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AN INTERSECTIONAL APPROACH TO DISCRIMINATION

Addressing Multiple Grounds in Human Rights Claims

Discussion Paper

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Prepared by the Policy and Education Branch

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Discussion Paper Policy and Education Branch

We will never address the problem of discrimination completely, or ferret it out in all its forms, if we continue to focus on abstract categories and generalizations rather than specific effects. By looking at the grounds for the distinction instead of at the impact of the distinction...we risk undertaking an analysis that is distanced and desensitized from real people's real experiences.... More often than not, disadvantage arises from the way in which society treats particular individuals, rather than from any characteristic inherent in those individuals.¹

In Canada, as the understanding of human rights evolves, the focus is increasingly on a contextualized approach to discrimination. A contextualized approach places less emphasis on characteristics of the individual and more on society's response to the person. It also takes into account historical disadvantage experienced by the group the person belongs to. One recent and striking example of this phenomenon is seen in the *Mercier*² decision, in which the Supreme Court of Canada indicated that the determination of what constitutes a disability should be based on whether the person has experienced "social handicapping" rather than focusing on bio-medical conditions or limitations. The Ontario Human Rights Commission's (the "Commission") recent policy and research initiatives have similarly shown a move towards an analysis of discrimination that takes into account the lived realities of individuals and the social context of discrimination.³ On the compliance side of the Commission's mandate, the Ontario board of inquiry's decision in *Kearney v. Bramalea Ltd. (No. 2)*⁴ demonstrates the successful use of such an analysis and has, therefore, been lauded as a very important case for equality rights in Canada.

The objective of this paper is to build on the work that the Commission has already done to recognize the complexity of how people experience discrimination. It describes a framework for a contextualized approach to analyzing discrimination in multiple grounds complaints. This contextualized approach is termed "an intersectional approach to discrimination"⁵. The paper outlines the importance of

1 *Egan v. Canada*, [1995] 2 S.C.R. 513 at 551-2 [hereinafter *Egan*].

2 *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 S.C.R. 665 [hereinafter *Mercier*].

3 See Ontario Human Rights Commission, *Policy and Guidelines on Disability and the Duty to Accommodate* (March 2001) and the section on Ageism in *Time for Action: Advancing Human Rights for Older Ontarians* (June 2001), online: Ontario Human Rights Commission <<http://www.ohrc.on.ca>>.

4 *Infra* note 57.

5 In the context of disability, a contextualized approach to disability discrimination has frequently been referred to using the term "social handicapping".

exploring how an intersectional approach might be consistently applied in all areas of the Commission's work. In doing so, the paper reviews equality and human rights jurisprudence, emerging academic research and commentary on multiple and intersecting grounds of analysis and information about how the Commission currently handles multiple grounds complaints.

This paper is a starting point in a process that will involve all areas of the Commission as well as outside expertise. It is designed to stimulate discussion about how the Commission can more formally operationalize an intersectional approach to discrimination in all areas of its work including policy development, compliance and litigation of complaints. It is hoped that through broad consultation, the Commission will be able to more fully realize a contextual approach to discrimination for human rights complaints that involve multiple and intersecting grounds.

AN INTRODUCTION TO THE INTERSECTIONAL APPROACH

A human rights complaint or an equality rights case that cites multiple grounds of discrimination can be approached in one of several different ways. Depending on the approach that is selected, the analysis of the claim will differ and it is likely that the outcome will also be affected.

In most instances, an intersectional approach to a multiple grounds complaint is the preferred one. The concept of 'intersectionality' has been defined as "intersectional oppression [that] arises out of the combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination standing alone..."⁶ An intersectional approach takes into account the historical, social and political context and recognizes the unique experience of the individual based on the intersection of all relevant grounds.⁷ This approach allows the particular experience of discrimination, based on the confluence of grounds involved, to be acknowledged and remedied.

Several examples help to illustrate the unique experience of discrimination based on historical, political and social contexts and the intersection of grounds:

- In many cases, racial minority women experience discrimination in a completely different way than racial minority men or even women as a gender. Similarly, racial minority men may experience discrimination that would not be faced by non-minority males or even women of the same background. This is because groups often experience distinctive forms of stereotyping or barriers based on a combination of race and gender. An intersectional approach recognizes this.

⁶ M. Eaton, "Patently Confused, Complex Inequality and *Canada v. Mossop*" (1994) 1 Rev. Cons. Stud. 203 at 229.

⁷ C. A. Aylward, "Intersectionality: Crossing the Theoretical and Praxis Divide" (Paper Distributed at Transforming Women's Future: Equality Rights in the New Century: A National Forum on Equality Rights presented by West Coast Leaf, 4 November 1999) [unpublished].

- A person who belongs to a particular religion may face religious discrimination only if they identify by another ground such as race, colour or ethnic origin or may experience discrimination differently from co-religionists based on the relationship with another ground. Gender can also be a factor that has an impact on religious discrimination.
- Women may be more likely to experience sexual harassment if they are more vulnerable by virtue of another aspect of their experience such as recent arrival in Canada.
- Persons with disabilities may experience particular barriers when they identify by other grounds. For example, during the Commission's consultations on age discrimination, the Commission was told that for persons with disabilities, aging can result in a disproportionate impact or unique experiences of discrimination. Indeed, statistical evidence confirms the particular disadvantages faced by older persons with disabilities.⁸ Similarly, research indicates that persons with disabilities and persons who are members of racialized groups are more likely to be unemployed or under-employed.⁹ Therefore, members of racialized groups who have disabilities may be doubly disadvantaged. Aboriginal persons with disabilities face the same problems as other persons with disabilities but these are worsened by jurisdictional issues, namely the lack of disability-related services on reserves and the jurisdictional barriers to accessing services for those who live off reserves.¹⁰ Evidence also indicates that women with disabilities experience additional disadvantage as a result of the intersection of disability with gender.¹¹
- Discrimination on the basis of sexual orientation may be experienced differently by gay men and lesbians as a result of stereotypes around sexuality and relationships. Furthermore, the Commission's *Policy on HIV/AIDS-related Discrimination*¹² recognizes that the erroneous perception of AIDS as a "gay disease" may have a disproportionate

⁸ See *Time for Action: Advancing Human Rights for Older Ontarians*, supra note 3.

⁹ For example, *In Unison: A Canadian Approach to Disability Issues: A Vision Paper* (Federal/Provincial/Territorial Ministers Responsible for Social Services, 1998) notes, "persons with disabilities have a lower rate of employment as well as a lower participation rate in the labour force than those without disabilities" (at 36). Similarly, Canadian Race Relations Foundation, *Unequal Access: A Canadian Profile of Racial Differences in Education, Employment and Income* (Prepared for the Canadian Race Relations Foundation by the Canadian Council on Social Development, 2000) describes barriers to employment faced by racialized groups.

¹⁰ *In Unison: A Canadian Approach to Disability Issues: A Vision Paper*, *ibid.* at 39.

¹¹ "The disproportionate share of domestic responsibilities assumed by women with disabilities has presented significant barriers to their labour force participation and has contributed to increased poverty for many of these women." *ibid.* at 36. See also: D. Pothier, "Connecting Intersecting Grounds of Discrimination to Real People's Real Experiences" (Paper Distributed at Transforming Women's Future: Equality Rights in the New Century: A National Forum on Equality Rights presented by West Coast Leaf, 4 November 1999) [unpublished].

¹² (January 2000), online: Ontario Human Rights Commission <<http://www.ohrc.on.ca>>.

effect on gay men and may result in discrimination the basis of both sexual orientation and perceived disability.¹³

These are just a few examples of the complexity of the experience of discrimination when multiple grounds are involved. Many others have been identified in the Commission's policy work and complaints. Additional examples can be found throughout this paper and will continue to emerge as the Commission builds on its understanding of intersectionality.

