

THE NEW *ONTARIO HUMAN RIGHTS CODE*:
IMPLICATIONS FOR AN INTERSECTIONAL APPROACH
TO HUMAN RIGHTS CLAIMS

by

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Abstract

This paper explores the theory of intersectionality and its viability for the analysis of human rights under the new legal process and institutional framework in Ontario. First, I examine the debate between essentialism and intersectionality and conclude that intersectionality is a more comprehensive and inclusive approach to anti-discrimination laws. Second, I examine Canadian Human Rights Code cases and *Charter* equality cases involving intersectional claims. These cases reveal three inadequate approaches to analyzing multiple grounds of discrimination and two positive developments in the intersectional analysis of human rights claims. After assessing the general congruence of the new institutional framework with the principles of administrative justice, I identify three recent changes to Ontario's system that hinder the development of an intersectional analytical framework and I offer suggestions for improvement. I conclude that an intersectional approach to human rights claims is possible but is currently frustrated by the new institutional framework in Ontario.

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Introduction

In 2001, the Ontario Human Rights Commission [OHRC] published a Discussion Paper addressing the need for an intersectional approach to Human Rights claims when more than one ground of discrimination is experienced by an individual.¹ This non-traditional approach recognizes that categories of discrimination often overlap or intersect, resulting in multiple grounds of discrimination. Where there are multiple grounds, both analysis and accommodation is complex; it involves consideration beyond the stated grounds of discrimination, including historical, socio-economic and cultural factors in the context of an individual's experience.

The intersectional approach was first proposed in the 1980s under the umbrella of feminism.² Until then single grounds of discrimination were isolated and focused on as if other factors had no role in the occurrence of discrimination. Initially the intersectional approach focused on the intersecting of race and gender, specifically in the realm of black feminism.³ Over the last few decades, the intersectional approach has been predominantly analysed and applied in political and socio-economic contexts in the global economy, and specifically with regard to the effects on women.

More recently, attention has been given to the inadequacy of legal processes and frameworks for the utilization of an intersectional approach.⁴ Simultaneously, the concept of intersection of discriminatory factors has been extended by scholars beyond race and gender, and into the consideration of disabilities, age and other factors.

¹ Ontario Human Rights Commission, ("OHRC"), "An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims", Discussion Paper, Policy and Education Branch. (9 October 2001), online: <http://www.ohrc.on.ca/en/resources/discussion_consultation/DissIntersectionalityFmts> [OHRC Discussion Paper].

² Kimberle Crenshaw has been given credit for developing and articulating what has become known as the intersectional approach, a theory initially suggested by Angela P. Harris in the early 1980s. See Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics", University of Chicago Legal F. (1989) 139; also in Joy James and T.Denean Sharpley-Whiting, eds., *The Black Feminist Reader*. (Massachusetts: Blackwell Publishers Ltd., 2000), online: HeinOnline [Crenshaw].

³ *Ibid.*

⁴ Elena Marchetti, "Intersectional Race and Gender Analyses: Why Legal Processes Just Don't Get It", *Social and Legal Studies* 17(2) (2008) 155-174 [Marchetti].

The OHRC originally sought contributions from the community in 2001 to create an intersectional framework that could be applied in education, policy development, complaint intake, investigation and litigation.⁵ However, the new *Ontario Human Rights Code* [Bill 107] has removed the complaint intake and investigation process from the Commission.⁶ In addition, only two secretariats focusing on researching discriminatory practices and facilitating policy development have been created: an Anti-Racism Secretariat and a Disability Rights Secretariat.⁷ No other secretariats have been proposed to address policy or education with respect to other grounds of discrimination. Under the new *Code*, it does not appear that an intersectional approach to the analysis and determination of Human Rights claims is specifically contemplated where there are multiple and overlapping grounds of discrimination.

In this paper, I will explore the theory of intersectionality and determine its viability for analysis and determination of human rights claims, and specifically, its viability within the newly implemented legal process and institutional framework in Ontario. I will conclude that essentialism has proved inadequate in addressing claims of discrimination in the human rights arena, and that the resulting legal decisions and remedies demonstrate a failure to explore and acknowledge the reality of the circumstances of discrimination. The intersectional approach is a more complex but worthy alternative that should be given serious consideration. It is essentially an interdisciplinary approach that requires expertise in social sciences, economics and the historical and political circumstances within which each claim is situated, as well as expertise in the substantive law and the institutional framework within which the legal processes operate. Finally, I will conclude that despite the validity of an intersectional approach, this approach is frustrated, if not defeated by the newly implemented legal processes and institutional framework for human rights in Ontario.

This paper is comprised of five chapters: In Chapter 1, I will examine the theoretical components of the intersectional approach. This will necessitate a discussion of essentialism, the

⁵ OHRC Discussion Paper, *supra* note 1.

⁶ *Human Rights Code Amendment Act*, 2006, S.O. 2006, c.30.

⁷ *Ibid.* [ss. 31.3 and 31.4 of the new *Code*].

earlier and conflicting theory which purports to accomplish the task of contextualizing discriminatory factors by isolating the root of discrimination in any given instance, and which has been and continues to be the standard approach to identifying, analyzing and determining human rights claims. Critiques of the essentialist approach expose the flaws of this approach and the need to investigate and pursue a more comprehensive and inclusive approach to anti-discrimination law. This more inclusive approach can be identified as the intersectional approach. The development of intersectionality as the analytical tool for human rights claims will be assessed in the context of moving beyond identity politics as well as recognizing the interconnectedness of historical, socio-economic and political positions within a societal framework. It is also necessary to address recent concerns about the systematic or structural approach applied by American scholars like Crenshaw, and the constructionist approach taken by British scholars like Nira Yuval-Davis, where the notion of individual agency is more fluid and moves beyond categories that ignore that we are “simultaneously less and more than the sum of the social categories with which we are identified.”⁸ I will argue that this constructionist approach and the structural approach are not so different and both focus on anti-essentialism and shift away from a single axis framework of analysis.

In Chapter 2, my objective is to explore the viability of an intersectional approach to analyzing and determining human rights claims in general. To accomplish this task, I will assess Canadian human rights decisions and cases under section 15 of the *Canadian Charter of Rights and Freedoms*⁹ that have derailed an intersectional approach despite claims of multiple grounds of discrimination. I will review the analytical framework applied in section 15 *Charter* cases and the analytical approach used to establish a *prima facie* human rights case and identify the structural similarities to these approaches that can serve as useful tools in developing a similar framework for intersectional analysis. I will then identify three inadequate approaches to

⁸ Baukje Prins, “A Blind Spot in the Intersectional Approach?”, *European Journal of Women’s Studies* 13:3 (2006), 277-290 at 281. Online: <<http://ejw.sagepub.com> DOI: 10.1177/1350506806065757> [Prins].

⁹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

multiple grounds of discrimination: (1) where more than one ground of discrimination is evident but treated as separate and distinct by adjudicators, thereby ignoring or missing the issue of intersectionality and its implications; (2) where intersectional issues are acknowledged but without comprehensive analysis or specific guidelines for an intersectional approach, or discussion of its implications on the nature or impact of the discrimination experienced; and (3) where an intersectional analysis leads decision makers to take a cumulative approach to conclude that where there is more than one ground of discrimination, the claimants' vulnerability is correspondingly compounded by the number of prohibited grounds involved. Next, I will examine two positive approaches to intersectional issues: (1) efforts at an intersectional analysis that requires both a subjective test with individual narratives and an objective test of contextual factors and the impact of intersecting grounds and other factors on claimants; and (2) the recognition that a claimant need not be homogeneous with other members of a particular group in order to make a finding of discrimination or intersectional discrimination. I will examine the patterns of analysis that may be helpful and those that may be a hindrance to the development of an intersectional analytical framework, and attempt to articulate how guidelines can be created for effective intersectional analysis without compromise of the unique individual experience of discrimination.

In Chapter 3, I will examine the institutional framework and its relationship to the goals of human rights legislation. I will demonstrate that the objectives of administrative justice are equally congruent with the objectives of an intersectional approach as they are with the objectives of the Canadian Constitution in section 15(1) of the *Charter*.

In Chapter 4, I will provide a brief overview of the recent changes to the *Code* and the institutional framework and process for human rights claims that affect the viability of an intersectional approach in discrimination cases. I will focus on the changes that potentially and actually have an impact on human rights claims with where there are multiple grounds of discrimination. This will be helpful in identifying whether and how intersectional human rights claims were taken into consideration, given the earlier initiative taken by the OHRC to pursue the possibility of an intersectional approach to human rights claims in Ontario. I have identified three significant obstacles in the new institutional framework: (1) the structure of the Human

Rights Legal Support Centre; (2) the lack of comprehensive procedural guidelines for human rights claims where there are intersectional issues; and (3) the inadequacy of the newly created Anti-Racism and Disability Rights Secretariats. This will include an examination of the purpose, role and function of secretariats in general and the new OHRC secretariats in particular. I will argue that the newly created institutional framework and legal processes frustrate the viability of an intersectional approach to human rights claims in Ontario. I will argue that the objectives of administrative justice and of an intersectional approach to human rights claims are congruent and should not be separated in analysis of discrimination claims.

In Chapter 5, I will conclude that the new institutional framework frustrates the viability of an intersectional approach to human rights claims in Ontario. This new framework frustrates access to justice in the administrative and judicial processes on the most basic levels, and therefore also poses serious challenges to the viability of an intersectional approach to human rights claims.

A failure to address the complexity of multiple and intersecting grounds of discrimination experienced by an individual ignores the reality of his or her experience in society, and does not take into account historical, political and socio-economic contexts. Furthermore, this failure does not acknowledge the complexity of discriminatory practices, nor does it permit effective and comprehensive analysis of complaints or appropriate remedies. Finally, I provide some proposals for the future implementation of an intersectional approach to human rights claims in Ontario.

Chapter 1

Introduction

Existing anti-discrimination laws were developed by identifying likely grounds of discrimination against individuals within our societal framework. In Ontario, anti-discrimination laws extend to categories that include race, gender, disabilities, age, religion, family status, sexual orientation, and others.¹⁰ The areas of our society that are recognized as relevant to individuals' vulnerability to discrimination include accommodation, employment and services.¹¹

Until the 1980s, the analytical approach to discrimination cases usually led to the identification of a single ground of discrimination. This ground of discrimination was isolated and analyzed as if no other grounds of discrimination or other contextual factors had a role in the discrimination experienced by the claimant. Only recently have we seen a shift to acknowledge more than one ground of discrimination and the implications of intersecting grounds and other contextual factors that impact a claimant's lived experience.

The Essentialist Approach to Discrimination Cases

The essentialist approach to discrimination embraces universalism and the rights of the individual within a societal framework. Essentialism is embodied both within the categories created by the legislation and the analytical framework utilized to process and determine human rights claims. This approach in feminist theory is welcomed by liberal ideology.¹² This is significant because liberal ideology relies on objectivity and universalism as the foundation of resolving claims of discrimination. This means that individuals are slotted into groups based on

¹⁰ *Ontario Human Rights Code*, R.S.O. 1990, c. H. 19 at sections 1, 2 and 5 (the *Code*).

¹¹ *Ibid.*

¹² Radha Jhappan, "Post-Modern Race and Gender Essentialism or a Post-Mortem of Scholarship", *Studies in Political Economy* 51 (1996) 15-63, at 26 [Jhappan].

particular traits or characteristics, and these groups are considered to be homogeneous and independent of context.¹³ Individuals may possess other characteristics that are not needed to include or exclude them from a given group, but as a result, their experiences are generalized. Consequently, individuals' life experiences are treated collectively based on the group they fit into because of their "permanent, unalterable" essence.¹⁴ This means that little or no consideration is given to additional sociological, economical, historical or cultural explanations.¹⁵ Essentialism as a method of defining self is a belief that the essence of self lies at the core of an individual and is therefore constitutive of that individual.¹⁶ In discrimination cases, identification of the essence of an individual is dependent on focusing on a category or trait that is singled out as the cause of the discrimination experienced by an individual. As one academic writer also observes, essentialism results in false generalizations about women since it treats women as a group without accounting for power differences between women as well as the historic, economic and other factors previously mentioned.¹⁷

Legal scholar Kimberle Crenshaw maintains that this creates and entrenches a "single axis framework".¹⁸ She argues that because discrimination cases are decided based on pre-determined categories of rights, individuals' experiences based on unique, overlapping grounds are not effectively recognized in the determination of human rights claims.¹⁹ This approach to

¹³ Crenshaw, *supra* note 2 at 139-140 and 146.

¹⁴ Angela P. Harris, "Race and Essentialism in Feminist Legal Theory", in Adrian Katherine Wing, ed. *Critical Race Feminism: A Reader*, 2nd edition. (New York: New York University Press, 2003), 34-41 at 36. Also in *Stanford Law Review* 42 (1989-1990), 581, online: HeinOnline [Harris].

