal went on to dispose of the section 15 challenge and held that there was no equality rights violation as the chronic pain provisions did not demean the human dignity of the claimants. The injured workers appealed that decision to the Supreme Court.

64. Martin, supra note 6, authored by Justice Gonthier for the Court.

65. ARCH represented the Ontario Network of Injured Workers Groups as Interveners before the Supreme Court in the Martin case.
With respect to the issue of jurisdiction, the Supreme Court reversed the Court of Appeal, holding that the Appeals Tribunal was empowered to interpret the Charter since the empowering legislation had expressly conferred on the tribunal the authority to decide questions of law in exercising its duties.\textsuperscript{66} The Court then proceeded to consider the section 15 claim of discrimination. In applying the Law methodology, the Supreme Court in \textit{Martin} found that the first and second branches of the test were easily met. The Court noted that the \textit{Act} created a separate regime for the claimant group: injured workers disabled by chronic pain. The Court then identified this as a formal legislative distinction made between the claimants and the comparator group (that is, the group of workers subject to the \textit{Act} who do not have chronic pain and are eligible for compensation for their employment-related injuries). The Supreme Court held that the differential treatment accorded to claimants disabled by chronic pain and other injured workers was based on the section 15 enumerated ground of physical disability.

Under the third branch of the Law inquiry, the Supreme Court noted that the impugned Nova Scotia workers' compensation law funneled workers with chronic pain into a "one-size-fits-all" four-week rehabilitation program and provided, in lieu of regular benefits, temporary benefits capped at one year. The Supreme Court concluded that, in doing so, the Nova Scotia scheme lumped all injured workers with chronic pain into one category that treated such workers as temporarily disabled without considering their individual situation, their symptoms, their needs, or their capacities. The Court found that workers with chronic pain were denied permanent disability benefits, vocational rehabilitation, medical aid, re-employment, and accommodation. In reaching its conclusion that this generalized treatment of injured workers with chronic pain was discriminatory, the Supreme Court affirmed the notion that persons with disabilities must be treated, as much as possible, on an individualized basis.

Ultimately, the Supreme Court of Canada allowed the appeal, concluding that the exclusion of benefits for chronic pain from the general compensation scheme violated the equality rights of workers disabled by chronic pain, contrary to section 15, and the infringement was not justified under section 1 of the Charter. In finding that the impugned provisions could not be upheld as reasonable and demonstrably justified under section 1, Justice Gonthier observed that the Nova Scotia workers' compensation scheme pre-emptively deemed all chronic pain claims to be fraudulent and made "no effort whatsoever to determine who is genuinely unable to work and who is abusing the system."\textsuperscript{67} The Court suspended its declaration of invalidity for six

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\item \textsuperscript{66} The Supreme Court decision in \textit{Martin} is also very important because it clarified when administrative tribunals are empowered to interpret and apply the Charter. That part of the decision is ground breaking in that the Court overrules \textit{Cooper v. Canada} [1996] 3 S.C.R. 854. The jurisdictional issue is beyond the scope of this paper.
\item \textsuperscript{67} \textit{Martin}, supra note 6, para. 112.
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months to give the Nova Scotia government time to come up with an appropriate legislative response.

**How Martin Advances Disability Rights**

In many ways, the *Martin* decision represents important progress for advancing the rights of persons with disabilities. In fact, the Supreme Court’s application of the first two branches of the *Law* test reinforced several key points that disability rights advocates have maintained as necessary for moving *Charter* analysis in the proper direction to enhance the equality rights of persons with disabilities. For instance, the Court in *Martin* reinforced the earlier judgments of the Supreme Court of Canada that a comparison group can be made up of other individuals within that same enumerated population.68 In other words, there can still be a finding that workers disabled by chronic pain have been discriminated against on the basis of physical disability as compared to other persons with different disabilities. The Court flatly rejected the counter argument made by the Workers' Compensation Board that differential treatment within the benefits scheme was not based on physical disability, because all workers under that scheme are disabled. The Supreme Court confirmed its earlier decisions that “differential treatment can occur on the basis of an enumerated ground despite the fact that not all persons belonging to the relevant group are equally mistreated.”69