Applying an intersectional or contextualized approach to multiple grounds of discrimination has numerous advantages. It acknowledges the complexity of how people experience discrimination, recognizes that the experience of discrimination may be unique and takes into account the social and historical context of the group. It places the focus on society's response to the individual as a result of the confluence of grounds and does not require the person to slot themselves into rigid compartments or categories. It addresses the fact that discrimination has evolved and tends to no longer be overt, but rather more subtle, multi-layered, systemic, environmental and institutionalized. Madame Justice L'Heureux-Dubé has summed up the benefits of this approach:

...categories of discrimination may overlap, and...individuals may suffer historical exclusion on the basis of both race and gender, age and physical handicap, or some other combination. The situation of individuals who confront multiple grounds of disadvantage is particularly complex. Categorizing such discrimination as primarily racially oriented, or primarily gender-oriented, misconceives the reality of discrimination as it is experienced by individuals.¹⁴

Although an intersectional analysis is relevant to any combination of grounds, it has particular implications for race or race-related cases. Thus, the importance of recognizing the intersectionality of multiple forms of discrimination was emphasized in the United Nations World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance ("WCAR"), which was held in 2001 in South Africa.¹⁵ Moreover, it can be a useful strategy to link grounds of discrimination to the social, economic, political and legal environment that contributes to discrimination. Conditions (such as underemployment/ unemployment, poverty,

¹³ For example see *Moffat v. Kinark Child and Family Services (No. 4)* (1998), 35 C.H.R.R. D/205 (Ont. Bd. Inq.).

¹⁴ Madam Justice L'Heureux-Dubé writing for the minority in *Canada (A.G.) v. Mossop*, [1993] 1 S.C.R. 554 at 645-646 [hereinafter *Mossop*].

¹⁵ For example, in an opening address Mary Robinson, United Nations High Commissioner for Human Rights and Secretary-General of the World Conference against Racism, stated:

You are also, I know, aware of the intersectionality of multiple forms of discrimination – how gender intersects with race, how sexual orientation intersects with race, how poverty intersects with race. This is a dimension which is deservedly receiving particular attention at this Conference. [online: Office of the United Nations High Commissioner for Human Rights <<http://www.unchr.ch>> (date accessed: 27 September 2001)].

homelessness) that may not be directly covered by the Ontario *Human Rights Code* (the “Code”), but nevertheless lead to high levels of disadvantage for vulnerable populations, could be included as part of the contextual analysis. Finally, an intersectional analysis can also be used to include human rights protections provided for in international conventions in the ambit of the *Code*.

Many scholars and advocates have argued that human rights claims should recognize that individuals have multiple identities and that these identities shape their experience of discrimination. Within the Commission, there is a growing recognition that we can improve our understanding of the impact when grounds of discrimination intersect and that tools for applying an intersectional analysis will be very helpful in the handling of complaints, from inquiries through to litigation, and in our policy work. As little has been done by human rights agencies and courts in Canada, developing a framework for an intersectional analysis has the potential to be ground breaking.

OTHER APPROACHES TO MULTIPLE GROUNDS

As discussed above, the intersectional approach is the preferred one for complaints and cases that cite multiple grounds. Nevertheless, there are other ways in which multiple grounds matters are being handled by human rights bodies, courts and international bodies such as the United Nations (the “UN”). In some instances, the grounds are looked at sequentially to see whether discrimination can be made out on the basis of each one in turn. In other cases, a strategic choice is usually made regarding where to place the evidentiary focus of the complaint and the other grounds are not considered at all.¹⁶ A decision to eliminate another ground might be as a result of the difficulty in proving it, or because the case law may not be as well established in that area. Either of these two approaches really puts an emphasis on a single ground.

In other cases, one ground is seen as compounding discrimination on the basis of another ground so as to increase the overall burden of inequality.¹⁷ For example, in a situation where all women experience discrimination and all persons with

¹⁶ For insight into why a claimant might choose to frame her case as sex rather than race-discrimination see E. Carasco, “A Case of Double Jeopardy: Race and Gender” (1993) 6 C.J.W.L. 142. Professor Carasco notes the difficulty identifying and proving the basis for the discriminatory conduct:

Proving systemic discrimination based on gender in my case was made possible by the availability of research and statistics relating to women in Canadian universities. Proving systemic discrimination based on the combination of race and gender would have been a lot more difficult simply because of the paucity of women of colour in Canadian universities and the corresponding lack of salary data. The issue of why there are so few women of colour in law faculties is a whole other story. As a woman of colour, I could not help wondering if it was indeed necessary to prove that other women of colour had been treated in a similar fashion before my own treatment, as a woman of colour, could be acknowledged. [at 152]

¹⁷ Intersectionality: Crossing the Theoretical and Praxis Divide, *supra* note 7.

disabilities experience discrimination, women with disabilities will face compounded disadvantage. One example might be a physical test as a pre-condition for employment. If the test disproportionately screens out women and disproportionately impacts persons with disabilities, a woman with a disability will face an accumulated burden and therefore compounded discrimination. This approach differs from an intersectional approach because it simply adds one form of discrimination to the other without recognizing that in fact something unique is being produced. Furthermore, it does not incorporate a contextualized approach which examines society's response to the person as a result of the combination of grounds.

A review of human rights decisions across Canada, cases under s. 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), and even international instruments and complaints, reveals that at present the most common approach to discrimination claims is one that tends to focus on a single ground. Current models for human rights and equality claims apply overarching principles in proving and remedying discrimination that do not always take into consideration the unique circumstances of the individual or the social context of the discrimination.

The current approach has been shaped by several factors. Human rights legislation evolved to address overt expressions of discrimination in public spheres. The social, legal and political climate of the time shaped the way in which the legislation developed and was implemented. Another contributing factor was the historical development of human rights legislation and the interpretation given to human rights. Human rights legislation was based on the United Nations' Universal Declaration of Human Rights, which emphasized civil and political rights at the expense of economic, social and cultural rights and did not explicitly recognize the possibility of the intersection of grounds. Some have argued that the current approach has been informed by dominant political ideologies and philosophies such as liberalism in which the 'subject' is treated as independent, unitary, coherent and fixed.¹⁸

In the sections that follow, discrimination cases involving multiple grounds will be analyzed. *Charter* cases, human rights complaints and complaints under international instruments in which an intersectional approach was not followed will be discussed and an analysis of how the failure to do so led to problematic outcomes will be provided. By way of contrast and to illustrate how an intersectional approach can and should be applied, cases in which a more contextualized approach was used will be reviewed.

Human Rights and Charter Cases

Section 15 of the *Charter* guarantees the right to equality based on a list of 'enumerated' grounds, namely race, national or ethnic origin, colour, religion, sex,

¹⁸ See D. Kropp, "'Categorical' Failure: Canada's Equality Jurisprudence – Changing Notions of Identity and the Legal Subject" (1997) 23 *Queen's L.J.* 201, online: QL.

age and mental or physical disability. In addition, in appropriate cases, courts can recognize ‘analogous’ grounds of discrimination. With the exception of the Manitoba *Human Rights Code*, human rights statutes in Canada contain an enumerated list of grounds of discrimination with no power to recognize further grounds.

Some scholars have been critical of the focus on enumerated and analogous grounds in *Charter* and human rights cases for two primary reasons. The first relates to the fact that “a limited view of identity ensures that those persons who are unable to categorize or caricaturize themselves according to one of the enumerated categories find themselves “falling through the cracks” of Canadian equality and anti-discrimination law”.¹⁹ The second relates to situations in which there is sufficient evidence to find discrimination on the basis of one of the grounds, but to focus solely on that ground would do an injustice to the lived realities of those facing discrimination. In addition to failing to comprehend the complex nature the discrimination, the injustice can involve failing to fashion an appropriate remedy.

A frequently cited example of a case where the single ground approach has resulted in a discrimination claim being dismissed altogether is the majority decision of the Supreme Court of Canada in *Mossop*.²⁰ The majority of the court has been criticized for preferring the least problematic categorization available, namely that Mr. Mossop’s claim of discrimination for being denied bereavement leave to attend the funeral of his same-sex partner’s father was a claim of discrimination on the basis of sexual orientation and not on the basis of family status.²¹ The majority decision was based on an assumption that the grounds of “family status” and “sexual orientation” were mutually exclusive. As the majority characterized the claim as based on sexual orientation, and due to the fact that at the time, sexual orientation was not a prohibited ground of discrimination in the *Canadian Human Rights Act*, Mr. Mossop’s claim failed despite the clear differential treatment he had experienced.

Other cases have ‘fallen through the cracks’ in the sense that discrimination has been found on one ground only, in a way that fails to comprehend the complexity of the claimant’s experience. One author surveyed race and sex discrimination cases reported in the Canadian Human Rights Reporter from 1980 to 1989 to see how Canadian human rights tribunals have responded to claims of discrimination brought by racial minority women.²² The first finding was that it was very difficult to find reference to racial minority women in the cases. The effect of this was that racial minority women and their unique experiences of discrimination seemed to

¹⁹ *Ibid.* at para. 1.