¹⁵ Crenshaw, *supra* note 2 at 146.

¹⁶ Jhappan, *supra* note 12 at 28. See also Diana Fuss, *Essentially Speaking: Feminism, Nature and Difference*. (London: Routledge Press, 1989), at 2.

¹⁷ Cressida Heyes, "Back to the rough ground: Wittgenstein, essentialism, and feminist methods", Dissertation. (McGill University, 1997), online: <<http://www.escholarship@McGill>> [Heyes].

¹⁸ Crenshaw, *supra* note 2 at 139.

¹⁹ *Ibid.* at 148.

human rights claims marginalizes those individuals who do not fit into the neatly and narrowly defined categories of discrimination.²⁰

Feminist theorist Catherine MacKinnon maintains that societal structure shapes our lives and the way that we function within it.²¹ Her position that “men are the measure of all things”²² lies at the heart of her “dominance theory”²³, a theory which is dependent on accepting that women are functioning within a framework dominated by white males of privilege. Many scholars have identified MacKinnon as essentialist in her approach to women’s issues in society.²⁴ MacKinnon assumes a commonality shared by all women by virtue of their gender. However, a more in-depth analysis of her position reveals that she believes that women’s traits are socially constructed and not inherent in the way that essentialists maintain they are.²⁵ If this is true, it seems to support the position that categorizing women based on so-called inherent traits or essence of being is not the best approach to analysis of women’s human rights claims. However, MacKinnon does not discredit the category of “women”.²⁶ While the essentialist approach homogenizes the experience of women, MacKinnon acknowledges that each experience is not unified, but highly diverse or variable, changing over time and affected by economic and cultural conditions.²⁷

In fact, this essentialist homogenization of women, and other categories of individuals based on common traits or characteristics, is reinforced by pre-determined categories and seems to be

²⁰*Ibid.*

²¹ Catherine MacKinnon, “From Practice to Theory, or What is a White Woman Anyway?” in Diane Bell and Renate Klein, eds., *Radically Speaking: Feminism Reclaimed*. (Spinfax, 1996), online: <<http://www.feminist-reprise.org/docs> > [MacKinnon].

²² Denise Reaume, “What’s Distinctive About Feminist Analysis?: A Conceptual Analysis of Women’s Exclusion from Law”, *Legal Theory* 2 (1996), 265-299 at 278.

²³ Harris, *supra* note 14 at 36.

²⁴ *Ibid.* See also Heyes, *supra* note 17.

²⁵ Heyes, *supra* note 17. See also MacKinnon, *supra* note 21.

²⁶ Heyes, *supra* note 17.

²⁷ Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness and the Politics of Empowerment*. (Boston: Unwin Hyman, 1990), at 42. See also MacKinnon, *supra* note 21.

precisely and even intentionally applied by human rights adjudicators.²⁸ Furthermore, it is my position that in Ontario, human rights legislation encourages this analytical approach by its very drafting.²⁹ The grounds of discrimination are provided in a list which is arguably intended to be exhaustive based on the statutory language used, and further clarifies that each category or ground of discrimination is to be treated as distinct and separate. This is clearly intended by the use of the word “or” in the list of grounds instead of the word “and”.³⁰ Because categories of grounds for discrimination are specifically listed in anti-discrimination laws, it naturally follows that human rights adjudicators first approach a case based whether the facts allow a clear identification of a ground of discrimination. This ground must then be proven by evidence that establishes discriminatory practices. For example, if a black woman alleges discrimination on the basis of race, does the evidence show that other visible minorities (and specifically black men) have experienced the same discrimination? If an individual’s experience is not clearly identified within an existing category of discrimination, how is discrimination recognized and contextually analyzed? Furthermore, if an individual’s experience means that a number of categories of discrimination overlap, the degree and nature of the discrimination will vary and adversely affect some members of a particular group more than others.³¹

If one of the flaws of the essentialist approach to discrimination claims is an adherence to pre-determined categories (which MacKinnon cannot even entirely negate), does this mean that

²⁸Nitya Duclos (Iyer), “Disappearing Women: Racial Minority Women in Human Rights Cases”, *Canadian Journal of Women in Law* 6 (1993) 25 at 31-32 [Duclos (Iyer)]. Duclos (Iyer) notes that no headings in the C.H.H.R. indicate more than a single ground of discrimination and allegations of race, colour, ancestry, place of origin, nationality and ethnic origin are lumped into a single category of race. Gender, although a separate category, is often not specifically addressed in cases at all, even though the complainant’s gender may be an intersecting factor.

²⁹ This is particularly relevant because the possibility of overlapping or intersecting rounds of discrimination is not addressed in the *Code* directly or indirectly.

³⁰The *Code*, *supra* note 10; see sections 1, 2 and 5.

³¹ *Ibid.* Note that the “liberal interpretation” section of the *Ontario Legislation Act*, S.O. 2006 c.21 Schedule F (s.64) likely would not help in reinterpreting the common meaning and usage given to the words “and” and “or”.

³¹ Crenshaw, *supra* note 2 at 148-149.

categories need to be dispensed with in order to adequately address the complexities and overlapping factors of discrimination in human rights claims? Without some type of categorization, how do we clearly identify legal parameters for grounds of discrimination? Equally important, how, without defined categories, do we hold those legally responsible (such as employers) for avoiding and prohibiting discriminatory practices? It seems that some form of categorization is helpful for the creation of boundaries for human rights claims, but these same categories are also a hindrance to effective and realistic analysis of the often complex experiences of an individual. As scholar Jhappan maintains, perhaps a framework which gives “space” but not necessarily primacy to experience, subjectivity and political agency would allow for a complex, layered analysis.³²

The number of human rights cases where this essentialist analytical and decision-making approach has been applied is difficult to determine because of the manner in which human rights cases have been reported in Canada.³³ Cases are categorized by the prohibited ground of discrimination alleged by the claimant, but where there is more than one ground alleged or even determined to exist, the case may be listed under only one of those grounds. No provision has been made in the reporting and categorizing of discrimination cases that would enable us to clearly identify human rights claims where there are multiple and intersecting grounds of discrimination.

An excellent but troubling example of essentialist analysis in an American case was utilized by feminist legal scholar Kimberle Crenshaw in her critique of essentialism and her quest for a theory which embraces the individual’s lived experience of intersectionality. In *DeGraffenreid v. General Motors*, a 1976 case where five black women brought a lawsuit against General Motors alleging discrimination against black women in their seniority system, the court stated that “the [P]laintiffs have failed to cite any decisions which have stated that Black women are a special class to be protected from discrimination. . .they should not be allowed to combine

³² Jhappan, *supra* note 12 at 22.

³³ Duclos (Iyer), *supra* note 28 at 31-32.

statutory remedies to create a new “super-remedy”. . .”³⁴ The court maintained that if a claim were to succeed on behalf of black women, it would give them greater standing than a black male.³⁵ The court went even further and took the position that to allow various combinations of claims of discrimination would open a Pandora’s Box.³⁶ The difficulty, according to the court, was not whether these claims were legitimate, but that these types of claims would cause an increase in exaggerated claims and remedies, a position which could not and has not been supported by any statistics. Crenshaw argues that recognizing intersectionality does not mean “stacking” race and gender; race and gender don’t double up but intersect to create distinct experiences.³⁷

Some Supreme Court of Canada decisions have acknowledged the uniqueness of individual experience and commented on multiple and intersecting grounds of discrimination.³⁸ However, even where the courts have acknowledged the intersection of multiple grounds of discrimination, it has been suggested that the complexity of interaction may be irrelevant as long as the individual is protected from discrimination in any event.³⁹ This reasoning is flawed because without properly assessing the impact of the discrimination against an individual in its entirety, with all its complexities and contextual factors, how do we properly determine remedy or prevention and avoidance of discriminatory practices?

Some assumptions need to be made in order for the essentialist approach to work. One, in order to preclude a claim of discrimination as a black woman, a claim based on the grounds of race

³⁴ Crenshaw, *supra* note 2 at 141 and see also *DeGraffenreid v. General Motors* 413 F Supp 142 (E D Mo 1976).

³⁵ *Ibid.*

³⁶ *Ibid.* See also *DeGraffenreid*, *supra* note 34 at 142.

³⁷ *Ibid.* at 142-143.

³⁸ OHRC Discussion Paper, *supra* note 1. See also the minority comments made by Madame Justice L’Heureux-Dube in *Canada (Attorney-General) v. Mossop*, [1993] 1 S.C.R. 554, 100 D.L.R. (4th) 658, aff’g (1990), [1991] 1 F.C. 18, 71 D.L.R. (4th) 661 (F.C.A.), rev’g (sub.nom. *Mossop v. Canada (Secretary of State)* (1989), 89 C.I.I.C. 17010. See also 46 C.C.E.L. 1, 93 C.L.L.C. 17,006, 13 Admin. L.R. (2d) 1, 149 N.R. 1, [1993] 1 S.C.R. 554, 100 D.L.R. (4th) 658, 17 C.H.R.R. D/349, J.E. 93-444, online: 1993 CarswellNat 1365.

³⁹ *Ibid.*

and gender, one or both claims must be rejected. To reject a claim on the basis of race but accept the claim on the basis of gender, or vice versa, requires several assumptions: First, that it is possible to isolate a particular identifying factor of an individual and discard the rest; second, that even if race and gender interconnect and are both the characteristics of that individual, a discrimination factor can be singled out and isolated from other characteristics of the individual in question. If a woman, because of her race, has a different “essence” than another woman, the parameters of the group that she finds herself in is not the same as women of other races. Third, the assumption could be made that race is irrelevant if the claim of discrimination could also apply to a non-black woman and specifically, a white woman.⁴⁰ This assumption is dependent on the premise of the commonality of women.⁴¹ Similarly, gender could be eliminated as a ground of discrimination if the evidence indicated that black males were experiencing the same type of discrimination as their female counterparts.

There has been much intellectual debate about whether there is an implicit assumption of hierarchy – that gender claims trump race claims.⁴² If race, gender and class are inextricably connected, can the root of discrimination be isolated to just one claim? In many cases, such a conclusion has been reached. For example, if a black woman is not hired for a managerial position within a company, there may be evidence that *no* women are being hired for managerial positions within that company. Her race is therefore irrelevant to the company’s practices, unless there are no black individuals, male or female, in managerial positions within the company. In that case, the discrimination claim would be isolated to race, and it is the gender discrimination claim that would be rejected. What this type of analysis does not account for is the complexity of the intersection of factors such as race and gender. Statistically in Canada and the United States, there are fewer women in managerial positions than men, and

⁴⁰ Crenshaw, *supra* note 2 at 144.

⁴¹ Harris, *supra* note 14 at 36.

⁴² Jennifer Nedelsky, “Reconceiving Rights and Constitutionalism”, *Journal of Human Rights*, 7 (2008) 139-173 at 148 and 152.

less black women than white women in managerial positions.⁴³ While these statistics could be explained by a variety of factors, singling out claims of discrimination as being based on one factor or the other ignores the socio-economic, cultural and historical factors that may impact the lived experience of a black woman that a white woman would not experience.

Another complicating factor in the analysis of discrimination claims that are based on both race and gender is the determination of the methodology behind the analysis of these types of claims. It is possible to be discriminated against on the basis of race and gender as a white woman. However, what is our measuring stick for determining that discrimination has taken place? The majority of managerial positions in the private sector continue to be held by white males. For a claim made by a white woman, the measuring stick is gender-based and not race based. If discrimination claims are assessed based on differential treatment experienced because of a particular trait, it has to be measured against something. It is in fact measured against the treatment of employees who do not experience discrimination on those grounds.

An interesting example of society's approach to the issues of race and gender recently played itself out in the United States' political arena during the Presidential campaign.⁴⁴ During the campaign, there were African-American women who were criticised for not backing their white "sister" Hillary Clinton, and choosing instead to back an African-American male, Barack Obama. These women were viewed as traitors to their gender.⁴⁵ Yet in the 1950s and 1960s, black women put women's rights issues temporarily aside to pursue black civil rights on behalf of the entire African-American community.⁴⁶ What is striking here is that white women like

⁴³ Jeeva Saraswati, "Poverty and Visible Minority Women in Canada", online: <<http://www.pi.library.yorku.ca/ojs/index.php/cws/article/viewFile/12664/11747>>. See also online: <<http://www.statcan.gc.ca/pub>>; <<http://www.actew.org/projects>>.

⁴⁴ Marjorie Valbrun, "Does Race Trump Gender?", *The Root News* (Feb.6/08), Online: <<http://www.theroot.com/views/does-race-trump-gender>>. Valbrun is a Washington-based journalist and writes for *The Washington Post* and *The Wall Street Journal*.