In clarifying this branch of the *Law* test, the Court also emphasized the importance of a flexible approach to the analysis of distinctions drawn among various disabilities – more so than other enumerated grounds of discrimination – for one simple reason: persons with disabilities are not a homogenous group with identical characteristics and needs. Rather, their characteristics are infinitely varied and their needs are divergent. More clearly than ever before, the Supreme Court pronounced that the section 15 *Charter* right to equality for persons with disabilities must recognize the varying needs of persons with disabilities and the right to be accommodated on an individualized basis. In recognizing that the fundamental duty of accommodation operated on an individualized basis, even in the context of a large-scale benefits-granting program like a provincial workers' compensation regime, the Court commented:

> Due sensitivity to these differences is the key to achieving substantive equality for persons with disabilities. In many cases, drawing a single line between disabled persons and others is all but meaningless, as no single accommodation or adaptation can serve the needs of all…. The question, in each case, will not be whether the state has excluded all disabled persons or failed to respond to their needs in a general sense, but rather whether it has been sufficiently responsive to the needs and circumstances of each person with a disability [emphasis added].70

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68. For an earlier decision of the Supreme Court of Canada according protection for subgroups, see *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566.

69. *Martin*, supra note 6 at para. 76.

The Court stressed that an individualized approach to disability is mandated by the Charter guarantee of equality. The Court explained that the purpose of the section 15 equality right for persons with disabilities is the imperative to recognize the needs, capacities, and circumstances of persons with disabilities in a vast range of social contexts. The Court noted that to secure the equal participation of persons with disabilities in society requires altering the social dynamic in many different ways, depending on the abilities of the person. The Court persuasively described this obligation in this interesting scenario: “If a government building is not accessible to persons using wheelchairs, it will be no answer to a claim of discrimination to point out a TTY (teletypewriter) telephone for the hearing impaired has been installed in the lobby.”

Furthermore, in dismissing the Board’s argument that workers with chronic pain were not discriminated against because they were no more stigmatized than other injured workers, the Court reinforced the principle that the claimant does not have to prove a more severe disadvantage relative to the comparator group. In order to prevent such a “race to the bottom,” the Court stated:

> [W]hile a finding of relative disadvantage may in certain cases be helpful to the claimant, the absence of relative disadvantage should in my view be seen as neutral when, as is the case here, the claimants belong to a larger group – disabled persons – who have experienced historical disadvantage and stereotypes.

Indeed, the Court emphasized that the “relative disadvantage” inquiry is largely inappropriate in disability cases where at the heart of the section 15 claim is the great lack of correspondence between the differential treatment to which the claimants are subject and their actual needs, capacities and circumstances. The Court explained:

> It can be no answer to a charge of discrimination on that basis to allege that the particular disability at issue is not subject to particular historical disadvantage and stereotypes beyond those visited upon other disabled persons.

Last, and once again seen favourably by disability advocates, the Supreme Court in Martin endorsed the view that government “should be wary of putting too low a value” on protecting equality rights and accommodating disability.

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71. Ibid.
72. This phrase was used by the Supreme Court in Lovelace v. Ontario, [2000] 1 S.C.R. 950, where it was recognized that the inquiry into whether an individual or group alleging discrimination has experienced pre-existing prejudice is not “a race to the bottom”.
73. Ibid. at para. 88.
74. Ibid. at para. 89.
75. We borrow this phrase from an earlier disability rights decision of the Supreme Court, British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights), [1999] 3 S.C.R. 868 at para. 41, wherein the Court recognized it is all too easy to cite increased cost as a reason for refusing accommodation.
**Human Dignity and Economic Integrity in Martin**

Notwithstanding the positive aspects of the *Martin* decision, the Supreme Court did not steer away from the problematic third prong of the Law test. The Court returned to the principle that some distinctions are allowed, for reasons of practicality and efficiency, and that a distinction will infringe section 15 of the Charter only when it is seen to violate the “essential human dignity” of the individuals affected. In fact, the Court, commenting on the importance of this third leg of the inquiry, stated “the distinction drawn in this case, like many other disability-based distinctions, will stand to survive or fail the s.15(1) analysis at this stage.”  