²⁰ *Supra*, note 14.

²¹ See for example: J. Freeman, “Defining Family in *Mossop v. DSS*: The Challenge of Anti-Essentialism and Interactive Discrimination for Human Rights Legislation” (1994) 44 U.T.L.J. 41 and Patently Confused: Complex Inequality and *Canada v. Mossop*, *supra* note 6.

²² N. Duclos, “Disappearing Women: Racial Minority Women in Human Rights Cases” (1993) 6 C.J.W.L. 25 [hereinafter “Disappearing Women”].

‘disappear’. Moreover, when cases involving racial minority claimants were found, there was no consideration in the tribunals’ decisions that racial minority women might be relevantly different from racial majority women or racial minority men. In other words, the cases distorted the women’s actual experiences, analogizing them to what would have happened to “raceless women or genderless racial minorities”.²³

Most of the scholarly literature available on the intersection of gender with other grounds focuses on the experience of women. Of course, as illustrated in the examples given throughout this paper, for many men, the intersection of gender with another ground of discrimination produces a unique experience of discrimination.

One common problem with not using an intersectional approach can be seen in many sexual discrimination and harassment cases. Stereotypes arising from particular combinations of race and gender are often the source of discriminatory treatment. Sexual harassment cases tend to proceed on the basis that the race, ethnic origin, ancestry of the alleged harasser and the complainant are not relevant. However, there may be stereotypes about the sexuality of women based on their race, ethnic origin, ancestry or place of origin. In one case where a Black woman was sexually harassed by her employer, the evidence revealed that he had said to her “that’s how black people make their living, by doing blow jobs” and the board even noted that the respondent made “a number of references to [the complainant’s] colour” during this testimony. Yet there was no serious consideration of how the complainant had been treated as a young Black woman and no finding of race discrimination.²⁴ In sexual harassment cases, factors such as age, marital status, and sexual orientation can also be relevant.²⁵

In another case, involving sexual harassment of factory workers by their foreman, the board suggested that the sexual harassment was exacerbated by the complainants’ ethnic and linguistic characteristics as well as place of origin and immigration status:

*It is clear that Mr. DeFilippis tried to intimidate and manipulate the female workers he desired sexually. He was in a position, as he knew, of being able to hire very dependent, immigrant female workers (very much needing work, not speaking English and being relatively inarticulate, and who perhaps appeared from their cultural backgrounds to more likely subject themselves to male authority) who he could seek to take sexual advantage.*²⁶

²³ *Ibid.* at 30.

²⁴ *Cuff v. Gypsy Restaurant and Abi-ad* (1987), 8 C.H.R.R. D/3972 (Ont. Bd. Inq.) as discussed in *Disappearing Women*, *ibid.* at 34-5.

²⁵ For a sexual harassment case in which the sexual orientation of the complainant was a factor in her experience, see *Crozier v. Asselstine* (1994), 22 C.H.R.R. D/244 (Ont. Bd. Inq.).

²⁶ *Olarte v. DeFilippis and Commodore Business Machines Ltd.* (1983), 4 C.H.R.R. D/1705 (Ont. Bd. Inq.) [hereinafter *Olarte*].

To its credit the board did recognize that what was experienced by the complainants was not just a product of their gender but also other grounds. However, it did not find discrimination on the basis of race, ancestry, place of origin or ethnic origin. Nor was there any mention of these grounds as an exacerbating factor in the determination of an appropriate remedy.²⁷

In a single ground focused approach, the strategic decision as to where to place the ‘evidentiary focus’ of the claim is often based on which grounds are more ‘palatable’. Several authors have noted that this often results in race being erased. For example, *Alexander v. British Columbia*²⁸ a First Nations woman who was partially blind and had a motor impairment affecting her gait and speech was refused service in a liquor store because the store manager thought she was drunk. Despite the fact that she asserted that the discrimination was on the basis of race, colour, ancestry and/or physical disability, the tribunal characterized the store manager’s refusal to believe her assertions about her disability as discrimination on the basis of disability only and did not consider whether stereotypes about Aboriginal women were at play.

Another common criticism is that the “law’s conception of race is so impoverished that it cannot seem to grasp differences between racial groups.”²⁹ Persons who are not members of the dominant group tend to be viewed as a homogenous category of ‘not-white’, ‘racial minority’ or ‘visible minority’. Everyone within that group is treated as being the same and the particular stereotypes or forms of disadvantage that may be experienced by different persons based on their particular identity are not acknowledged. For example, in *Wattley v. Quail*³⁰, an apartment was not rented to a Black man. The respondent gave evidence that a potential tenant would have to be a “person who was compatible with her as she lived alone and she wanted a person with whom she felt comfortable and secure.”³¹ Evidence was given by another tenant, an East Asian woman, that the respondent was not racist because the respondent had rented an apartment to her. However, this did not address the fact that the respondent may have held stereotypes about Black men and may have viewed the complainant very differently based on his gender and race. In that case, the evidence of the other tenant was not successful in defeating the complaint. However, the case illustrates that evidence that a respondent has not discriminated against persons from a different racial background must be used carefully as it can result in a claim of discrimination being defeated, despite the fact that a person may have had a unique experience as a result of their particular identity.

²⁷ Each complainant received general damages ranging from \$1,500 to \$4,000 plus interest and lost wages for a total award of \$21,000. For a further discussion of remedies see the section **The Move Towards an Intersectional Approach**.

²⁸ *Disappearing Women*, *supra* note 22 at 45.

²⁹ *Disappearing Women*, *supra* note 22 at 43.

³⁰ (1988), 9 C.H.R.R. D/5386 (B.C.C.H.R.).

³¹ *Ibid.* at D/5387.

Another concern with combining different racialized groups into a single category is that it tends to assume that only members of a dominant group can discriminate and that racial minorities cannot discriminate against each other.³² Future policy work on race ethnicity and origin will provide a more detailed analysis of the experience of racial discrimination.

Further evidence of the difficulty in grasping differences is illustrated by the tendency to treat race, colour, ethnic origin, ancestry and place of origin as a single category. This fails to recognize that these are separate grounds which may intersect to produce a qualitatively different experience for persons who are identified by more than one ground. For example, a recent Canadian Race Relations Foundation report concludes that within racialized groups, foreign-born persons face even greater disadvantage in employment.³³

It is important to note that although the discussion of intersectionality in the scholarly literature often focuses on the intersection of race with other grounds, in particular gender, the concept is applicable to all forms of multiple grounds discrimination. A single ground approach has resulted in inappropriate outcomes and the erasure of the complexity of the discrimination in cases involving any combination of grounds including race related grounds, age, disability, sexual orientation, creed and gender. The need for an intersectional approach is therefore necessary to apply a proper analysis, no matter what the combination of grounds involved.

The Commission's Approach to Complaints

Complaints to the Ontario Human Rights Commission filed between April 1997 and December 2000 indicate that 48% of the complaints included more than one ground, while 52% cited only one ground of discrimination.

³² Disappearing Women, *supra* note 22 at 43.

³³ *Unequal Access: A Canadian Profile of Racial Differences in Education, Employment and Income*, *supra* note 9 .

Table 1

Number of Cases with more than one ground

Total number of cases filed by selected grounds	Race*	Age	Handicap	Sex	Receipt of Public Assistance
	4140	868	3303	2522	161
Number of cases with more than one ground					
Race		190	221	285	41
Age	190		134	131	33
Handicap	221	134		237	38
Sex	285	131	237		40
Receipt of Public Assistance	41	33	38	40	
Total	737	488	630	693	152

* The data on race includes the grounds of colour and place of origin³⁴.

Fifty-six percent (56%) of age complaints included other grounds; 19% of complaints filed on the ground of handicap included multiple grounds; 27% of cases filed on the ground of sex included multiple grounds; 94% of complaints citing the ground of receipt of public assistance included other grounds³⁵. Of all the complaints filed, 18 % of 'race' cases included more than one ground. Unfortunately, due to the fact that race has traditionally been treated as also encompassing grounds such a colour and place of origin, this statistic may not be meaningful in reflecting the complexity of the race-related cases the Commission receives.