⁴⁵ *Ibid.* See also Marjorie Valbrun, "Black Women are not Feeling the Feminists' Pain: Is the Sisterhood in peril?", *The Root News* (March 17/08), online: <<http://www.theroot.com/views>>. And see Atiya Kai Stokes-Brown (Oct.27/08), online: <<http://www.bucknell.edu/x46017.xml>>; Allison Samuels Commentary, *Newsweek* (March 17/08), online: <<http://www.newsweek.com/id/120076>>.

⁴⁶ Marjorie Valbrun, *supra* note 44.

Caroline Kennedy and Maria Shriver were not criticised or questioned about their commitment to their white “sister” when they chose to support a black male presidential candidate instead.⁴⁷

Unlike many essentialists, MacKinnon occasionally seems to recognize that focusing on gender results in erasing issues of race.⁴⁸ Angela Harris, who was an early critic of the essentialist approach, observes that MacKinnon’s generalizations of women do not go so far as to suggest that race is not a factor.⁴⁹ Instead, MacKinnon seems unwilling to acknowledge the depth and complexity of black women’s lived experience.⁵⁰ In my view, MacKinnon’s theorizing is restricted to working within the existing societal framework. If, as MacKinnon suggests, women are socially constructed by men, a revamped framework is necessary in order to reconstruct women’s lived experiences. This is particularly true where gender issues are impacted by socio-economic, cultural and historical factors. If efforts to reconstruct the societal framework are based on the commonality of women, there is a failure to acknowledge that the measuring stick of “commonality” marginalizes women of colour.⁵¹

Harris successfully argues that essentialism succeeds in excluding women of colour.⁵² As such, women are subverted and oppressed by a patriarchal system that does not recognize the significance of gender in societal structure, and the specific issues faced by black women become non-issues since the focus is on gender and not race.

Thus, one of the critical flaws with the essentialist approach is that it forces an issue of discrimination to be framed in a simplistic type of essence. In other words, it forces an individual to determine if the discrimination experienced is based on gender or race. For a white woman working within the framework of a white male-dominated society, the issue seems

⁴⁷ *Ibid.*

⁴⁸ Harris, *supra* note 14 at 36.

⁴⁹ *Ibid.* at 37.

⁵⁰ *Ibid.* at 39.

⁵¹ *Ibid.* at 36-39. The idea of commonality also does not account for women with disabilities, women with children, women of different religions, and so on.

⁵² *Ibid.*

obviously to be gender. The norm in this framework is implicitly white and race is a non-issue for this woman. There are multiple problems with this approach. The broad, generic category of gender seems to be inclusive, but in fact is representative of the accepted norm of white women of privilege.⁵³ It is also representative of a heterosexual woman and not of any other sexual orientation. Furthermore, it does not account for the differences in experience of black or other racial minority women operating within the same framework. The realities of lived experience as a racial minority is different for black women from the West Indies and black women of Africa; it has a different and unique meaning for South Asians, East Asians and permutations of all of these, and so on. Harris maintains that categories and sub-categories should not be eliminated in our assessment of discrimination cases, but instead should be fluid and relational.⁵⁴

The essentialist approach would have these women single out their gender as the essence of their being, and therefore identify that as the root of their experience of discrimination. However, this categorization of discrimination against an individual ignores that the reality of her experience is based on her *lived* experience not only as a *black* woman or a *racial minority* woman,⁵⁵ but combined with all the other factors and individual traits that create a unique individual experience, including age, historical, socio-economic and other factors.

Her oppression cannot lie in her gender, for if she was discriminated against on the basis of her gender, this discrimination would exist even if she were white. However, as is so acutely demonstrated in the *DeGraffenreid* case (discussed earlier) and so succinctly summarized by Kimberle Crenshaw, if the discrimination against a black woman is found to exist because of her race, then the discrimination must also exist against a black man.⁵⁶ And herein lies the flaw in the essentialist approach to discrimination issues. By creating mutually exclusive categories, essentialists in fact continue to work within a single axis framework that is the foundation of

⁵³ *Ibid.* at 36.

⁵⁴ *Ibid.*

⁵⁵ Crenshaw, *supra* note 2 at 144 and 148.

⁵⁶ *Ibid.*

anti-discrimination law.⁵⁷ The theory of intersectionality is complex and accounts for the multi-dimensional experience of an individual.⁵⁸ Crenshaw maintains that the essentialist focus on a specific ground in fact results in a fragmentation of identity.⁵⁹ In addition, it serves to reinforce the notion that individuals experience their lives through a dominant, singular characteristic inherent to their being, and the idea that there is in fact a hierarchy of characteristics. This hierarchy of traits or characteristics is created by focusing on the identified essence of an individual, be it gender, race or something else (such as disability), and disregarding other relevant traits that impact an individual's experience. Crenshaw takes this argument further, maintaining that even once a characteristic is singled out, analysis of discrimination is based on the experience of the more privileged class, and not the larger group of individuals with this characteristic.⁶⁰ This hierarchy of characteristics, race and gender for example, means that analysis of discrimination against a white woman would focus on her gender, and for black woman discrimination would be analyzed focusing on her race and not her gender.⁶¹ In other words, the analysis of a discrimination claim takes a different course depending on the essence of an individual that is identified by decision-makers as the core of the individual, and therefore the reason for the discrimination.

Harris argues that the essentialist approach fails to take into account the different challenges and discriminatory practices encountered by women in the different contexts in which that they are situated. A feminist, essentialist approach is based on gender and gender issues in a male-dominated world, regardless of race or any other characteristics or experiences of an individual.⁶² This approach also uses the experience of the "dominant culture", thereby generalizing the

⁵⁷ *Ibid.* at 139 and 149. This aspect of Crenshaw's argument suggests that essentialists not only work within the existing framework, but perpetuate the consequences of their approach by doing so.

⁵⁸ *Ibid.* at 149.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.* at 148-149.

⁶¹ *Ibid.* at 149.

⁶² Harris, *supra* note 14 at 35.

experience of women, as the yardstick for analysis.⁶³ Inadequate or non-existent consideration is given to the context in which the individual exists, including historical, political and socio-economic conditions.⁶⁴ As a result, claims of discrimination are grounded in a hegemonic collective identity that precludes anyone who does not meet the specific criteria of that classification.

An Intersectional Approach to Discrimination Cases

Kimberle Crenshaw followed the earlier critiques of essentialism by Angela Harris with her theory of intersectionality articulated in her work in the late 1980s.⁶⁵ In her arguments, she maintains that conceptualizing discrimination by isolating a single factor as the cause does not accurately reflect the reality of the context of an individual's circumstance. The intersectionality theory rejects the validity of ignoring the factors and circumstances that create and reinforce discrimination. An intersectional analysis of discriminatory practices recognizes that an individual is multi-dimensional; to slot an individual into a specified collective category homogenizes them in a way that betrays the true construction of that individual's experiences as a result of gender, religion, disability and other grounds of discrimination, as well as the historical, political and socio-economic context in which they live.⁶⁶

The rejection of the essentialist approach in critical race feminism and the acceptance of an intersectional approach are an acknowledgment of the fluid and dynamic construction of identity. Interestingly, part of the debate between essentialism and intersectionality involves the "authenticity" or identity of the scholars themselves, and who has the right or authority to even

⁶³ *Ibid.* at 36.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ Crenshaw, *supra* note 2 at 139-140 and 148-149.

address these issues.⁶⁷ We must exercise caution in distinguishing ourselves and segregating our positions on this basis, as Radha Jhappan articulates in her critique of race essentialism.⁶⁸ In this article, I argue that the viability of an intersectional approach should not be dependent on the authenticity of the advocate. Collaboration of thought, not always dependent on experience, is necessary to achieve the type of collective that will enhance our ability to develop a comprehensive framework for claims of discrimination. Furthermore, as Jhappan points out, the position that we cannot speak for each other becomes a convenient excuse to continue on a homogenous path and ignore the experiences of individuals already marginalized by other factors.⁶⁹

Crenshaw maintains that black women can experience discrimination in ways that are both similar to and different from those experienced by white women and black men.⁷⁰ The multi-dimensionality of every individual's experience, and specifically black women, although complex and challenging, reflects the interconnectedness of race and gender and all the implications of socio-economic position, geo-political identity, and other factors of their lived experiences. Crenshaw is clear that in order to achieve a dialogue that acknowledges and includes the experiences of black women, a new analytical framework must be created to apply an intersectional approach instead of trying to work within the existing, static framework. In addition, Crenshaw takes her critique of essentialism one step further and advocates not only for recognition of the intersection of multiple factors of individual lived experience cross-culturally, but intra-culturally as well.⁷¹ I would extend this proposition to all racial minority women, the disabled, the aged, and so on.

⁶⁷ Jhappan, *supra* note 12 at 48-50.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ Crenshaw, *supra* note 2 at 149.

⁷¹ Kimberle Crenshaw, "Traffic at the Crossroads: Multiple Oppressions, in *Sisterhood is Forever: The Women's Anthology*, Robin Morgan, ed. (New York: Washington Square Press, 2003).

Canadian legal scholar Nitya Iyer has contributed her observations of essentialism and the need for an intersectional approach in the context of the Canadian institutional framework and practice in human rights cases. Like Crenshaw, she focuses on the mutually exclusive categories of race and gender. However, Iyer extends her analysis beyond black women to “racial minority women”.⁷² This extension is significant in its recognition that within the category of race the construction of social identity is varied and complex. Through her research of reported Canadian human rights cases, Iyer discovered that race was sometimes mis-identified, often ignored, and in many instances treated as a generic category with little or no acknowledgment of the nuances of place of origin, ethnic origin, and the interplay with religion, cultural affiliations and many other factors.⁷³ In Iyer’s analysis of over 300 cases she found only 3 cases in ten years that were even listed as addressing discrimination on the grounds of race *and* gender, two of which involved men.⁷⁴ Crenshaw’s position that the systemic hierarchy of domination and marginalization sustains the essentialist approach of mutually exclusive categories of discrimination is substantiated by Iyer’s research of Canadian discrimination cases. Decision makers’ presumptions about individuals are based on the viewpoint of the privileged, which ignore the nuances of multidimensionality and lived experience and reinforce societal norms that are supported and sustained by the hierarchical structures within which we live.⁷⁵

In subsequent research Iyer continues her analysis of categorization as a tool that reinforces hierarchies that distinguish individuals that perpetuates their oppression.⁷⁶ Equally important, she points out that the rigid, mutually exclusive categories in anti-discrimination laws force individuals to deny and reinvent their social identities.⁷⁷ I am not convinced by her position that this occurrence is unintentional and predicated on the framework provided for decision makers.

⁷² Duclos (Iyer), *supra* note 28 at 25-26.

⁷³ *Ibid.* at 32.

⁷⁴ *Ibid.* at 31.

⁷⁵ *Ibid.* at 43.

⁷⁶ Nitya Iyer, “Categorical Denials: Equality Rights and the Shaping of Social Identity”, *Queen’s Law Journal* 19 (1993) 179-207.

⁷⁷ *Ibid.* at 195. See also *Canada (Attorney-General) v. Mossop* (S.C.C.), *supra* note 38.

Rather, while this may be the reality in some cases, in other cases there appears to be an unwillingness to engage in comprehensive analysis and liberal interpretation of anti-discrimination laws.

However, even within the intersectional school of thought there is controversy and debate as to the actual meaning and application of intersectionality. This is particularly problematic because it may disable progress from theory to practice. Baukje Prins, a European scholar, maintains that there is a distinct difference in approach to intersectional theory by American and British theorists.⁷⁸ In my view, the differences are minimal and he has incorrectly interpreted Crenshaw's approach to intersectionality as static and failing to acknowledge individual agency and the ability to be empowered in situations of societal marginalization. He labels the American approach to intersectionality, and specifically Crenshaw's approach, as systemic and the British approach as constructionist. To Prins, a systemic approach characterizes social inequalities through identities that are impacted by systems of domination.⁷⁹ He sees Crenshaw's approach as one where identities are determined through the context of societal structure and imposed systems of domination and marginalization, and not through any individual involvement in the formation of one's own identity.⁸⁰ He further argues that although Crenshaw advocates an approach that takes into account the multidimensionality of gender and race as well as social, political and economic factors, British scholars like Nira Yuval-Davis focus on more fluid, dynamic and relational aspects of identity.⁸¹ Prins does not seem aware of the work of feminist scholar Angela Harris, who, since the late 1980s, has advocated for examining identity in a fluid and relational context.⁸² Thus, the critical difference in approach is identified by Prins as one where American theory is built on the premise that social identity is formed by "systems of

⁷⁸ Prins, *supra* note 8 at 278.

⁷⁹ *Ibid.* at 279.