As was the case in *Granovsky*, despite the claimant's own perception and apprehension of the harm, it remains the Court's opinion that prevails in deciding what constitutes an offence to “essential human dignity”. Then, based on the Court's assessment of the enormity of the injury, a “distinction” may or may not be transformed into “discrimination” at this stage in the Law methodology.

According to the Supreme Court in *Martin*, “essential human dignity” is to be determined by analyzing whether “a reasonable and dispassionate person, fully apprised of all the circumstances and possessed of similar attributes to the claimant, would conclude that his or her essential dignity had been adversely affected by the law.” In sanctioning this malleable standard, the Court once again expects that the judiciary will be able to place themselves in the mind and heart of a reasonable and dispassionate person with a disability so as to determine whether the harm to the claimant's essential human dignity was of such a magnitude as to constitute a Charter violation. We argue that this exercise is not only controversial but may also pose real difficulties for a predominantly able-bodied, privileged judiciary. At the very least, this presents a significant risk of the judiciary importing prejudicial notions of dependency and charity prevalent in mainstream society, resulting in a finding that the dignity interests involved in a case were not “essential” enough or that there was insufficient harm of the requisite degree to offend the claimant's human dignity. The term “essential human dignity” is repeated throughout the third stage of the section 15 analysis in *Martin*, reinforcing the importance of this troublesome value judgement.

In performing the “essential human dignity” evaluation in *Martin*, the Supreme Court still seems to need to find that chronic pain may manifest into a “permanent and debilitating” condition before reliance on long-term income-replacement benefits is acceptable. Like the Court in *Granovsky*, the *Martin* judgment describes the disabled individual as more or less “fortunate”, depending on the perceived degree of disability. In considering the lack of responsiveness of the challenged legislation to the needs and circumstances of workers with chronic pain, the Court's concern is with those individuals who develop permanent impairments and are left with no source of income. According to the Court, this “cannot be consistent with the purpose of the Act or with

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76. *Martin*, supra note 6 at para. 83.
the essential human dignity of these workers.” In comparison, when speaking about those “chronic pain sufferers” who are “fortunate” enough to be only partially incapacitated, the Court shifts the focus of its inquiry on how the Act does not sufficiently encourage their return to work. In other words, for those who are only partially disabled, their essential human dignity is affected when they do not receive sufficient accommodation or vocational rehabilitation, not when they do not receive adequate income supports. It appears that for the more fortunate, partially disabled claimant, something more than an economic detriment must be present to cause a constitutionally unlawful harm to human dignity. While it is laudable that the Court does not treat persons disabled by chronic pain as one homogenous group, its conclusions perpetuate the pernicious stereotype, embedded in the economic model of disability, that to be allowed to seek state assistance for financial security, one must fall within the less fortunate category of the severely and profoundly disabled.

Most relevant to the issue of economic integrity for persons with disabilities are Justice Gonthier’s comments in Martin regarding the status of economic interests under section 15. To appreciate the significance of these comments, it is important to note that at the lower court level, in discussing the contextual factor of “the nature of the interests affected” under the third branch of the Law inquiry, the Court of Appeal in Martin concluded that the disadvantage suffered by workers with chronic pain was economic and therefore relatively minor. Similar to Granovsky, the Court of Appeal in Martin espoused the view that deprivation of a financial benefit itself was not enough to prove discrimination. At the Supreme Court, the Nova Scotia government, relying on these reasons from the Court of Appeal and the Granovsky precedent, argued that (1) the disadvantage suffered by the injured workers was solely economic in nature and therefore not protected by section 15 of the Charter, and (2) the deprivation of compensation benefits was relatively minor issue that did not constitute a violation of human dignity. Fortunately, writing for an unanimous Supreme Court, Justice Gonthier expressly rejected these arguments.