The approach followed by courts and tribunals in cases such as those discussed above are reinforced when these cases are incorporated into human rights policies and procedures. When decision-makers, as eminent as the Supreme Court, are struggling to apply a multiple grounds analysis, it is not surprising that human rights commissions are also having difficulty. At the same time, when commissions determine that there is sufficient evidence to proceed on a particular ground and not to pursue others, the case tends to be presented as such to the tribunal by commission counsel and will likely be determined on that ground alone.³⁶ A self-reinforcing cycle can then be established in which human rights commissions and

³⁴ The Commission's tendency to link place of origin with grounds such as race, colour, ethnic origin will be receiving further consideration in future policy work on race, ethnicity and origin.

³⁵ The statistic with respect to receipt of public assistance is not surprising given the relationship between low socio-economic status and other *Code* grounds. The Commission's Research Paper *Human Rights Commissions and Economic and Social Rights* (February, 2000) [unpublished], outlines in detail the relationship between poverty and being a member of a group identified by grounds such as gender, age, family and marital status, disability, race, ancestry, place of origin and citizenship.

³⁶ Disappearing Women, *supra* note 22 at 35.

decision-makers each play a part in perpetuating a single ground focused approach.

During intake, potential complainants are asked to identify the grounds on which they believe discrimination or harassment occurred. Some will indicate all of the grounds that they feel may have been a factor while others may not realize the relevance of another ground. When it comes to light subsequently, usually during an investigation, if the complaint is not promptly amended, it may be too late. Concerns about procedural fairness may be triggered if there is a change in the nature of the case the respondent has to answer. Timeliness may also be an issue. Once the complaint is referred to a board of inquiry, a party may only argue a new basis of liability without amending a complaint where it does not depend on the establishment of new factual allegations of which the respondent had no notice, the assertion of which could cause prejudice.³⁷

Unfortunately, the Commission's 1994 *Guidelines and Recommendations for Dealing with Race Cases from Intake to Board of Inquiry* do not discuss the need to address the intersection of race and race-related grounds with other grounds such as sex, disability and age to name just a few. Similarly, the Commission's Enforcement Manual does not provide explicit guidance on the intersection of grounds. In practice, all of the grounds mentioned in a complaint may not always be investigated. The simplest or most obvious ground may become the focus, with other grounds mentioned in passing or not at all. When all the grounds are investigated, rather than applying an intersectional approach, each ground may be treated as separate and not related to the others. This can result in a finding that there is insufficient evidence on any one ground to send a case to a board of inquiry, despite the fact that the person clearly experienced differential treatment. It can also result in inappropriate comparisons being made with persons identified by some but not all of the same grounds as the complainant.

In other cases, an intersectional approach to the multiple grounds is applied and an accurate picture of the discrimination is captured. For example, in an employment case involving a Black man from a country in Africa who had several children and a non-evident disability, viewing each ground separately, there did not appear to be enough evidence of discrimination on each ground alone to warrant a board of inquiry. Yet there was sufficient evidence that the complainant was experiencing differential treatment for reasons related to *Code* grounds and not just because of a personality conflict or job performance issues.³⁸ Had the Commission treated each ground as a separate and unrelated category, the case would likely have

³⁷ See *Vander Schaaf v. M & R Property Management Ltd.* (2000), 38 C.H.R.R. D/251 (Ont. Bd. Inq.) at para. 14 [hereinafter *Vander Schaaf*]. In that case, the Commission was denied its motion to amend the complaint to add "age" as a ground of discrimination.

³⁸ There were isolated incidents related to each of the complainant's race, disability and family status. Looking at each ground alone, there may not have been sufficient evidence for a board. Yet it appeared clear that the complainant's supervisor had issues with him as a Black man from Africa who needed time off due to family responsibilities and as a result of his non-evident disability. It was therefore, the intersection of grounds in this person that led to the discriminatory treatment.

been dismissed. However, the Commission concluded that the incidents that had occurred demonstrated that he had experienced discrimination on an intersection of grounds. In other words, a contextual analysis was used in which the full identity of the complainant was considered. The case was not about the complainant as an individual but rather the differential treatment he received as a result of the confluence of *Code* grounds.

A potential pitfall in investigating multiple grounds complaints is to compare the complainant to persons who only share some of the complainant's characteristics. For example, in a hypothetical case involving an allegation that an employer refused to promote a woman with a family because of a "glass ceiling" based on a presumption that women with young children are not sufficiently committed to their careers, it would not necessarily be appropriate to conclude that because the employer has women in management and men with children in senior positions, no discrimination has occurred. To the greatest extent possible, if comparisons are to be used, they should reflect all the aspects of the complainant's identity. In this hypothetical example, the experience of mothers with young children seeking to advance within the company would likely be the only meaningful comparison. If there are insufficient persons to compare to, it may be better to reflect the limited value of a comparison than to equate the complainant's situation to one that might be quite different because of the grounds involved. An intersectional analysis would recognize that comparisons must be used with great caution as an inappropriate comparison can lead to the dismissal of a case that should have been adjudicated.

Even where it is clear that there is enough evidence of discrimination on one ground alone, it may be appropriate to consider referring the case to the board of inquiry on the basis of all the grounds that make up the complainant's identity or on the basis of all of the grounds that might be relevant. For example, if a woman who is a recent immigrant alleges sexual harassment, it might also be appropriate to add the grounds of place of origin, citizenship and ethnic origin to ensure that the investigator and later the board of inquiry can consider whether part of the reason for the harassment was related to the woman's actual or perceived vulnerability as a recent immigrant, a perception about her sexuality based on her place of origin and so forth. Oral testimony, given under oath and subject to cross-examination, may be more successful in eliciting evidence about the complexity of the complainant's experience than a Commission investigation.

Jurisprudence of International Bodies

To date, international bodies are proceeding largely on the basis of a single ground focused approach. The problem of multiple disadvantage and multiple discrimination, in particular as experienced by minority women, has not been acknowledged in the case law of the European Court of Human Rights and the

Human Rights Committee.³⁹ Monitoring bodies select one aspect of discrimination and largely ignore other simultaneous violations. This has resulted in a failure to address the totality of the problems and the structural disadvantages experienced by groups such as minority women.⁴⁰

In a case concerning Britain's denial to women with permanent residence permits the right to have their spouses join them in Britain, the European Court established a violation on the ground of sex but did not consider in any detail the issue of discrimination based on national origin or birth.⁴¹ This resulted in a comparison only on the basis of sex, *i.e.* female permanent residents were compared with male permanent residents, rather than a comparison based on sex and birth. A more appropriate comparison would have compared female permanent residents with male citizens thus showing the true extent of the discrimination.⁴²

Closer to home, a very significant example of the Human Rights Committee's failure to consider multiple grounds discrimination can be seen in *Lovelace v. Canada*.⁴³ The case involved a complaint about Canada's *Indian Act* which provided that First Nations women would lose 'Indian status' and the associated rights upon marrying non-First Nations men. There was no similar loss of status for First Nations men marrying non-First Nations women. The Committee chose to focus on the issue of the right to culture, language and religion of persons belonging to minorities. Despite the strong sex discrimination aspect of the case, the Committee did not address in any substantial way the fact that Lovelace was denied the right to enjoy her culture *because she was a woman*.

The failure to address multiple grounds discrimination at the international level has important consequences. If the European Court of Human Rights or the Human Rights Committee establishes a violation, the states concerned are to amend the law or practice accordingly.⁴⁴ Thus, an incomplete analysis can affect the remedy or outcome. As well, the cases are used as examples and precedents by other states when enacting or amending laws, writing their reports under various international instruments and applying principles before their own national courts.⁴⁵

³⁹ A.S. Åkermark, "Minority Women: International Protection and the Problem of Multiple Discrimination" in L. Hannikainen, E. Nykänen, eds., *New Trends in Discrimination Law – International Perspectives* (Turku: Turku Law School, 1999) 85 at 86. The discussion of the treatment of multiple discrimination in cases before international bodies is from this article.

⁴⁰ *Ibid.* at 99 and 100.

⁴¹ *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, ECHR Series A, No. 94 (1985).

⁴² Åkermark, *supra* note 39 at 101-2.

⁴³ Views of the Human Rights Committee in UN Doc. A/36/40(1981).

⁴⁴ Åkermark, *supra* note 39 at 103.