⁸⁰ *Ibid.* See also Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color", 43 *Stanford Law Review* (1990-1991) 1264, online: HeinOnline.

⁸¹ *Ibid.* See also Nira Yuval-Davis, "Intersectionality and Feminist Politics", *European Journal of Women's Studies* 13:3 (2006) 193-209, online: <<http://ejw.sagepub.com> DOI: 10.1177/1350506806065752 > [Yuval-Davis].

⁸² Note that since the late 1980s, American scholar Angela Davis has maintained that identity politics should be treated as fluid and relational; this is not unique to British scholars, as Prins suggests. See Harris, *supra* note 14.

domination, oppression and marginalization . . .”⁸³ Prins argues that in contrast, Yuval-Davis views intersectionality in terms of ongoing struggles against hegemony and argues for a relational, fluid approach to social identity that does not restrict itself to the focus on black and white race in a system of racism.⁸⁴ In my view, Crenshaw does not reject fluidity, nor does she purport to limit intersectionality to the systemic racism imposed on black men and women in America, either in her earlier or more recent work. Rather, she exposes the flaws in the essentialist approach through an intersectional analysis that addresses the complexities of the lived experience of black women and men. In fact, her arguments of multidimensionality of experience do not limit the application of intersectionality, but serve to recognize and reject in general the “single axis framework that is dominant in anti-discrimination law.”⁸⁵ Furthermore, in her recent work Crenshaw has responded to her critics by encouraging others to go beyond race and gender in an intersectional analysis.⁸⁶ Her early focus on the mutually exclusive categories of race and gender was intended to be illustrative and not limiting.

The critical difference between a systemic approach and a constructionist approach, as Prins sees it, is that the first is premised on identities being formed by societal structure, and in the latter individual agency and control in the formation of identity is viewed as essential to overcoming marginalization in society. Individual agency is what will empower individuals and allow marginalized groups to forge ahead and be included in the process for change. To Prins, the constructionist approach supports the narrative of the individual instead of the categorization of parts of their identity.⁸⁷ In other words, each individual’s experience is unique and cannot be slotted into neatly pre-determined categories. So, while Crenshaw exposes the limitations of rigid and mutually exclusive categories of identity, she is nonetheless attempting to create a revised analytical framework that requires a categorized identity, albeit a multidimensional one,

⁸³ Prins, *supra* note 8 at 279.

⁸⁴ *Ibid.* at 280.

⁸⁵ Crenshaw, *supra* note 2 at 139.

⁸⁶ Crenshaw, *supra* note 43.

⁸⁷ Prins, *supra* note 8 at 281.

that is tied to and subject to systemic domination, racism and marginalization. However, one could argue that Crenshaw seeks to eliminate these societal structures and systems by redefining identity. If anything, Crenshaw does not view individuals as lacking in agency, but rather as members of a society that does not recognize the complexities of their identities. She does not, as Prins suggests, limit the possibilities of individual narratives, but rather seeks to create an alternative framework for more effective analysis and determination of individual narratives in discrimination claims.

If as Prins suggests, we rely solely on narratives of individuals and have no framework within which to operate, moving from theory to practical application of intersectionality is frustrated. Prins cautions against attempts to create a general framework for identity based on extreme, marginalized groups in society.⁸⁸ His assumption that Crenshaw's theory is based on extreme marginalized groups demonstrates his lack of understanding of the varying degrees of marginalization for significant numbers of individuals and groups in North American society. In my view, there is little significant difference between the systemic and constructionist approach. Both the systemic and the constructionist approach to intersectionality are anti-essentialist and recognize the multidimensionality of individual lived experience. Although Prins sees the systemic approach as limiting itself to a more static view of a subjected individual's identity because of its focus on societal structures that reinforce domination and marginalization, the constructionist approach suggests that a lack of some type of collective identity, or sub-categories within identity, be it via ethnic identity, nation, family, gender age, sexuality or class, leaves us to assess identity through narratives of each individual and their lived experience.⁸⁹ But this lack of restriction in categorizing identity limits the ability to create a general framework for anti-discrimination just as much as the systemic approach.

Furthermore, Yuval-Davis recognizes the political significance of making social power axes visible; political empowerment and mobility for change is equally (and sometimes more)

⁸⁸ Ibid.

⁸⁹ Prins, *supra* note 8 at 288-289.

important as social identities within a societal framework.⁹⁰ Nonetheless, a narrative approach which seeks to empower the “embedded self” and examine the ways in which intersections of grounds of discrimination *modify* one another and create very individual and subjective narratives is critical.⁹¹ Intersectionality is not about measuring discrimination and its severity by stacks of variables, such as race, gender and class. It is about acknowledging all aspects of individual identity and the way in which multi-dimensional complexities impact individual experiences of discrimination within societal frameworks. Ultimately, both the systemic and the constructionist approach are on the same theoretical track and face the same challenges of contextual analysis and implementation of an intersectional framework that rejects essentialism, domination and subordination of identity.

In more recent literature advocating intersectionality, more focus is directed at moving intersectionality from theory to practice.⁹² The movement towards utilizing the intersectional approach in legal processes is a critical step that can be divided into two streams: one, an examination of the lack of progress in injecting the intersectional approach into legal processes and the reasons for the inability to develop a feasible framework⁹³; and two, the exploration of developing a viable framework for an intersectional approach in judicial and administrative law cases.

It would seem that both the systemic and the constructionist approach to intersectionality are forced to analyze and critique the existing legal institutions and practices if we are to move forward from theory to practice. Without articulating the systemic obstacles, developing a viable analytical framework and correcting flaws in institutional practices will remain elusive. One of the difficulties faced by intersectional advocates in moving from theory to practice is caused by the lack of detailed articulation by human rights decision-makers as to how discrimination claims are decided. As the research of legal scholar Nitya Duclos Iyer shows, in many Canadian human

⁹⁰ Yuval-Davis, *supra* note 81 at 203.

⁹¹ *Ibid.* at 282. (Refers to Crenshaw, (1991) at 1245.)

⁹² Marchetti, *supra* note 4.

⁹³ *Ibid.*

rights cases, adjudicators are not providing satisfactory explanations for omitting certain aspects of identity, such as race, especially where it has been listed in the complaint.⁹⁴ For example, in *Jain v. Acadia University*,⁹⁵ the complainant's allegations included racial discrimination, but the written decision did not mention the complainant's race or ethnic origin.⁹⁶ In other cases, a lack of cultural, historical, and sociological understanding has resulted in erroneous and confusing categorizations, such as "black male of East Indian origin from Trinidad", or "oriental" sometimes used interchangeably with a national identification such as "Chinese".⁹⁷

This problem is further aggravated in these and other cases by their failure to even recognize still other aspects of identity in any given instance, whether it is an existing ground like gender or other factors like socio-economic or historical factors.⁹⁸ Another excellent example of how this single-axis analysis adversely affects the outcome of a human rights claim can be found in *Cuff v. Gypsy Restaurant and Abi-ad*⁹⁹. In that case, a young black woman was sexually harassed by her employer, who was originally from the Middle East. Evidence was presented showing that he had made sexual remarks about black women, and he also made several comments about the complainant's colour during the tribunal hearing. Even so, there was no analysis of the impact of her race on the sexual harassment she experienced, and there was no finding of race discrimination.¹⁰⁰ Since discriminatory conduct could be heightened or minimized by a complainant's gender, race or other factors such as economic privilege,¹⁰¹ and although analysis of these complexities in discrimination cases is much more difficult than a single axis approach,

⁹⁴ Duclos (Iyer), *supra* note 28.

⁹⁵ *Jain v. Acadia University* (1984), 5 C.H.R.R. D/2123; see Duclos (Iyer) discussion, *supra* note 28 at 31.

⁹⁶ *Ibid.*

⁹⁷ Duclos (Iyer), *supra* note 28 at 32 and see *Kampersad v. Vintage Grand Towing* (1987), 8 C.H.R.R. D/4301.

⁹⁸ *Ibid.* at 32.

⁹⁹ *Cuff v. Gypsy Restaurant and Abi-ad*, (1987), 8 C.H.R.R. D/3792, D/3793 at D/3979; and see Duclos (Iyer), *ibid.* at 34-35.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.* Duclos (Iyer) also demonstrates this point in her analysis at 36.

a failure to acknowledge and address these complexities thwarts efforts to de-marginalize affected individuals.

Perhaps one of the biggest challenges faced by intersectional theorists eager to put theory into practice is the necessity to address the legal frameworks and processes under which human rights cases are initiated, heard and determined. Thus far, we have seen the intellectual debate revolve around the lack of an intersectional approach, without concrete proposals as to how this might be implemented. Is the legal framework the problem? Or is it the lawyers and adjudicators' belief systems that prevent the advancement of intersectional theory?

In my view, the inadequacies in the legal process reflect both the institutional frameworks and the lawyers and adjudicators who generally work within them. Strict adherence to statutory interpretation rules, as mentioned earlier in this paper and an unwillingness to apply a liberal interpretation to the codified language of the laws and procedural rules is prevalent.¹⁰² For example, in Ontario, the *Human Rights Code* specifically lists the grounds of discrimination using the word “or” and not “and” in the list.¹⁰³ There are legal practitioners who interpret this language strictly and view this as a choice of grounds without considering the possibility of overlap of grounds in a given case. Part of the reason for this may be an inability to go beyond the letter of the law to understand the nuances of the historical, geo-political and socio-economic circumstances in which the individual and collective community is situated. This is identified by some scholars as a lack of social science knowledge and social science research expertise.¹⁰⁴ In my view, an intersectional analysis supports a multi-disciplinary approach to analysis of complex and multi-dimensional identities and redeveloping anti-discrimination laws and practice.

Furthermore, more recent intersectional analysts have called for a coalition of different organizations, social movements and advocacy groups that would enhance intersectionality through political manifestations, termed “political intersectionality”.¹⁰⁵ While this approach may

¹⁰² *Ibid.* at 164 and 166.

¹⁰³ *Code, supra* note 10 at s.2.

¹⁰⁴ *Ibid.* at 168.

¹⁰⁵ Elizabeth Cole, “Coalitions as a Model for Intersectionality: From Practice to Theory”, *Sex Roles* 59 (2008) 443-453 at 444.

again appear to focus on a systemic approach to intersectionality, advocates of this concept maintain that this is a method to both mobilize action for change and recognize the overlapping and multidimensionality of identity.¹⁰⁶ Critics of this approach make a troubling observation: While this approach may assist in political mobilization of social groups, it does not take into account the political agendas and issues of hierarchy and priorities within social groups and communities. Dominant voices in groups may drown out the needs and concerns of individuals and marginalize or re-victimize them in these efforts to mobilize.¹⁰⁷ For example, if the needs of the black community are pushed forward, and the advocates are predominantly black males pushing for increased access to education, jobs and youth activities, young, single black mothers will continue to be marginalized without housing, education, daycare and other family issues being addressed. Another example is the politically mobilized members of native communities in Canada. Native advocates have mobilized to pressure the Canadian government for self-governance, the acceptance of land claims, increased access to better education and educational funding, more opportunities for Aboriginal youth and more. However, the needs of the aging native population are drowned out by these dominant voices. Of primary concern is access to health care, particularly in rural areas, and neglect by their own youth. In addition, Aboriginals who live off-reserve do not have the same political mobilization as those who live on reserves.¹⁰⁸

Conclusion to Chapter 1

Essentialism has proved inadequate to the task of addressing human rights claims where there are multiple and overlapping grounds of discrimination. A shift away from a single axis framework of analysis is necessary in order to address the unique realities of an individual's lived experience. An intersectional analysis addresses the complexities of overlapping grounds, combined with historical, socio-economic and political factors within a societal framework. It is

¹⁰⁶ *Ibid.* at 445.

¹⁰⁷ *Ibid.* at 446.

¹⁰⁸ *Ibid.*

this type of analysis that will enhance our understanding of discrimination and its impact on individuals and ensure that the objectives of anti-discrimination laws are met.

Chapter 2

Introduction

An examination of section 15 *Charter* cases and human rights decisions in the last decade reveals that lawyers, judges and tribunal adjudicators are beginning to recognize that in many situations, there are multiple grounds of discrimination that overlap. To effectively assess this case law, it is necessary to recapitulate the jurisprudential framework applied in equality cases. This requires an examination of both the three stage analytical framework articulated in *Law v. Canada*¹⁰⁹ and used in subsequent section 15 *Charter* cases and the analytical framework used by Ontario human rights tribunals to determine if a *prima facie* human rights case has been established. While neither of these analytical frameworks is specifically geared towards intersectional issues, they have nonetheless been applied in cases where issues of intersectionality needed to be addressed. In terms of their usefulness to the analysis of intersectional issues, the analytical frameworks are equivalent in their structure and approach to discrimination cases. Accordingly, I have not attempted to address *Charter* cases separately from *Code* cases.