With respect to whether section 15 protects economic interests, Justice Gonthier remarked, “[I]t was important to clarify right from the start what the status of economic interests is in the substantive discrimination context.” Justice Gonthier expressly noted that there is no presumption that section 15 does not protect against

78. Ibid. at para. 97.
79. Ibid. at para. 98. It is regrettable that the Court used the identifier “chronic pain sufferers”. Disability activists offer a critique of when this type of language is used in jurisprudence to portray disability, for example, persons with certain types of disability, i.e. persons living with multiple sclerosis, may prefer not to be labelled as “sufferers” or described as “suffering from” because this suggests they are victimized by their condition.
80. Martin, supra note 6 at para. 103, wherein Justice Gonthier noted that it cannot be said that the loss of financial benefits is a trivial matter, particularly given that there was no other source of financial support for the permanently disabled claimants.
81. Martin, supra note 6 at para. 103.
economic disadvantage. Until now there has been significant debate as to whether or not the Charter protects against financial deprivation. This was a contentious issue in the Gosselin case, where the applicants strenuously argued that the Charter's section 7 "right to life, liberty and security of the person" mandated an affirmative duty on the state to provide for an adequate level of social assistance. However, the majority of the Supreme Court in Gosselin held that the facts of the case did not warrant a novel application of section 7 as forming the basis for a positive state obligation to guarantee an adequate standard of living.  

In Martin, Justice Gonthier considered the question of economic interests under the third branch in the section 15 guidelines. Justice Gonthier held that "while a s. 15(1) claim relating to an economic interest should generally be accompanied by an explanation as to how the dignity of the person is engaged, claimants need not rebut a presumption that economic disadvantage is unrelated to human dignity." Thus, in Martin, the Supreme Court "clarified" the status of economic interest in the substantive discrimination context by acknowledging that, in certain circumstances, economic deprivation may lead to loss in dignity. As the high-water mark for championing respect for the economic integrity of persons with disabilities, Justice Gonthier noted that economic deprivation may be "symptomatic of widely-held negative attitudes towards the claimants and thus reinforce the assault on their dignity." For many in the disability community, these remarks constitute a critical first step towards legal recognition of the profound importance of economic integrity for persons with disabilities. Unfortunately, however, the Court was careful not to say that the financial disadvantage is related to essential human dignity, and when applied to the facts of the case, the Court simply concluded that the loss of financial benefits was not "trivial". The Court went on to find, "more importantly" that the interests affected in the case were not "purely, or even primarily, economic". Beyond being denied financial benefits,
injured workers were deprived of vocational, medical, and accommodation benefits, which the Court found would clearly assist them in preserving and improving their dignity by returning them to work when possible. The Supreme Court has consistently emphasized the crucial importance of work and employment as a feature of "essential human dignity" under section 15 of the Charter. Indeed, the Court in Martin reaffirmed this sentiment by citing the words of Justice Bastarache from Lavoie that "work is a fundamental aspect of a person's life". Unfortunately, economic security is not accorded the same status by the Court as the ability to work. Thus, even though the Court in Martin found that financial disadvantage may be associated with the concept of human dignity, given its statement of the importance of work to "essential human dignity", it seems unlikely that any case based solely on economic disadvantage will succeed in the near future.

In conclusion, while the overall thrust of the Martin decision is encouraging insofar as it upholds the right to equal treatment for all disabled workers, we see that, within the Supreme Court, there remains lingering judicial doubt about a conception of human dignity that includes economic integrity, and a further unconcealed caution about the validity of economic interests under section 15 of the Charter.

Conclusions
A study of the specific language chosen by the Supreme Court in the Law decision reveals that it was not by accident that the revised section 15 test narrows the concept of human dignity. The Law decision reiterates at a number of junctures that the purpose of section 15 is to prevent the violation of "essential human dignity". The Supreme Court, in making these references to "essential human dignity", appears to delineate between degrees of human dignity as it pertains to equality rights. The Court expressly draws a distinction between a disadvantage arising from mere differential treatment and disadvantage from discriminatory treatment, holding that only the latter is sufficient to trigger Charter protection. The Supreme Court seems to suggest that what demeans a person's human dignity can be objectively evaluated and that certain facets of human dignity can be calibrated as essential. The question we should all ask is: What dimensions of human dignity are worthy to be characterized as "essential", and what is unworthy as non-essential to engage the concept of human dignity? We should pose another query: Are those in a position of economic privilege suited to determine what financial disadvantage or deprivation is so unfair as to amount to an indignity that is contrary to the Charter?