⁴⁵ *Ibid.* At 104.

THE MOVE TOWARDS AN INTERSECTIONAL APPROACH

Multiple Grounds in Equality and Human Rights Jurisprudence

Some courts and tribunals have started to acknowledge the need to make special provision for discrimination based on multiple grounds and to recognize the social, economic and historical context in which it takes place. However, despite these advancements, the courts' understanding of a proper intersectional approach is still in its infancy. What follows is a discussion of recent cases in which a move towards a multiple grounds or intersectional analysis is evidenced in either a majority or dissenting opinion.

Supreme Court of Canada

Recently, decisions of the Supreme Court of Canada have included comments on multiple grounds of discrimination and intersecting grounds. In some of these decisions, the social context and life experiences of persons who suffer discrimination are discussed. The perspective of the individual is reaffirmed.

Writing for the minority in the *Mossop* case, Madam Justice L'Heureux-Dubé remarked, "it is increasingly recognized that categories of discrimination may overlap, and that individuals may suffer historical exclusion on the basis of both race and gender, age and physical handicap or some other combination." She further commented that:

...categorizing such discrimination as primarily racially oriented, or primarily gender-oriented, misconceives the reality of discrimination as it is experienced by individuals. Discrimination may be experienced on many grounds, and where this is the case, it is not really meaningful to assert that it is one or the other. It may be more realistic to recognize that both forms of discrimination may be present and intersect.

She went on to comment on the way to deal with multiple forms of discrimination where both grounds are prohibited:

On a practical level, where both forms of discrimination are prohibited, one can ignore the complexity of the interaction, and characterize the discrimination as one type or the other. The person is protected from discrimination in either event.

However, though multiple levels of discrimination may exist, multiple levels of protection may not. There are situations where a person suffers discrimination on more than one ground, but where only one form of discrimination is a prohibited ground. When faced with such situations, one should be cautious not to characterize the discrimination so as to deprive the person of any protection. ... One should not lightly allow a

*characterization which excludes those from the scope of the Act who should legitimately be included.*⁴⁶

While being generally positive about L'Heureux-Dubé's J.'s recognition of intersecting grounds of discrimination, many commentators have been critical of her suggestion that where both forms of discrimination are prohibited, one can just select one of the grounds. This represents a return to the traditional single ground focused approach and does not reflect an intersectional analysis. This comment likely arose owing to the facts of the case and L'Heureux-Dubé J.'s words nevertheless represent an important first step in recognizing the intersection of multiple grounds.

In a subsequent decision, *Egan*, L'Heureux-Dubé J., once again in a dissenting opinion, reiterated that categories of discrimination cannot be reduced to watertight compartments, but rather will often overlap in significant measure. Awareness of, and sensitivity to, the realities of those experiencing discrimination is an important task that judges must undertake when evaluating the impact of the distinction on members of an affected group.⁴⁷

More recently, in its majority decision in *Law v. Canada*⁴⁸, the Supreme Court recognized that a discrimination claim can present an intersection of grounds that are a synthesis of those listed in s. 15(1) or are analogous to them:

*... it is open to a claimant to articulate a discrimination claim under more than one of the enumerated and analogous grounds. Such an approach to the grounds of discrimination accords with the essential purposive and contextual nature of equality analysis under s. 15(1) of the Charter. Where a party brings a discrimination claim on the basis of a newly postulated analogous ground, or on the basis of a combination of different grounds, this part of the discrimination inquiry must focus upon the issue of whether and why a ground or confluence of grounds is analogous to those listed in s. 15 (1). This determination is made on the basis of a complete analysis of the purpose of s. 15(1), the nature and situation of the individual or group at issue, and the social, political and legal history of Canadian society's treatment of the group. A ground or grounds will not be considered analogous under s. 15 (1) unless it can be shown that differential treatment premised on the ground or grounds has the potential to bring into play human dignity.... If the court determines that recognition of a ground or confluence of grounds as analogous would serve to advance the fundamental purpose of s. 15(1), the ground or grounds will then be so recognized.*⁴⁹

The Court further stated:

⁴⁶ *Mossop*, *supra* note 14 at para. 53-54.

⁴⁷ *Egan*, *supra* note 1 at 563.

⁴⁸ [1999] 1 S.C.R. 497 [hereinafter *Law*].

⁴⁹ *Ibid.* at 554-5.

There is no reason in principle, therefore, why a discrimination claim positing an intersection of grounds cannot be understood as analogous to, or as a synthesis of, the grounds listed in s. 15 (1).⁵⁰

Subsequent to *Law*, the Supreme Court applied this analysis to recognize a new analogous ground of discrimination, namely “aboriginality-residence.” In *Corbière v. Canada*⁵¹ the court considered a provision of the *Indian Act* which barred band members who live off-reserve from voting in band elections. In establishing the new analogous ground the court noted that the group experiencing differential treatment was based on a combination of traits, namely being Aboriginal persons who are band members but living off a reserve. L’Heureux-Dubé J.’s decision also noted the particular adverse impact that the impugned law had on Aboriginal women because of the history of their involuntary loss of Indian status:

*Aboriginal women, who can be said to be **doubly disadvantaged** on the basis of both sex and race, are among those particularly affected by legislation relating to off-reserve band members, because of their history and circumstances in Canadian and Aboriginal society.⁵²[Emphasis Added.]*

Furthermore, in describing whether recognition of an analogous ground will further the purposes of s. 15(1) of the *Charter*, L’Heureux-Dubé J. noted:

The second stage [of the s. 15(1) inquiry] must therefore be flexible enough to adapt to stereotyping, prejudice, or denials of human dignity and worth that might occur in specific ways for specific groups of people, to recognize that personal characteristics may overlap or intersect (such as race, band membership, and place of residence in this case), and to reflect changing social phenomena or new or different forms of stereotyping or prejudice.⁵³

The decision places a significant emphasis on a contextual approach that recognizes stereotyping, prejudice or denials of human dignity may occur in specific ways for specific groups of people and that personal characteristics may overlap or intersect.

The inability to recognize new analogous grounds under the *Code* does not mean that these Supreme Court of Canada cases are inapplicable to the Commission’s work. Rather they represent an important first step in acknowledging that grounds are not rigid, watertight compartments and in signalling a move towards an intersectional and contextualized approach. As the approach to human rights and *Charter* cases should be as congruous as possible⁵⁴, this evolution in the Supreme Court’s jurisprudence signals a need for human rights bodies to follow by applying existing grounds in a manner that most promotes an intersectional approach.

⁵⁰ *Ibid.*

⁵¹ [1999] 2 S.C.R. 203 [hereinafter *Corbière*].

⁵² *Ibid.* at 259.

⁵³ *Ibid.* at 253.

⁵⁴ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 [hereinafter “*Meiorin*”].

Courts and Tribunals

Several notable decisions recognizing the relationship between multiple grounds have come out of Canadian courts and human rights tribunals.

One of the earliest and most significant decisions is that of the Nova Scotia Court of Appeal in *Dartmouth/Halifax County Regional Housing Authority v. Sparks*⁵⁵. In that case, the court recognized that in considering whether legislation has a discriminatory effect, regard must be had to the characteristics shared by persons comprising the group adversely affected. The Court recognized that discrimination is the combined effect of multiple factors, including poverty:

*As a general proposition persons who qualify for public housing are the economically disadvantaged and are so disadvantaged because of their age and correspondingly low incomes (seniors) or families with low incomes, a majority of whom are disadvantaged because they are single female parents on social assistance, many of whom are black [sic]. The public housing tenants group as a whole **is historically disadvantaged as a result of the combined effect of several personal characteristics listed in s. 15(1).***⁵⁶ [Emphasis Added.]

In a significant Ontario human rights case, *Kearney v. Bramalea Ltd. (No. 2)*⁵⁷ a very similar approach was followed but in the context of a complaint under the Code. The case involved the use of rent-to-income ratios to determine eligibility for rental accommodation. Expert witnesses provided the board of inquiry with evidence that the rent-to-income ratios operated to exclude certain socially disadvantaged groups who were statistically more likely to never meet the required ratio. The statistical evidence presented noted the particular situation of persons who present an intersection of grounds, such as single mothers, young single women, single First Nations women, single Black women, single South Asian women, single women from Africa, non-citizen female single parents and unattached women on social assistance.