After I outline the two analytical frameworks currently being applied by the courts and tribunals, I will identify three inadequate approaches to multiple grounds of discrimination: (1) where more than one ground of discrimination is acknowledged, but those grounds are not treated as intersecting or overlapping, and the impact of intersectionality is missed altogether; (2) where intersectional issues were acknowledged but without comprehensive analysis or specific guidelines for approaches to intersectionality or discussion of its implications on the nature or impact of the discrimination experienced; and (3) where the intersectional analysis leads decision makers to take a cumulative approach to conclude that where there is more than one ground of discrimination, the claimants' vulnerability is correspondingly compounded by the number of prohibited grounds involved.

¹⁰⁹ *Law v. Canada*, [1999] 1 S.C.R. 497 [*Law*].

In the first kind of case, adjudicators fail to recognize the intersectional issues that permeate the facts in the discrimination cases before them. This omission results in the continued analysis of discrimination cases using a single axis framework that ignores the complex and multidimensional and unique experience of the individual. Through an analysis of the second inadequate approach adjudicators have taken, we see efforts to shift away from a single axis framework for discrimination claims. Intersectionality is recognized by adjudicators, but they are uncertain as to how to methodically reason their way through the complexities of how grounds of discrimination overlap, or how other socio-economic, cultural or historical contextual factors impact an individual's multi-layered experience of discrimination. In the third faulty approach I have identified, adjudicators correctly go beyond a single axis framework of analysis and examine intersectional issues, but they misread overlapping grounds of discrimination to mean that if there are two grounds of discrimination experienced, the individual is "doubly" discriminated against, and if there are three overlapping grounds the claimant is "triply" discriminated against, and so on. This conclusion is based on faulty reasoning that does not account for a layered and complex experience which results in a qualitatively different impact that cannot necessarily be calculated with a mathematical equation. It also means that adjudicators have missed the significance of the other subjective contextual factors that are socio-economic or historical in nature, rendering their reasoning and their conclusions deficient.

From there, I will examine two approaches where positive steps have been taken to go beyond acknowledgment of overlapping grounds to analysis of intersectionality issues. The first approach recognizes that a comprehensive analysis requires both a subjective test, with individual narratives and contextual factors, and an objective test that requires analysis of contextual factors and the impact of the overlapping characteristics and factors on individuals or groups of individuals. The second positive thread of reasoning that has appeared in some cases is the recognition that a particular individual within a group need not be homogeneous with other members of the group in order to make a finding that there is discrimination or intersectional discrimination. Both of these approaches have removed some of the rigidity in the application of the *Law* three stage analysis and the analysis of the prima facie case in human rights cases, and have shown that analytical frameworks can serve as a guidelines that still leave room for

adjudicators to consider the relevant factors in each case that are unique and interchangeable. In my concluding comments in this section, I will identify the similarities and differences between the two analytical frameworks and examine the patterns of analysis that may be helpful and those that may be a hindrance to the development of an intersectional analytical framework. I will conclude that despite some positive developments in anti-discrimination cases, the concept of intersectionality is inconsistently identified, and an intersectional approach is inconsistently attempted and applied. I will argue that an intersectional approach to discrimination cases is feasible, but that an analytical framework for intersectional analysis needs to be clearly laid out for results to be more consistent and productive for future cases. This methodology should not be rigid, but should provide a framework for identification of grounds, together with recognition of contextual factors and the unique individual experience of discrimination that is fluid and relational.

The Three Stage Analytical Framework in *Law v. Canada*

In *Law v. Canada*, the majority of the Supreme Court of Canada developed a three stage analytical framework for section 15 *Charter* cases that has been referred to and applied judicially and in human rights cases.¹¹⁰ The judgment in this case is significant for a number of reasons. First, although the *Law* case involves a constitutional question, the analysis and judgment is useful in the assessment and determination of human rights cases before both courts and tribunals. The Supreme Court of Canada has made it clear on many occasions that human rights legislation should be viewed as “fundamental and quasi-constitutional.”¹¹¹ Since the objectives of the equality provisions of section 15 of the *Charter* are considered congruent with the objectives of human rights legislation, valuable observations can be made and utilized in human

¹¹⁰ *Ibid.*

¹¹¹ *Gibbs v. Battlefords & District Co-operative Ltd.*, [1996] 3 S.C.R. 566 (S.C.C.) as per Sopinka, J. This concept was discussed and concurred with by the Ontario Board of Inquiry in *Kearney v. Bramalea Ltd.* (1998), 34 C.H.H.R. D/1 (Ont. Bd. Inq.) [*Kearney*]. See also *Arzem v. Ontario (Ministry of Community and Social Services)*, online: 2006 CarswellOnt 9216 (WLeC) [*Arzem*].

rights claims. Second, the three stage analysis or framework in *Law*, as laid out by Iacobucci, J., is a useful tool in developing a similar framework for intersectional analysis. Although this framework is specifically geared towards the challenge of legislation that violates section 15 of the *Charter*, a modified or restructured comprehensive version of it could be the key to entrenching an intersectional analysis of human rights claims before tribunals and the courts. Third, consistent judicial and tribunal reference to the *Law* case and Iacobucci J.'s three stage analysis demonstrates that when a clear and concise framework is formulated, tribunals and courts are eager to use it to guide their way through discrimination claims.

The three stage analysis (referred to in some cases as a three stage framework) is laid out by Iacobucci J. in *Law* as follows: (1) Does the law in question cause differential treatment, in purpose or effect? (2) Does the differential treatment constitute discrimination on the basis of one or more enumerated grounds or analogous grounds? And (3) Does the law have a purpose or effect that is discriminatory within the scope of the equality guarantee (in section 15(1) of the *Charter*)?¹¹² A review of the cases referring to *Law* and this three stage analysis reveals that although the three stages do not specifically refer to or require identification of intersectional issues, the *Law* analysis has nonetheless been applied in several cases (some of which are discussed below) where intersectional issues have been identified. This is especially the case because in order to determine if a specific law, in its purpose and effect, is discriminatory, an analysis of the “full context”, or all the contextual factors, is necessary.¹¹³ As a result, more than one overlapping ground of discrimination is often revealed. The recent trend of recognizing intersectional issues when the *Law* three stage analysis is used demonstrates that a comprehensive investigation of intersectionality is possible, and guidelines more specifically geared to intersectionality would reduce inconsistencies and faulty analysis of these complex issues.

¹¹² *Law*, *supra* note 109 at paras. 59-87. See also the three stage analysis from *Law* as applied in *Arzem*, *supra* note 111 at paras. 25-34.

¹¹³ *Ibid.* in *Arzem*, at para. 26.

Establishing a *Prima Facie* Human Rights Case

In Ontario human rights cases, Boards of Inquiry have adopted a three stage analysis as outlined in Keene's human rights treatise.¹¹⁴ The three step analysis to establish a *prima facie* case is as follows: (1) Can the complainant establish the existence of the factor in question? (2) What is the effect of that factor? Does the use of the factor result in the exclusion or restriction of a group of persons identified by a prohibited ground of discrimination? (3) Is the complainant a member of one or more of the groups so excluded or restricted?¹¹⁵

This analytical framework has similarities to the *Law* framework. This analysis also guides adjudicators to seek evidence of differential treatment that is prohibited by law, and to identify the effect or impact of the discrimination on the individual. As with the *Law* framework, intersectional issues can be recognized and incorporated in the analysis of discrimination. We also see from the case law, though, that a lack of specific guidelines for intersectional issues leaves human rights cases lacking consistent, comprehensive determinations that reflect the complexities of overlapping grounds of discrimination combined with socio-economic, cultural and historical contextual factors.

Recognition of Multiple Grounds of Discrimination without Acknowledgement of Intersectionality

Thus far, both federal and provincial Canadian cases occasionally recognize the *claim* of multiple grounds, but often courts continue to isolate one ground of discrimination as the root of

¹¹⁴ Judith Keene, *Human Rights in Ontario*, 2nd ed., (Toronto: Carswell, 1992) at 126 [Keene]. There is no evidence available to suggest that the newly formed Ontario Human Rights Tribunal will deviate from this approach to establishing a *prima facie* human rights case.

¹¹⁵ *Ibid.* See also *Vander Schaaf v. M&R Property Management Ltd.* (2000), 38 C.H.H.R. D/251. at 21 [*Vander Schaaf*], and *Kearney*, *supra* note 111 at para. 110.

the claim and set aside any other claims made. In addition, the reasoning in many of these cases accepts a hegemonic approach to identity without any reference to historical, cultural or socio-economic context in which the individual is situated. As a result, the remedies, if granted, are also directed at an isolated ground of discrimination, and do not reflect the realities and complexities of the discrimination experienced.

In many cases, the acknowledgement of multiple grounds of discrimination does not always lead the deciding bodies to comprehensively analyze the *intersection* or overlap of those grounds and the impact of it on the discrimination experienced by an individual. An example of this inadequate approach can be found in *Birchall v. Guardian Properties Ltd.*, where the British Columbia Human Rights Tribunal adopted the early views of Madame Justice L'Heureux-Dube and held that a complainant need only prove one ground of discrimination.¹¹⁶ Even so, the Tribunal held that the complainant was discriminated against based on her marital status, family status and her lawful source of income when she was refused a rental apartment by the Respondent.¹¹⁷ The Tribunal did not, however, identify the intersection of these factors. Instead, each factor was accepted, based on the evidence, as part of a “laundry list” of grounds of discrimination. It is unclear whether the Tribunal assumed it was obvious that the grounds intersected in this case, or if, because of their view that only one ground needs to be proved, a failure to acknowledge and analyze these complexities was irrelevant to the outcome of the case. For instance, the Tribunal determined that the discrimination experienced by the complainant was the result of her source of income. However, the Tribunal does not question whether her rental application would still have been rejected if the amount of income she received was the same but was not government-assisted. As well, even though the Tribunal found that the Complainant had also been discriminated against on the ground of family status, no reasoning was provided as to why or how her two children impacted the Respondent’s decision to reject her application, or how the discrimination impacted this disabled Complainant who had the added challenge of supporting two children.

¹¹⁶ See *Birchall v. Guardian Properties Ltd.* 38 C.H.H.R. D/83, 2000 BCHRT 36 [*Birchall*].

¹¹⁷ *Ibid.* at para. 37.

We can see a similar approach taken by the Ontario Board of Inquiry in *Vander Schaaf v. M&R Property Management Ltd.*¹¹⁸ In that case, the Ontario Board of Inquiry took a much narrower approach to the claims of discrimination in accommodation based on the grounds of age, sex and marital status.¹¹⁹ The Board found that Vander Schaaf was discriminated against in her residential tenancy application based on marital status, since as an unattached woman, she did not have a combined income of two spouses that would enable her to meet the criteria of the rent-to-income ratio used by the respondent: “...the Board concludes that a rental application from spousal co-tenants would have been treated differently by the landlord, who would have considered whether their combined income satisfied its rent/income ratio. The Board finds on the basis of the above facts that the Respondents directly discriminated against the Complainant on the grounds of marital status...”¹²⁰

Furthermore, statistics show that unattached women do not have the same income distribution as unattached men, and so the Board made a separate finding that she was discriminated against on the basis of sex, or gender, holding: “...that income distribution is such that unattached women are disadvantaged relative to unattached men...Consequently, a group identified by the prohibited ground of sex is restricted in its access to accommodation by the use of (rent/income) ratios.”¹²¹ The Board did not acknowledge that several grounds of discrimination overlapped, and so did not attempt to apply an intersectional approach that would take into account the complexities of overlapping and intersecting factors.¹²² Although it considered extensively an earlier Ontario Board decision, *Kearney*, in which there were multiple grounds of discrimination, it did not acknowledge or analyze the intersectionality of the discriminatory grounds claimed in the same way as that case.¹²³ The approach in *Vander Schaaf* is narrow. The Board could have

¹¹⁸ *Vander Schaaf*, *supra* note 115.

¹¹⁹ *Ibid.* See also OHRC Discussion Paper, *supra* note 1 at 4.

¹²⁰ *Ibid.* at para. 84.

¹²¹ *Ibid.* at para. 94.

¹²² *Ibid.*

¹²³ *Ibid.* See also *Kearney*, *supra* note 111. (Bd. Decision, 1998.)

acknowledged intersectionality and an approach where the co-relation between gender, age, income and socio-economic patterns are assessed, but the Board stopped short of this type of comprehensive analysis of the co-relation between the factors. When the complexity of overlapping grounds is adequately examined, we can gain a deeper understanding of the multidimensional and unique experience of individual claimants, and in this case, we could have seen the rudimentary formation of guidelines for analysis of intersectional analysis. This in turn could have lead to the development of better policies and educational guidelines for the avoidance of discriminatory practices and increased awareness in the employment, housing and service sectors. Guidelines that enhance the public's understanding of intersectional issues could also provide assistance on how to accommodate individuals with complex experiences of overlapping grounds of discrimination combined with other contextual factors.