While the Court contends that the goal of the new section 15 methodology is to foster substantive equality, the Granovsky and Martin judgments suggest that the "essential human dignity" component of the new test gives the judiciary expansive discretion in determining what types of disadvantage qualify as discrimination. Clearly, it is no longer enough that a claimant is a member of a protected group, perceives discrimi-

nation, and can demonstrate differential treatment based on the enumerated ground. The claimant must now prove that the impugned government activity or legislation has a grave, deleterious effect on the individual’s “essential” human dignity. In other words, it is no longer enough to be treated differently or less favourably; the claimant must now show that he or she has been demeaned and degraded, as if unfair treatment because of disability is not sufficiently insulting. This “essential human dignity” formulation of section 15 clearly poses a more stringent test for claimants to demonstrate harm and in doing so, enunciates an arguably more privileged and subjective version of human dignity. As section 15 jurisprudence currently stands a lifetime of financial deprivation meted out as a result of disability may not be a blow to dignity sufficient to constitute an infringement of the Charter’s equality guarantee.

Although the new Law methodology purportedly requires the judiciary to assess discrimination from the outlook of the claimant, we see in the Granovsky judgment that the Supreme Court is comfortable in concluding that something it believes to be a minimal disadvantage, contrary to the claimant’s perspective, cannot demean the claimant’s “essential human dignity” and therefore does not amount to an infringement of section 15. In Granovsky, the Court implicitly relies on an economic model of disability where it finds that those temporarily disabled claimants, who are excluded from the CPP program, either didn’t work hard enough or weren’t disabled enough, and as such the differential and adverse treatment dispensed by the scheme did not diminish these claimants’ human dignity. The Court in Granovsky overlooks the reality that a long-term, uninterrupted work history is often the privilege of the able-bodied, and that generally in Canadian society persons with disabilities suffer financial hardship and live at subsistence levels as a result of precarious employment status. By ignoring such systemic inequality, the Court deems it acceptable to separate human dignity from economic well-being for persons with disabilities.

In Martin, the Supreme Court made significant progress in holding that there is no presumption that a section 15 claimant needs to show something more than an economic detriment, to call into question the constitutional validity of a law or government program. Despite taking this important step towards recognizing that economic deprivation may engage human dignity and protection under section 15, the Court in Martin was still not prepared to find that an impugned governmental law or practice that jeopardizes the financial security of persons with disabilities should always be considered to invoke equality concerns regarding the status of persons with disabilities in Canadian society. In Martin, the Court again perpetuates the paradigm of the “deserving disabled”, first applied in Granovsky, where only the severely and profoundly disabled are worthy of financial support, and thereby further entrenches the economic model of disability in equality rights jurisprudence. When looking beyond the Supreme Court’s “essential human dignity” test to the core of the decisions in Granovsky and Martin, while paying due regard to the positive aspects of those cases

89. A. Sabharwal, supra note 34.
for persons with disabilities, what is ultimately revealed is the Court's reluctance to hold the state accountable for laws or policies that discriminate in the provision of financial assistance, even when directly linked to the protected ground of disability.

In conclusion, what is most objectionable about the "essential human dignity" test is the impoverished interpretation of human dignity as it pertains to persons with disabilities. As legal advocates, we must vigilantly draw the Court's attention to how the economic model of disability underlies our public programs and how insidious this theory is in reinforcing social inequalities. The challenge remains for the judiciary to dispel the myth that persons with disabilities must be seriously and permanently disabled, living in tragic, awful circumstances, in order to be entitled to section 15 protection. For the right to equality to be meaningful for persons with disabilities, section 15 of the Charter must be interpreted as protecting the economic integrity of all persons with disabilities. The time has come to recognize that economic integrity, and the human rights values of inclusion and independence that are promoted by such recognition, are profoundly related to the dignity and self-respect of persons with disabilities. Human rights advocates can no longer remain complacent when courts minimize the fundamental equality interests that flow from financial security and lie at the heart of section 15 protection for persons with disabilities. We must start by reminding the judiciary of the social and economic inequality experienced by persons with disabilities and the fact that this systemic inequality goes to the very heart of human dignity, as was poignantly acknowledged by Supreme Court in its earlier Eldridge decision. This reminder must then be translated by the judiciary into a commitment to identify and reject the pervasive economic stereotypes of poverty, dependency, and charity that constrain persons with disabilities from participating in society as equal and valued members.