The tribunal accepted evidence that the use of criteria had a disparate impact on individuals based on their age, sex, race, family status, marital status, citizenship, place of origin and the receipt of public assistance. The tribunal acknowledged that the evidence presented noted the importance of recognizing that many “groups” intersect and overlap substantially.⁵⁸ The tribunal found discrimination on the basis of every ground cited in each complaint. For example, in the case of Catarina Luis, a single Black mother, a refugee from Angola, and in receipt of family benefits assistance, the board concluded

⁵⁵ (1993), 101 D.L.R. (4th) 224 (N.S.C.A.) [hereinafter *Sparks*].

⁵⁶ *Ibid.* at 234.

⁵⁷ (1998), 34 C.H.R.R. D/1 (Ont. Bd. Inq.) [hereinafter *Kearney*]. The decision of the Superior Court of Justice, Divisional Court confirms the Board of Inquiry's approach and treatment of the expert evidence: *Shelter Corp. v. Ontario (Human Rights Comm.)* (2001), 39 C.H.R.R. D/111 (Ont. Sup. Ct.).

⁵⁸ *Kearney, ibid.* at D/16.

discrimination on the basis of race, sex, marital status, family status, citizenship, place of origin and receipt of public assistance.

In the subsequent decision of *Vander Schaaf*, the board of inquiry once again reverted to an approach that primarily looked at the alleged grounds of discrimination, namely age, sex and marital status, in isolation instead of giving full consideration to their intersectional effect. In another recent decision in which the complainant, a single mother on social assistance, alleged she was denied rental accommodation because of her source of income and her marital and family status, the tribunal noted that “in order to prove her complaint, the complainant need only establish that one or more of these grounds was one of the factors in the respondent’s denial of tenancy”.⁵⁹ While this approach may be technically accurate, it tends to negate the complexity of discrimination faced by groups such as single mothers in receipt of social assistance. It should, therefore, only be followed where evidence supports only one ground and not where the discrimination is clearly based on an intersection of grounds. In those cases, all grounds should be recognized, investigated and, if there is evidence to warrant, sent to a board on the totality of grounds.

In *Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch)*, the Ontario Divisional Court followed *Sparks and Corbière* to find that “the recognition of the Respondents as members of a group suffering discrimination by reason of their status as sole support mothers on social assistance, a basis analogous to the enumerated grounds, would advance the fundamental purpose of s. 15(1), the protection of human dignity.”⁶⁰

In *Irshad (Litigation guardian of) v. Ontario (Minister of Health)*⁶¹, the Court recognized that the reason the claimants were not eligible for OHIP coverage, the basis for the *Charter* claim, was not because they were disabled or immigrants, but because they were immigrants with a disability. Had they not been disabled they would have been able to satisfy the medical requirements under the *Immigration Act* and thereby entitled to OHIP coverage. Had they been born in Ontario they would also have been entitled even with the same disabilities. Despite this acknowledgement of the effect of the intersection of grounds, the court’s decision to dismiss the *Charter* challenge lacked an assessment of the intersectionality of the grounds of disability and immigration status. On appeal, the Court accepted that but for their disabilities, the claimants would have been eligible for OHIP. However, it concluded that the eligibility criteria used by Ontario were based on immigration status. It was the federal immigration authorities who decided that physical disabilities rendered the claimants ineligible for landed immigrant status. The adverse effect caused by selecting criteria, namely immigration status, that were based on disability, was not considered.

⁵⁹ *Birchall v. Guardian Properties Ltd.* (2000), 38 C.H.R.R. D/83 at para. 30 (BCHRT).

⁶⁰ [2000] O.J. No. 2433 (Div. Ct.), online: QL. This decision is under appeal.

⁶¹ (1999), 60 C.R.R. (2d) 231 (Ont. Gen. Div.); aff’d 197 D.L.R. (4th) 103 (Ont. C.A.).

In *Rivers v. Squamish Indian Council*,⁶² the tribunal examined a discrimination claim based on more than one enumerated ground. The complainant, an Aboriginal woman whose national and ethnic origin was Gitskan, alleged that she was discriminated against because she was a “married in” as opposed to a blood born member of the Squamish Band and was not connected to one of the “chiefly families.”⁶³ The dissenting member of the tribunal recognized that the complaint was based on multiple grounds *i.e.* national/ethnic status and family status and stated that the alleged grounds had been analyzed separately but that the two grounds are very closely related and in fact overlap.⁶⁴ While indicating that the dimension of the interaction of multiple grounds or the concept of intersectionality would be relied upon, the dissenting member then proceeded to analyze the case by dealing with each ground in turn rather than dealing with the effect of their intersection. This type of approach illustrates the desire on the part of decision-makers to acknowledge an intersectional approach despite the fact that they are, in some instances, unsure how to apply an intersectional analysis to the facts.

One case provides an excellent example of a tribunal expressly recognizing the intersection of race and sex in finding discrimination. In *Frank v. A.J.R. Enterprises Ltd. (c.o.b. “Nelson Place Hotel”)*,⁶⁵ the majority of the clientele of the respondent’s hotel was Aboriginal. However, the complainant and other Aboriginal women found themselves evicted from their rooms or denied service at the lounge on several occasions. The respondent sought to argue that as it primarily served Aboriginal persons, it would not have discriminated against the complainant. (Essentially the respondent argued that as it does not discriminate against other Aboriginal persons, it could not have discriminated against the complainant.) The tribunal looked at the historical context of the treatment of Aboriginal persons in Canada:

*...it is not inconceivable for an agency, a business, a nation, or a people, to maintain business dealings with a people it holds in contempt and to blatantly discriminate against it **or a class within it**.... To hold Native people in contempt while taking every dollar from them is not an unheard of business practice in our history. The Respondent’s actions and practices, to say the least, smack of this negative attitude toward **aboriginal women as a class of people**.*⁶⁶ [Emphasis Added.]

The tribunal took offence to the respondent’s insinuation that the complainant was a prostitute: “What is particularly offensive about this is the assumption that she is a prostitute because she is a single Native woman in

⁶² *Rivers v. Squamish Indian Council*, [1994] C.H.R.T. No. 3 No. T.D. 3/94 [hereinafter *Rivers*].

⁶³ *Ibid.* at 93-94.

⁶⁴ *Ibid.* at 97.

⁶⁵ (1993), 23 C.H.R.R. D/228 (BCCHR) [hereinafter *Frank*].

⁶⁶ *Ibid.* at D/232.

a hotel by herself”.⁶⁷ The tribunal used strong language about the intersection of race and sex and compensated the complainant for the indignity of both race and sex discrimination:

*I recognize that this is not the platform for me to pontificate about the evils of sexism and racism, but suffice it to say that **sexism and racism do often intersect to the degree that sometimes one is unsure which of these two forces is at work.** Nevertheless, I wish to draw attention to the magnitude of the complaint, **to the intersection of sex and race discrimination which, in my view, is the essence of this complaint,** and to the indignity suffered by the Complainant. I also wish to draw attention to the fact that that attitude and conduct of the Respondent seems to me to **reflect a pattern of malignant and contemptuous sexism intertwined with callous racism and disregard for the basic dignity, humanity and feelings of aboriginal women.**⁶⁸ [Emphasis Added.]*

Increasingly, tribunals and courts are recognizing a need for an intersectional analysis. After having acknowledged the need for an intersectional approach, courts and tribunals are meeting with varying degrees of success in applying such an analysis to the determination of whether discrimination has occurred. In some cases, the analysis takes into account the effect of the existence of multiple grounds, while in others the decision-makers tend to revert back to a sequential analysis of each ground in isolation. Nevertheless, some significant developments have occurred and include: (1) a recognition by the Supreme Court that an intersection of grounds can be recognized as a new analogous ground where social context, historical disadvantage and essential human dignity are involved,⁶⁹ (2) the application of a contextual analysis, focusing on society’s response to the individual and it’s construction of identity, that includes examination of historical disadvantage, social, political and cultural context and socio-economic issues,⁷⁰ (3) the use of statistical evidence to illustrate the particular circumstances of groups identified by an intersection of grounds,⁷¹ (4) findings of discrimination based on all the grounds that make up a complainant’s identity and not just those that are the least complex or controversial,⁷² and (5) the rejection of individuals or groups that are identified by some but not all of the same grounds as the complainant as being inappropriate for comparison to the complainant.⁷³

Remedies

Although courts and tribunals have acknowledged the reality of discrimination on more than one ground, there are no clear directions on dealing with remedies in these types of claims. There is very little evidence to show that remedies awarded

⁶⁷ *Ibid.* at D/233.