Recognition of Intersectionality with Insufficient Analysis

The second inadequate approach that I have identified in human rights cases before courts and tribunals where there are multiple grounds of discrimination is the adjudicators' recognition of the intersection of grounds without any comprehensive analysis to identify the significance of intersectionality or its implications. This lack of analysis prevents us from learning how intersectionality plays out in discrimination claims, the impact on individual claimants, and how the adjudicators' conclusions were reached.

Initially, it was actually in dissenting opinions that we saw some recognition of the legitimacy of identifying overlapping grounds of discrimination in the Supreme Court of Canada. For example, in *Canada (Attorney General) v. Mossop*, Madame Justice L'Heureux-Dube acknowledged that grounds of discrimination may overlap.¹²⁴ Madame Justice L'Heureux-Dube again made reference to intersectional grounds of discrimination in her dissenting opinion in *Egan v. Canada*.¹²⁵ However, in that case she went a little further in her analysis and identified

¹²⁴ *Canada (Attorney General) v. Mossop*, (S.C.C.) *supra* note 38.

¹²⁵ OHRC Discussion Paper, *supra* note 1.

the significance of judges' evaluation and sensitivity to individuals' experiences exceeding the boundaries of pre-existing, narrow categories.¹²⁶ Nonetheless, advocates of an intersectional approach have criticised her comments since she ultimately adhered to the traditional single axis approach in her final analysis and conclusions.¹²⁷ Although it is a positive step to recognize intersectionality, it is only minimally helpful for future human rights decision makers seeking guidelines for understanding and handling intersectional claims.

An early example of a human rights board's deficient analysis despite its recognition of multiple and intersecting grounds of discrimination can be found in a British Columbia case, *Frank v. A.J.R. Enterprises Ltd. (c.o.b. "Nelson Place Hotel")*.¹²⁸ In that case, the complainant alleged discrimination on the basis of race (Aboriginal) and sex (or gender). The respondents maintained that most of their clientele were Aboriginal so they could not have discriminated against the complainant. The Board accepted the complainant's evidence that she was treated differently based on her Aboriginal race *combined* with her gender within the historical context of the treatment of Aboriginals, and Aboriginal women in particular, in Canadian society. The intersection of "malignant and contemptuous sexism intertwined with callous racism..." was clearly recognized by the board.¹²⁹ This acknowledgement was important because it identifies the injustice and discrimination experienced by the individual complainant, but unfortunately no analytical framework for intersectional analysis was developed. Nonetheless, despite that fact that the Board did not delve into an intersectional analysis, its decision reflects an implicit recognition that (a) the claimants were not discriminated against based on race or sex, but on the basis of an intersection of those factors; (b) the intersection of race and gender created a subgroup of Aboriginal women within the group of Aboriginals; and (c) establishing discriminatory practice includes an assessment of evidence beyond prohibited grounds to include historical context within Canadian society, stereotypes and prejudice.

¹²⁶ *Egan v. Canada*, [1995] 2 S.C.R. 513 (S.C.C.) [*Egan*].

¹²⁷ OHRC Discussion Paper, *supra* note 1 at 2.

¹²⁸ *Frank v. A.J.R. Enterprises Ltd. (c.o.b. "Nelson Place Hotel")* (1993), 23 C.H.R.R. D/228 (B.C.C.H.R.) [*Frank*].

¹²⁹ *Ibid.* at 233. See also OHRC Discussion Paper, *supra* note 1 at 6.

In my view, the lack of a methodical approach to analysis of intersecting grounds impacts both the outcome of this case and future cases before the Tribunal in other ways as well. Without a structured approach to intersectional analysis, in every case adjudicators will be left to try and determine the relevance of issues and factors without any guidance from previous cases. This will in turn result in continued inconsistencies and deficiencies in analysis and decisions where there are multiple and intersecting grounds of discrimination. For example, without a clear analysis of the impact on an individual where there are intersecting grounds of discrimination, any remedy granted to the individual could be identical (and wrongly so) as an individual who has brought a complaint based on a single ground of discrimination. Each claim should be asserted, investigated, and acknowledged in the totality of all the claims made in every human rights case.

An intersectional analysis could include the following guidelines: (a) Do the facts in question indicate an overlap or intersection of more than one ground of discrimination? (b) What are the subjective contextual factors that impact the individual or group in question? [What insights about the unique, lived experience of the individual can we learn from detailed, individual narratives within his or her social condition?] (c) Can objective contextual factors be identified that help us determine the impact of the discrimination? [What are the discriminatory stereotypes faced by the individual? What is the purpose and impact of the legislation, policy or practice? What is the social, political and legal history of the individual's treatment in Canadian society?] If these more detailed questions could serve as a structure or guideline for in-depth intersectional analysis, the implicit findings in *Frank* could have been more explicitly and comprehensively laid out. More detailed analysis and articulation of reasons would also provide more insight as to the nature and complexity of marginalization experienced by human rights claimants. These findings could in turn serve as critical information in policy development related to poverty, low income housing and social assistance, and help to identify "minorities within minority groups" who may require unique consideration of their socio-economic and other conditions to effectively overcome discriminatory practices.

A Cumulative Approach to Intersectional Claims: Measuring Vulnerability and the Impact of Discrimination

Another perplexing development in intersectional human rights cases is the misguided theory that where multiple grounds of discrimination have been established, the claimants have corresponding multiple or cumulative vulnerability. For example, if two grounds of discrimination are established, such as race and sex, then the claimant is sometimes found to be “doubly vulnerable” or disadvantaged.¹³⁰ An example of this approach can be found in *Arzem v. Ontario (Ministry of Community and Social Services)*.¹³¹ This Ontario human rights case was decided in 2006, and it is a very useful example of contemporary human rights analysis because it was a section 15 *Charter* challenge of section 10(1) of the *Ontario Human Rights Code*. Accordingly, this case required analysis of both human rights law and a constitutional question.

In *Arzem*, the complainants were minor children with pervasive development disorders, including Autism Spectrum Disorder and Asperger’s Disorder.¹³² Ontario, specifically the Ministry of Community and Social Services, only provided a public service called Applied Behaviour Analysis, or Intensive Behavioural Intervention, to children between the ages of two and five.¹³³ Ontario refused or terminated this service when children attained the age of six.¹³⁴ The Tribunal in *Arzem* took judicial notice that as a group, the mentally ill are “highly vulnerable” and have experienced “pre-existing disadvantages, stereotyping and general social

¹³⁰ *Arzem*, *supra* note 111 at para. 77. See also the dissenting opinion of Madame Justice L’Heureux-Dube in *Corbiere v. Canada*, [1999] 2 S.C.R. 203, online: 1999 CarswellNat 663 (WLeC) at para. 72 [*Corbiere*].

¹³¹ *Arzem*, *supra* note 111.

¹³² *Ibid.* at para. 2.

¹³³ *Ibid.* at para. 6.

¹³⁴ *Ibid.*

prejudice.”¹³⁵ The intersection of the complainants’ age and mental disability, according to the Tribunal, made them “doubly” vulnerable.¹³⁶

We can see the same conclusion reached in the dissenting opinion of Madame Justice L’Heureux-Dube in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, a section 15 *Charter* case.¹³⁷ In this Supreme Court of Canada case, a claim was made by aboriginals that the federal *Indian Act* discriminated against band members by prohibiting them from voting in band elections if they lived off-reserve.¹³⁸ Both the majority decision and the dissenting opinion recognized the analogous ground of “aboriginality-residence”, but neither commented on double vulnerability on that basis. Rather, Madame Justice L’Heureux-Dube remarked in her dissenting opinion that aboriginal women were “doubly disadvantaged” because of their race *and* gender, and because of the historical context of their treatment in Canadian society.¹³⁹ In its decision, the majority commented that her reasoning was unnecessarily complex.¹⁴⁰ In fact, nowhere else in this case does there seem to be any particular reference to any specific or distinct claim by aboriginal women, or evidence that would support such a claim in this case.

One must be cautious in the characterization of the overlapping of multiple grounds. To say that a group is doubly vulnerable places us at a troubling spot in the intersectionality debate: recall that in the American *DeGraffenreid* case, where the judge viewed recognition of more than one ground of discrimination as stacking grounds, creating a “special class” and creating new “super” remedies.¹⁴¹ That is not to say that in some instances, an in-depth analysis of objective and subjective evidence may reveal that an individual or group is in fact “doubly” disadvantaged. But it cannot be assumed that if two grounds of discrimination have been established, it

¹³⁵ *Ibid.* at para. 77.

¹³⁶ *Ibid.*

¹³⁷ *Corbiere*, *supra* note 131.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.* at para. 72.

¹⁴⁰ *Ibid.* at para. 1.

¹⁴¹ See discussion of the *DeGraffenreid* case in Section I of this paper at 12. See also footnote 34.

automatically follows that double the amount of discrimination has occurred. We can look at the example of a black woman who has established discrimination at her workplace on the basis of race and gender. She may present evidence that shows that she is receiving less pay than her white female co-workers and her black male co-workers. If we stack the grounds of race and gender and conclude that this claimant is doubly disadvantaged, we miss the complexities of intersectionality her unique lived experience as a black woman. We do not take into account that she may be disadvantaged by this discriminatory practice, but by a different percentage than double, either lower because of other subjective, contextual factors, or even higher because of these contextual factors.

It is precisely the complexities of intersectionality that require an assessment of the nature of the intersection and the impact on a particular individual or group to determine the nature and extent of discrimination. In my view, the objective of the intersectional approach is not to stack grounds and create special classes. Instead, it is to recognize the complex contextual factors and overlapping grounds of discrimination as they are experienced by the individuals in question. To apply an intersectional approach to the same black woman mentioned above, a more detailed analysis will more accurately reveal the nature of the discrimination she has experienced and our understanding of the extent of the impact on her life changes. For example, what is her socio-economic condition? Has she been historically disadvantaged in a way that is different from her male or female co-workers? Has she experienced marginalization in her educational experience and faced any unique obstacles in obtaining job qualifications or promotions? Has her marital status, family status or sexual orientation, (or any other factors) impacted her circumstances or the discriminatory practices she has experienced? Does she belong to a marginalized sub-group within the black community? Or for example, if she is not Canadian born, or English is not her first language, or she is a refugee or perhaps does not wear western clothing, or she has a “foreign” name unfamiliar to her employer and her co-workers, have any of these factors impacted her lived experience differently than other black women?

To simply create a new, special or doubled up class would not address the unique circumstances of an individual’s lived experience. This type of faulty reasoning could also lead to incorrectly awarding a “double” remedy, a proposition that was rejected in *DeGraffenreid*. Certainly

tangible factors such as a specific amount of pay may be more readily ascertainable based on empirical evidence. But the intangibles, difficult as they are to assess, are equally important and should not be ignored only because it is a challenge to determine the appropriate remedy where complex contextual factors play a role in discriminatory practices.

Positive Results of the Two Prong Approach: Subjective and Objective Analysis of Discrimination

Recent anti-discrimination cases have also produced some positive developments that move intersectionality from theory into practice. In *Law v. Canada*, the Supreme Court of Canada as a whole recognized that a discrimination case can involve a “combination of different grounds” and that a complete analysis includes a consideration of the social and political history of the particular group and their treatment within Canadian society.¹⁴² In this case we can see an acknowledgement of intersectionality and an objective analysis of contextual factors and their impact, but there is no recognition of the subjective factors and the individual narratives that come into play in intersectional discrimination cases.

More significantly, there are a number of cases where we can see an approach to multiple grounds of discrimination that analyzes intersectionality with two prongs. The first prong is subjective and takes into account individual narratives and the contextual factors that impact the individual or group involved. The second prong is objective and takes into account contextual factors that help to identify the impact of the discrimination. We can see some positive use of empirical evidence to assist in an intersectional analysis that assesses an individual’s experience based on both subjective and objective analysis of contextual factors and their impact.

¹⁴² *Law, supra* note 109. It is, however, important to note that the court stated that it is up to claimants, and this of course also means their legal counsel, to articulate a claim based on multiple grounds of discrimination. This suggests that the court will not identify intersectionality without some indication from the parties before them.

An early example of this type of intersectional analysis can be found in *Sparks v. Dartmouth/Halifax County Regional Housing Authority*.¹⁴³ In this case, the complainants were public housing tenants who argued that they were being treated differently than private sector tenants on the basis of race, sex and income.¹⁴⁴ The Nova Scotia Court of Appeal (N.S.C.A.) disagreed with the trial judge's conclusion that the complainant was required to single out a characteristic of "being a black, female, social assistance recipient . . ." ¹⁴⁵ Instead, the appeal court identified the key consideration as the *impact* of the law on an individual or particular group.¹⁴⁶ The Court of Appeal also took the position that evidence of discriminatory treatment should not be limited to personal characteristics, particularly where substantial, objective evidence has been provided by the complainant that proves differential treatment experienced by individuals in this group and further substantiates that this group is historically disadvantaged.¹⁴⁷ As the court noted, "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 [emphasis added]."¹⁴⁸ The language used by the court demonstrates an understanding of the intersection of characteristics and contextual factors. The court further emphasized that to ignore these complexities of the individuals' lived experiences ignored the makeup of the public tenancy housing group and the effect or impact of the legislative provisions that led to their discrimination.¹⁴⁹

¹⁴³ *Sparks v. Dartmouth/Halifax County Regional Housing Authority*, 30 R.P.R. (2d) 146, 119 N.S.R. (2d) 91, 330 A.P.R. 91, 101 D.L.R. (4th) 224, online: 1993 CarswellNS 89 (WLeC) [*Sparks*].

¹⁴⁴ *Ibid.* at paras. 5 and 34.

¹⁴⁵ *Ibid.* at para. 14.

¹⁴⁶ *Ibid.* at para. 15.

¹⁴⁷ *Ibid.* at para. 22.

¹⁴⁸ *Ibid.* at para. 33.

¹⁴⁹ *Ibid.* at para. 34.

Given the specific acknowledgement by the Nova Scotia Court of Appeal of the intersection of multiple grounds of discrimination combined with historic and other contextual factors to produce the impact of differential treatment, it is unfortunate that an analytical framework was not provided for future cases, particularly since this may be the reason that it was not consistently referred to in future cases involving multiple grounds of discrimination. For example, the court concluded that several groups were discriminated against and treated differently because they were public housing tenants. These groups were identified and included blacks, women and social assistance recipients, with multi-layered and overlapping grounds for many individuals, all of whom the court found to be historically disadvantaged.¹⁵⁰ But these are conclusions based on empirical evidence without an analytical framework for how these conclusions were reached. It would have been helpful, for example, if we had seen the following questions posed and answered by the court: (1) Have the respondent's practices resulted in differential treatment of the claimants? (2) Does this differential treatment amount to prohibited discrimination? (3) Is there an intersection of more than one prohibited ground of discrimination? (4) Are there other, subjective contextual factors that impact individuals, and are these factors different or unique within one or more of these groups? (5) What is the nature and extent of the impact of the discrimination experienced by the individual claimants? (6) In what way(s) can these discriminatory experiences be remedied?

We see a similar but even more simplistic approach in a more recent Ontario human rights case. In *Kearney v. Bramalea Ltd. (No.2)*, the Divisional Court confirmed the Board of Inquiry's decision and the analysis of the evidence before it.¹⁵¹ This complaint was brought based on discrimination by a rental management company in the selection of tenants for rental properties. The company's criteria were based on a rent-to-income ratio. Evidence was presented to the Board of Inquiry which showed that the company's criteria excluded socially disadvantaged groups who statistically would not meet the rent-to-income ratio requirements. These groups included single mothers, single First Nations women, single black women and single women on

¹⁵⁰ *Ibid.* at para.33.

¹⁵¹ *Kearney v. Bramalea Ltd.*, *supra* note 111 (Ont. Bd. Inq.; confirmed by Superior Court of Justice, Divisional Court in *Kearney v. Bramalea Ltd. (No.2)*, O.A.C. 54, 39 C.H.R.R. D/111, 2001 CarswellOnt 256) (WLeC) [*Kearney No.2*].

social assistance.¹⁵² The evidence and statistics presented to the Board of Inquiry led it to find discrimination based on every ground cited, and the Divisional Court agreed with the Board's findings.¹⁵³ The Board concluded that the effect of the company's rent-to-income ratio was that all of the complainants in those groups could not meet or were less likely to meet the income criterion.¹⁵⁴ However, despite the fact that it specifically acknowledged that many categories or groups intersect, the Board provided no analysis to that effect. The recognition that many of the claimants in *Kearney* fell into several groups listed in human rights legislation and the additional and significant acknowledgement of subjective contextual factors such as historical socio-economic conditions did not lead the Board to clearly articulate such a position in its reasons and conclusions. In essence, *Kearney* is a case where an intersectional dimension is acknowledged but not pursued, and is in fact shied away from in the contextual analysis and findings.

In the *Kearney* case, substantial evidence was presented to the Board which included objective statistics and detailed subjective individual narratives.¹⁵⁵ Objective, contextual factors were examined in each allegation of discrimination based on insufficient earnings, sex, marital status, citizenship, place of origin, family status, receipt of social assistance and age and sex.¹⁵⁶ The acknowledgement of intersectionality played an important role in the Board's conclusion that the respondent's rent-to-income ratios had a disparate effect on a number of protected groups and individuals who could be characterized as being members of more than one of those groups.¹⁵⁷ This recognition was stated, but the implications were not analyzed. An analysis would have been useful in showing us whether the Board recognized that the complexities of intersectionality meant that the individual complainants' narratives reflected different lived

¹⁵² *Ibid* at paras.57-61. See especially para. 60.

¹⁵³ *Ibid*.

¹⁵⁴ *Ibid*. See especially paras. 57-63.

¹⁵⁵ *Ibid*.

¹⁵⁶ *Ibid*.

¹⁵⁷ *Ibid*. at para. 121.

experiences even amongst them. This more detailed analysis might show the extent of discrimination experienced by different individuals who fall within the same groups or subgroups. It may also reveal that some individuals were impacted differently even within subgroups because of marital status, family status or other factors *combined* with other circumstances like marginalization due to a lack of educational opportunity, culture, or clothing and language barriers. Any findings on these contextual factors improve our understanding of the complexities and subtleties of discrimination; it is only through this knowledge that we can move forward in constructively eliminating or reducing implicit or explicit societal barriers and discriminatory practices.

The Ontario Court of Appeal also recognized discrimination based on multiple grounds analogous to enumerated grounds in *Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch)*.¹⁵⁸ In this section 15 *Charter* case, the complainants were single mothers who, originally eligible for social assistance under the legislation, became ineligible because of legislative amendments that broadened the definition of “spouse”, thereby excluding them from eligibility because of their respective co-habiting boyfriends.¹⁵⁹ The males they cohabited with had no legal responsibility to support them or their children, and the women maintained as much financial independence as possible. In his reasons for the Ontario Court of Appeal, Laskin J.A. concurred with the decision of the Divisional Court and stated that any definition of spouse should take into account social, familial and economic factors.¹⁶⁰ To single out one factor, such as economics, can lead to erroneous conclusions about the nature of the relationship between two people. The Court of Appeal applied the three-step framework applied by the Supreme Court of Canada in the *Law* case and agreed with Iacobucci J. that the three-step framework is a guideline for analysis of section 15 cases, and not “a rigid test to be applied mechanically.”¹⁶¹

¹⁵⁸ *Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch)* [2000] O.J. No. 2433 (Div. Ct.), (WLeC) [*Falkiner*].

¹⁵⁹ *Ibid.* at paras. 44 – 45 and para. 60.

¹⁶⁰ *Ibid.* at para.55.

¹⁶¹ *Ibid.* at para. 65.

Using the guidelines in *Law*, the Ontario Court of Appeal provided an extensive objective analysis of the definition of “spouse” in the relevant legislation.¹⁶² The court recognized that although the definition of spouse was gender neutral, the impact of the definition fell on women and not men.¹⁶³ It is also significant that in their analysis, the Ontario Court of Appeal examined both the intended impact and the actual impact on the individual claimants.¹⁶⁴

In his subjective analysis, Laskin J.A. analyzed the grounds of marital status, gender, receipt of social assistance and other factors as an “interlocking set of personal characteristics.”¹⁶⁵ He applied the *Law* analysis to include the subjective inquiry into the case from the perspective of the claimant.¹⁶⁶ Based on its objective analysis of the relevant legislative definition of spouse and its subjective analysis of the intersecting grounds of sex, marital status and receipt of social assistance, together with other contextual factors and the actual impact of the relevant legislation of the claimants, the Court of Appeal concluded that the claimants were subjected to differential treatment that reflected and reinforced “existing disadvantages, stereotypes and prejudice.”¹⁶⁷

The *Falkiner* case appears to be the most adequate approach to intersectionality thus far. Nonetheless, this case is not without its shortcomings. For one thing, the Court of Appeal acknowledged intersectionality within the existing *Law* three stage analytical framework intended for section 15 *Charter* cases. This resulted in a missed opportunity to embrace intersectionality as a complex and intricate theory which requires its own analytical framework. The three stage analysis in *Law* can be applied whether or not intersectionality exists in a section 15 *Charter* case. Secondly, because Laskin, J.A. adhered to the *Law* guidelines, his subjective analysis lacked the detailed individual narratives that would assist him (and us) in identifying the subjective contextual factors that are so critical in intersectional analysis. It is these subjective

¹⁶² *Ibid.* at paras. 13-18 and 41-60.

¹⁶³ *Ibid.* at para. 75.

¹⁶⁴ *Ibid.* at para. 84.

¹⁶⁵ *Ibid.* at paras 71-72.

¹⁶⁶ *Ibid.* at para. 65.

¹⁶⁷ *Ibid.* at para. 96.

contextual factors that reveal the complexities, subtleties and the depth of discrimination.

Thirdly, without individual narratives, it is difficult to determine (and it appears that Laskin, J.A. did not take this step) the nature and extent of the impact of discrimination for each claimant. Even though the lower court did look at individual narratives, it would have been instructive to have these narratives addressed in the Ontario Court of Appeal decision. If these issues were clearly outlined and addressed by the Court of Appeal, more detail might have been revealed about how these individuals were uniquely impacted, based on their distinct experiences, and not just as members of a group or subgroup. Only then can we adequately address, both judicially and as a society, the way in which stereotypes and prejudices impact individuals and the way that discriminatory practices need to be addressed in order to be eliminated.

Not all efforts at intersectional analysis in anti-discrimination cases have been as clear as the one in *Falkiner*. I have already discussed the *Corbiere* case in the context of the court's inadequate approach to the measure of vulnerability experienced by claimants. However, the *Corbiere* case is an example of a case where there are glimpses of a positive approach to intersectionality that become clouded by efforts to minimize or simplify the complexities of intersectional issues. In *Corbiere*, the Supreme Court of Canada seemed to apply an intersectional analysis to the aboriginals' claim that the federal *Indian Act* discriminated against band members by prohibiting them from voting in band elections if they lived off-reserve.¹⁶⁸ As stated earlier, the majority decision and the dissenting opinion recognized the analogous ground of "aboriginality-residence."¹⁶⁹ In doing so, it would seem that they recognized the intersection of Aboriginal and residence status. In fact, the majority decision is based on a strict legal analysis via the *Law* three stage framework that does not address the complexities of the historical disadvantage experienced by off-reserve aboriginals, and focuses on the current situation of the group.¹⁷⁰ The majority decision viewed the dissenting opinion of Madame Justice L'Heureux-Dube as too complex and one that muddied the waters.¹⁷¹ Because Madame Justice L'Heureux-Dube

¹⁶⁸ *Corbiere*, *supra* note 130 at 15.

¹⁶⁹ *Ibid.* at para. 14.

¹⁷⁰ *Ibid.* at para. 19.

¹⁷¹ *Ibid.* at paras. 1 and 9.

examined contextual factors more closely, the majority decision cautioned against what they viewed as “a contextual, fact-based conclusion about whether discrimination exists in a particular case.”¹⁷² They maintained that the enumerated grounds are constant, legislative markers and a legal expression of a characteristic subject to discrimination.¹⁷³ In their view, the enumerated grounds in section 15 of the *Charter* and any analogous grounds must be constant and unchangeable in accordance with a particular set of facts or a particular individual’s unique experiences. As their reasons state, “If “Aboriginality-residence” is to be an analogous ground ...then it must always stand as a constant marker of potential legislative discrimination, whether the challenge is to a governmental tax credit, a voting right, or a pension scheme.”¹⁷⁴ The majority decision maintained that their approach was simpler than that of Madame Justice L’Heureux-Dube.¹⁷⁵ They objected to Madame Justice L’Heureux-Dube’s position that the court must consider purposive and various contextual factors at all three stages of section 15 analysis, and that the analysis of legislative, historical and social context of the distinction created by the law must be done together with an assessment of individuals’ experiences and the intent of section 15 of the *Charter*.¹⁷⁶

While I agree with the majority in *Corbiere* that legislative and analogous markers should be constant, their efforts to simplify the contextual analysis leads them to miss the opportunity to develop an intersectional analytical framework that compliments or enhances the three stage analytical framework in *Law* and embraces both an objective and a subjective analysis where there is more than one ground of discrimination. These so-called “markers” should be the starting point for analysis that is fluid and relational to the individuals or groups of individuals involved, and not a point of finality that ignores the complexity of contextual factors. It is precisely this contextual analysis that Madame Justice L’Heureux-Dube emphasizes as critical to

¹⁷² *Ibid.* at para. 7.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.* at para. 10.