⁶⁸ *Ibid.* at D/234.

⁶⁹ *Law, supra* note 48 and *Corbière, supra* note 52.

⁷⁰ *Frank, supra* note 65, *Sparks, supra* note 56 and *Kearney, supra* note 57.

⁷¹ *Kearney, ibid.*

⁷² *Kearney, ibid.* and *Frank, supra* note 65.

⁷³ *Frank, ibid.* and *Corbière supra* note 52.

in human rights complaints consider multiple or intersecting grounds of discrimination. While some tribunal decisions acknowledge that discrimination may be experienced at multiple levels, this appears not to be reflected in awards or remedies. For example, although extensive documentation was presented in *Kearney* on the impact of the landlord's policy on multiple grounds of discrimination, the remedies did not recognize or address the multiple effects of the discrimination. In *Olarte*, the court recognized that the respondent took advantage of the particularly vulnerable status of his dependent, immigrant female workers who very much needed work, may not have spoken English and perhaps appeared from their cultural backgrounds to be more likely to subject themselves to male authority. Despite recognizing their particularly disadvantaged status, the remedy given did not acknowledge that more harm may have been occasioned thereby.

In *Crozier*, the respondent had tried to pursue a sexual relationship with the complainant, a lesbian, by trying to convince her that there were problems with her current sex life that could be remedied by having a heterosexual relationship with him. The tribunal acknowledged that “the respondent’s conduct amounts to harassment because of sexual orientation as well as sexual harassment.”⁷⁴ The tribunal relied on an analogy of a hypothetical case between a complainant and respondent of different races and concluded that a similar situation would constitute racial as well as sexual harassment. Counsel for the complainant urged that separate amounts be awarded. While the tribunal accepted that “the element of harassment for sexual orientation adds weight to the sexual harassment committed by the respondent” and that the complainant’s vulnerability was “undoubtedly increased by the fact that as a lesbian, she was a member of a marginalized group”,⁷⁵ the tribunal concluded that “the violation of the two provisions of the *Code* are closely intertwined, and neither one doubles the effect of the other.”⁷⁶

In *Egan*, L’Heureux-Dubé J. drew an interesting analogy to demonstrate the impact that an act of discrimination can have on different groups:

*No one would dispute that two identical projectiles, thrown at the same speed, may nonetheless leave a different scar on two different types of surfaces. Similarly, groups that are more socially vulnerable will experience the adverse effects of a legislative distinction more vividly than if the same distinction were directed at a group which is not similarly socially vulnerable.*⁷⁷

Similarly in *Sparks*, the Nova Scotia Court of Appeal looked at the impact of Ms Spark’s characteristics (a person of colour [Black], a woman, a sole support mother, a social assistance recipient, a subsidized tenant, and a poor person) and

⁷⁴ *Supra*, note 25 at D/247.

⁷⁵ *Ibid.* at D/248.

⁷⁶ *Ibid.* at D/249.

⁷⁷ *Egan*, *supra* note 1 at 553.

the disadvantaging effect of the legislative provisions in question, in a global and cumulative way – the way in which Irma Sparks herself experienced them.⁷⁸

In *Ghosh v. Domglas*⁷⁹, a complaint of harassment because of disability, the tribunal introduced the issue of race, although this was not alleged in the complaint, to note that this may have had an effect on the injury suffered:

*...while there is nothing to suggest that Mr. Ghosh was harassed because of his race, in considering damages it is to be considered that the wrongdoer takes his victim as he finds him. His membership in a visible minority may have had nothing to do with the harassment, but I have no doubt that that fact was a subjective element in increasing his vulnerability and anguish...*⁸⁰

As the aim of human rights remedies is, in part, to restore the person to the position she would have been in if the discrimination had not occurred, the damage to the person as a result of the discrimination is a critical factor to consider. In this regard, L’Heureux-Dubé’s acknowledgement that persons who are more socially vulnerable will experience greater impact is significant for the purposes of determining remedies for multiple and intersecting discrimination. Therefore, while in some cases, a more significant award may not be warranted, there may be some situations in which the particular vulnerability of the person, as a result of the intersectionality of grounds, should be acknowledged in the damages for injured dignity, mental anguish and so forth.⁸¹ It could be another factor to be considered in determining the extent of the complainant’s injury as a result of the discrimination or harassment.

Aside from monetary compensation, a *Task Force on Gender Equality in the Legal Profession* (the “*Task Force*”) has suggested that the best way of remedying and preventing systemic discrimination (multiple grounds discrimination being one component) is through the equality principles of affirmative action and the human rights principle of the duty to accommodate.⁸² The *Task Force* notes that equality rights law, which applies the contextual approach, provides the rationale for affirmative action programs that “acknowledge that existing social and legal arrangements have actively benefited certain groups and disadvantaged others... [and] aim to restore the balance.”⁸³ The *Code* allows historical disadvantage to be

⁷⁸ M. Jackman, “Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination Under the Canadian *Charter* and Human Rights Law” (1994) 2 *Review of Constitutional Studies* 76 .

⁷⁹ *Ghosh v. Domglas Inc. (No. 2)* (1992), 17 C.H.R.R. D/216 (Ont. Bd. Inq.).

⁸⁰ *Ibid.* at para. 21.

⁸¹ One author has suggested that in the highly discretionary category of compensation for humiliation and suffering (*i.e.* general damages), the tribunal’s perceptions of all the characteristics of the complainant should come into play; see *Disappearing Women*, *supra* note 22 at 41.

⁸² Canadian Bar Association Task Force on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: The Canadian Bar Association, 1993) (Chair: The Hon. Bertha Wilson) at 16-17.

⁸³ *Ibid.* at 16.

remedied on a proactive basis through *special programs* (s. 14), designed to relieve hardship or economic disadvantage faced by disadvantaged persons or groups.

The duty to accommodate is also a central principle in human rights law and can result in institutional policies, practices and standards being transformed to respond to the needs of different groups.⁸⁴ The Supreme Court's decision in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* has noted the need for employers, service providers and others to design neutral rules and standards in a way that is as inclusive as possible.⁸⁵ This could include a consideration of persons who are identified by an intersection of grounds. Possible remedies could therefore include requiring respondents to establish standards that provide for individual accommodation of persons who present with complex identities.

Academic Research on Multiple and Intersecting Identities

Recognizing the need to address the fact that people's unique experience of discrimination may not be captured by a single ground focused human rights approach, researchers and academics have suggested the use of an intersectional analysis.

Several authors have examined the issue of multiple and intersecting identities and their relationship to people's experience in the social, economic, political and legal environment. Several socio-economic reports and research studies documenting individuals' experiences in society, the workplace and other social spheres highlight the importance of multiple factors that constitute identities and recognize its importance not only in human rights discourse but in human rights policy development as well. Esmeralda Thornhill,⁸⁶ Nitya Iyer (formerly Duclos),⁸⁷ Emily Carasco,⁸⁸ and Carol A. Aylward⁸⁹ are several scholars who have studied the issue of the intersection of race and gender and have written about the situation of individuals who confront multiple grounds of disadvantage. Celia Rothenberg,⁹⁰ writing about the Palestinian community in Toronto, notes the diversity among Palestinian women and observes that the differences among women's lives are "not entirely due to individual idiosyncrasies or circumstances. Rather, these women's lives provide illustrations of how larger socio-economic factors play

⁸⁴ *Ibid.* at 17.

⁸⁵ *Supra*, note 54 at para. 68.

⁸⁶ E. Thornhill, "Regard sur le racisme: Perspectives juridiques à partir d'un vécu noir" (1993) 6 C.J.W.L. 1 and E. Thornhill, "Focus on Racism: Legal Perspectives from a Black Experience" (1994) *Currents* 8, discussed in C. A. Aylward, *Canadian Critical Race Theory: Racism and the Law* (Halifax: Fernwood, 1999) at 45.

⁸⁷ N. Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19 *Queen's L.J.* 179; *Disappearing Women*, *supra*, note 22.

⁸⁸ A Case of Double Jeopardy: Race and Gender, *supra*, note 16.

⁸⁹ Intersectionality: Crossing the Theoretical and Praxis Divide, *supra*, note 7.

⁹⁰ C. E. Rothenberg, "Diversity and Community: Palestinian Women in Toronto" (1999) 19 *Canadian Woman Studies* 75.

themselves out within the Palestinian community.”⁹¹ Pointing to the differing political viewpoints and religious identities, she writes that it is important for policy makers and analysts of culture to recognize diversity, rather than rely on generalizations.

In an article explaining the need for educator sensitivity to the connections between race, gender and social class, Goli Rezai-Rashti⁹² writes about the tendency of equity issues to be compartmentalized or discussed as separate subjects with the result that a systematic analysis of the relational nature of gender, race and social class is lost to teachers and students. In addition, Rezai-Rashti describes a lack of cultural sensitivity or of an understanding of the complexity of equity issues as alienating minority-students. For example, Rezai-Rashti writes of a group of female Muslim Somali students who felt that “because of their socio-economic status, race, culture, religion, and, last but not least, their gender, they were perceived by other students, and sometimes by their teachers, as inherently inferior in terms of a pseudo-hierarchical order with other cultural and religious groups in their school. Because of their religion (Islam) and gender, they came to believe that other students thought of them as submissive, obedient, oppressed, and even mutilated individuals incapable of experiencing any sort of sexual pleasure”.⁹³ The students reported that a 1995 CBC program on female genital mutilation generated racism in their school and contributed to creating an environment that made it easier for other students to “persist in their harassment” because the information presented was “decontextualized” and demeaned their culture and background.⁹⁴

In Rezai-Rashti’s analysis, many teachers view issues of race, class and culture from an essentialist perspective, *i.e.* a viewpoint in which women are seen as stable, homogenous and undifferentiated, rather than in a “non-essentialist, unstable, and conflicting way”.⁹⁵ According to Rezai-Rashti, an essentialist perspective would label specific cultures as backward because of their oppressive treatment of women, whereas a non-essentialist perspective would help students “develop a more critical understanding of racism, sexism, and class issues across cultures”.⁹⁶

Carl F. Stychin has applied an intersectional analysis in examining nationalism and identity in Canada, focusing on the constitutional recognition of sexual orientation as analogous ground of discrimination⁹⁷.

⁹¹ *Ibid.* at 76.

⁹² G. Rezai-Rashti, “Gender Equity Issues and Minority Students: Connections of Race, Gender and Social Class” (1997) 28 ORBIT: Ontario’s Magazine for Schools 24.

⁹³ *Ibid.* at 24.

⁹⁴ *Ibid.* at 25.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ C. F. Stychin, “A Postmodern Constitutionalism: Equality Rights, Identity Politics and the Canadian National Imagination” (1994) 17 Dalhousie L. J. 61.

For women with disabilities, an analysis based on intersecting grounds, with its focus on the perspective of the claimant and the contextual approach, would address concerns that their unique experiences are not recognized in human rights procedures and policy development. Diane Pothier, for example, writes that her experiences are defined by the fact that she is a woman with a disability.⁹⁸

The *Task Force* has written that the legal concept of equality requires consideration of several inter-related concepts: the formal/substantive equality dichotomy; the contextual approach; discrimination and multiple discrimination.⁹⁹ The *Task Force* addresses the issue of multiple discrimination as experienced by female lawyers and describes it as consisting of:

...the cumulative and compounding effect of discrimination based on several group characteristics. It is difficult, if not impossible, to untangle discrimination based on gender and other characteristics such as race...

It is critical to appreciate that the experience of multiple discrimination is different from the experiences of differential treatment based on one ground of discrimination. It is not always easy to appreciate this distinction because of the mainstream perspective on discrimination. ...

Racial and gender discrimination can occur simultaneously and are both rooted in society at large, including the legal and justice systems. Both individual and systemic discrimination can be traced to hardened attitudes and commonly involve rigid stereotypes stressing ethnic differences at the expense of those who cannot confirm to the status quo...

Aboriginal women lawyers also face sexual and racial discrimination in the profession. In addition, they have unique concerns emanating from being First Nation Individuals. ... Similarly lesbians must deal with negative stereotypes and pressure to be like their heterosexual colleagues. ... Women lawyers with disabilities are faced with a great deal of ignorance concerning their ability to function as lawyers.¹⁰⁰

This is indicative of the increasing use of the concepts of multiple and intersecting identities as a tool to determine how discrimination may be experienced in unique ways.

Finally, in the recent discussions surrounding the potential amendment of the *Canadian Human Rights Act*, authors have noted the need for investigators and adjudicators to perceive the particularities of discrimination experienced by, for example, Aboriginal women, Black women, women with disabilities, lesbians and single mothers and have suggested that a revised *Act* should specifically state that:

⁹⁸ Connecting Intersecting Grounds of Discrimination to Real People's Real Experiences, *supra*, note 11.

⁹⁹ *Touchstones for Change: Equality, Diversity and Accountability*, *supra*, note 82 at 12.

¹⁰⁰ *Ibid.* at 15.

...the purpose of the Act is to address those forms of discrimination that too easily disappear from view because of the compartmentalization of grounds, that is, overlapping forms of discrimination experienced by Aboriginal women, women of colour, immigrant women, women with disabilities, lesbians, single mothers and older women.¹⁰¹

APPLYING AN INTERSECTIONAL APPROACH

An intersectional analysis based upon a two-pronged approach has been suggested by Professors Aylward, Pothier, and Iyer. It requires a shift from a single ground perspective to an analysis based on the assumption that an individual's experiences are based on multiple identities that can be linked to more than one ground of discrimination. The second component of the two-pronged model requires the analysis to proceed to consider contextual factors, based on the facts of the case. According to Aylward, a contextual analysis means examining the discriminatory stereotypes; the purpose of the legislation, regulation or policy; the nature of and / or situation of the individual at issue, and the social, political and legal history of the person's treatment in society.

An intersectional analysis can be informed by developments in gender equality analysis, critical race analysis, disability rights analysis and equality rights jurisprudence. These strategies have developed to address the stereotypes, as well as the unique and intersecting experiences of individuals, because of race or gender or disability and would form a necessary part of the contextual and analytical framework. An intersectional analysis can become one of the lenses through which the social context of the individual can be examined. In some measure, it can address social conditions relating to poverty, low income and homelessness.

In some cases, grounds such as sex, race, or disability, to name just a few, may intersect and together produce unique effects creating "discreet and insular minorities" who are socially handicapped because of these characteristics. At other times, any one of these characteristics may intersect with other grounds such as social assistance, family status and further link to economic and social and class status to create unique experiences for the individuals that are ignored in the current human rights framework. Even when combined with other grounds such as social assistance and family status, the extent of the discrimination may not be revealed by a traditional, non-intersectional approach.

¹⁰¹ S. Day & G. Brodsky, "Women's Economic Inequality and the *Canadian Human Rights Act*" (Ottawa: Status of Women Canada, October 1999), online: Status of Women Canada <<http://www.swc-cfc.gc.ca/research>>.

NEXT STEPS

This paper has explored the need for a more holistic understanding of how people experience discrimination. The Commission has already started applying an intersectional approach to some of the complaints that have come before it. In addition, an intersectional analysis has been added as one of the lenses through which policy work is conducted. An understanding of discrimination as largely a product of the social construction of identity, based on social, historical, political and cultural factors, is informing the Commission's work in all areas. The Commission's new framework for protecting the rights of persons with disabilities, as set out in its *Policy and Guidelines on Disability and the Duty to Accommodate*, is an example of this.

The Commission has an opportunity to build on the work that has been done to date by searching for more concrete ways to implement intersectionality in all aspects of its mandate. This paper represents the first phase of this effort. It has endeavoured to review human rights and *Charter* cases as well as literature with a view to analyzing shortcomings where an intersectional analysis has not been applied. It outlines positive developments that can guide the Commission in the application of an intersectional approach. It is a starting point to stimulate further discussion of how the Commission can operationalize an intersectional approach.

The next step is to involve all areas of the Commission as well as outside expertise in a process of consultation. The Commission would therefore invite comment on this Discussion Paper and, in particular, on practical ways in which an intersectional approach can be applied in all areas of the Commission's work including: intake and drafting of complaints, mediation, investigation, litigation and policy and education. Written submissions will be accepted until **October 31, 2002** and may be sent to:

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