¹⁷⁵ *Ibid.* at para. 1.

¹⁷⁶ *Ibid.* at paras. 7 and 56.

reaching a comprehensive conclusion. Although her written opinion does not reveal a comprehensive intersectional framework, her application of the *Law* three stage framework is an example of how a detailed analysis of contextual factors leads to a better understanding of the impact of discriminatory laws and practices on individuals or groups. The majority decision acknowledged that the *Law* analysis was not intended to be a “formalistic straitjacket”¹⁷⁷, but failed to recognize the fluidity of the individual experiences and contextual factors and particularly the place of the group in the socio-economic, legal and political structures of our society.¹⁷⁸

In Ontario, a more recent positive example of a discrimination case where the Board of Inquiry attempted an intersectional analysis is *Arzem v. Ontario (Ministry of Community and Social Services)*.¹⁷⁹ We see recognition of more than one ground of discrimination, and efforts at an intersectional analysis. Unfortunately, although the Board acknowledged the impact of the intersection of grounds and other contextual factors in the claims before it through an objective and a subjective analysis, a framework for intersectional analysis, or even a more detailed reference to intersectionality in its analysis and conclusion, is absent from its decision.

As stated earlier, in *Arzem*, the complainants were minor children with pervasive development disorders, including Autism Spectrum Disorder and Asperger’s Disorder.¹⁸⁰ The Ontario Ministry of Community and Social Services only provided a public service called Applied Behaviour Analysis, or Intensive Behavioural Intervention, to children between the ages of two and five, and from five to six years of age the province provided an Intensive Early Intervention program.¹⁸¹ Ontario refused or terminated this service when children attained the age of six.¹⁸²

¹⁷⁷ *Ibid.* at para. 12.

¹⁷⁸ *Ibid.* at para.59.

¹⁷⁹ *Arzem*, *supra* note 111.

¹⁸⁰ *Ibid.* at para. 2.

¹⁸¹ *Ibid.* at para. 6.

¹⁸² *Ibid.*

Although the complainants brought the complaint based on discrimination due to disability, Ontario argued that the claim should correctly be brought on the grounds of age instead of or in addition to disability.¹⁸³ The framing of the complaint is in itself fascinating. The complainants were unable to bring the complaint on the basis of age because the *Code* does not allow complaints to be brought by or on behalf of persons under the age of 18. The prohibited ground of discrimination based on age only applies to persons who are 18 years of age or older.¹⁸⁴ The province seized upon this in its arguments to say that because of the complainants' tender ages, the complaint could not be brought and should therefore be dismissed. The province also argued that there was no connection between the exclusion of the complainants from the protected ground of age and their disabilities.¹⁸⁵ Thus, applying Ontario's reasoning, even if the Tribunal wanted to find discrimination on the basis of disability, the complaint would fail because of the young age of the complainants. This is a classic example of essentialist reasoning; a single axis framework would prevent recognition of the overlap of factors and the more complex vulnerability of children under the age of 18 who are mentally disabled.

The Tribunal's recognition of contextual factors is significant because it pushes the analysis beyond a single axis focus. To disregard the age of the children discounts their historical vulnerability and disadvantage. Similarly, to disregard their mental disabilities in the analysis would fail to take into account the lived experience of these children and their unique vulnerability. The subjective part of the analysis is the examination of the contextual factors specific to the children in the case at hand, and the objective part of the analysis is the examination of the purpose of the *legal* limitation on age in the law and its impact.¹⁸⁶

The Tribunal found that section 10(1) of the *Code* denied access to children because of age and that these provisions violate section 15(1) of the *Charter* and cannot be upheld under section 1 of

¹⁸³ *Ibid.* at para. 7.

¹⁸⁴ *Code*, *supra* note 10 at s.2.

¹⁸⁵ *Arzem*, *supra* note 111 at paras. 65-74.

¹⁸⁶ *Ibid.* at para. 16.

the *Charter*.¹⁸⁷ Despite its analysis of contextual factors and the implications for children who are even more vulnerable because of their mental disabilities, the tribunal held that “it is the *blanket* [emphasis added] exclusion of children” that results in the failure of section 10(1) of the *Code*.¹⁸⁸ The first stage of the *Law* analysis requires a determination of whether or not the law in question causes differential treatment. The Tribunal found that section 10(1) of the *Code* causes differential treatment to children under the age of 18. Although this answers the specific question at hand, a more detailed acknowledgement of the context of minors with a mental disability in the Tribunal’s conclusion (which we see in some of their reasoning) would have addressed the complexities and difficulties faced by these specific complainants compared to other children without mental disabilities.

The analysis in *Arzem* is a step towards a more contextual analysis, but the Board’s conclusion does not reflect this observation. It is helpful that the Tribunal reiterated the position of the Supreme Court of Canada that the interpretation of section 15 of the Charter should “inform the interpretation of human rights legislation across Canada.”¹⁸⁹ However, one of the more unfortunate aspects of this case is that although the tribunal has jurisdiction to analyze and determine constitutional questions, administrative tribunals lack the jurisdiction to make general declarations that a statute or its provisions is inconsistent with the *Charter*.¹⁹⁰ The Tribunal’s jurisdiction is therefore limited to the specific matter before them. This means that any efforts made by a human rights tribunal to take an intersectional approach to discrimination cases must be more comprehensive than in *Arzem* and sufficiently structured that it will be referred to in subsequent cases. Like the three stage analysis or framework outlined by Iacobucci J. in the *Law* case, a methodological, structured framework for intersectional analysis, to the extent that it is possible given the unique contextual factors of each case, is necessary to more efficiently advance intersectionality in human rights claims.

¹⁸⁷ *Ibid.* at paras. 103-121.

¹⁸⁸ *Ibid.* at para. 121.

¹⁸⁹ *Ibid.* at para. 49. See also *Quebec (Commission des droits de la –personne & des droits de la jeunesse) c. Montreal (Ville)*, [2000] 1 S.C.R. 665.

¹⁹⁰ *Ibid.* at para. 166.

Eliminating Homogeneity within a Group as a Requirement

The second positive approach that I have derived from recent anti-discrimination cases is actually a result of the efforts to apply both an objective and a subjective analysis to intersectional cases: a subjective analysis of contextual factors and individual narratives has led some courts and tribunals to recognize that homogeneity within a group is not a requirement to make a finding of discrimination experienced by an individual or even a sub-group within a group. For example, in the *Kearney* case, the Board agreed with the position taken in *Sehdev v. Bayview Glen Junior School Ltd.*, where the Board maintained that the Commission and complainants need not prove that all members of a group share a particular characteristic.¹⁹¹ In this case, the Board acknowledged that not all Sikhs or Jews would be affected by a dress code that prohibited headwear, because not all Sikhs or Jews wear religious or cultural headwear. The Board in *Kearney* further stated that “[c]ases of direct discrimination do not require a finding that all people bearing the relevant characteristic be [sic] discriminated against.”¹⁹² The Board acknowledged that single women, single women with children, and single, visible minority women with children were all affected adversely by the company’s rent-to-income ratio, but that not all women in all of these groups were necessarily affected in the same way as the complainants in this case. The Board’s determinations were based on both objective, statistical evidence as well as an analysis of individual narratives and the impact or effect of the rejection of their rental application. This is consistent with an intersectional approach to discrimination claims, but the Board did not take it a step further to determine if each complainant was adversely affected in different ways.

A similar conclusion was reached by Laskin J.A. in the *Falkiner* case. He also concluded that homogeneity is not a requirement for recognizing an analogous ground in a section 15 *Charter*

¹⁹¹ *Kearney*, *supra* note 111 at para. 111. See also *Sehdev v. Bayview Glen Junior Schools Ltd.* (1988), 9 C.H.R.R. D/4881 (Ont. Bd. of Inquiry).

¹⁹² *Ibid.* at para. 112. See also para. 111; the Board in *Kearney* also referred to *Janssen v. Ontario (Milk Marketing Board)* (1990), 13 C.H.R.R. D/397, where the Ontario Board of Inquiry found that a “neutral” rule constituted “adverse effect discrimination even though it did not equally affect every member of a particular faith.”

case.¹⁹³ He identified single women as a subgroup of women, and concluded that this subgroup experienced a disproportionate impact of differential treatment.¹⁹⁴ Interestingly, Laskin J.A. also identified a subgroup of women based on marital status within the group of single mothers. This was not a position taken by the claimants. This judicial observation is significant because it demonstrates that it is not always necessary for the courts to ignore the complexities of intersectionality only because the claimants did not see the issue for themselves.

Conclusion to Chapter 2

What can we learn from these cases about the prospects for intersectionality in anti-discrimination cases? The language of the *Ontario Human Rights Code* does not allow tribunal adjudicators to recognize analogous grounds in the same way that the courts are able to in section 15 *Charter* cases.¹⁹⁵ This should not, however, prevent efforts to move forward with an intersectional approach to human rights claims. The Ontario Human Rights Commission believes that it is imperative that human rights tribunal decisions are consistent with decisions made in section 15 *Charter* cases.¹⁹⁶ This means that a methodology for intersectional analysis of claims must be developed within the existing grounds of discrimination under the *Code*. There have been Ontario human rights cases that have recognized discrimination on multiple and overlapping grounds, but the decisions are inconsistent and do not demonstrate a specific, disciplined approach to human rights complaints.

In human rights cases, we have seen inconsistent efforts to acknowledge intersectionality and to go beyond the prohibited grounds listed in the *Code* to identify objective and subjective contextual factors. The Board of Inquiry has relied on an established methodical analysis to establish a *prima facie* case which was adopted from an Ontario human rights treatise and

¹⁹³ *Falkiner*, *supra* note 158 at para. 91.

¹⁹⁴ *Ibid.* at para. 78.

¹⁹⁵ *Code*, *supra* note 10 at s.2. See also OHRC Discussion Paper, *supra* note 1; note that Manitoba is the only province that permits the human rights tribunal to recognize analogous grounds.

¹⁹⁶ OHRC Discussion Paper, *supra* note 1 at 3.

previously used by the Board of Inquiry in *Thorne v. Emerson Electric Canada Ltd.*¹⁹⁷ First, each complaint is analyzed to determine if the factor or factors of discrimination exist. Once the Board finds that the alleged factors exist, it then examines the effect of the factors. It is at this stage that we sometimes see the Board acknowledge intersectionality and attempt an analysis that includes socio-economics, historical disadvantage and other relevant factors beyond those listed as grounds in the *Code*.¹⁹⁸ The third step in the Board's analysis is to confirm that the complainant is a member in that protected group.¹⁹⁹ In the *Kearney* case, although the Board did not develop a specific intersectional approach, it recognized multiple grounds of discrimination, combined with other overlapping factors like socio-economical circumstances that are not listed in the *Code*. In the *Vander Schaaf* case, the Board applied the same three stage analysis to establish a *prima facie* human rights case, but it did not go beyond the specified framework to analyze intersectionality.²⁰⁰

The three stage framework in the *Law* case is not specifically geared towards or identified as an intersectional analysis. It is designed to address challenges based on section 15(1) of the *Charter*. Intersectionality has nonetheless been addressed by the courts and tribunals in these cases, as we have seen in *Falkiner* and *Arzem*.²⁰¹ Accordingly, we can conclude that it is possible to analyze the complexities of intersectionality in either doctrinal framework. There are a number of similarities in the approach to analysis of discrimination cases. In both frameworks, adjudicators must examine both the cause of differential or discriminatory treatment and the effect of that discrimination.²⁰² As well, both analytical frameworks require that the claimants establish that they are members of that group affected by the discriminatory treatment.

¹⁹⁷ Keene, *supra* note 115. See also *Thorne v. Emerson Electric Canada Ltd.* (1993), 18 C.H.R.R. D/510 (Ont. Bd. Inq.) at 513-514.

¹⁹⁸ *Ibid.* at para. 110.

¹⁹⁹ *Ibid.*

²⁰⁰ *Vander Schaaf*, *supra* note 115 at para.86.

²⁰¹ *Falkiner*, *supra* note 158; *Arzem*, *supra* note 111.

²⁰² *Law*, *supra* note 109 and Keene, *supra* note 115 at 126.

However, we have seen that since neither framework specifically addresses the issue of intersectionality, adjudicators are left to their own devices to analyze these complex issues and make sense of them within the existing frameworks. The *Corbiere* case demonstrates that there can be disputes as to which part of the three stage *Law* analysis the subjective contextual factors should be taken into account.²⁰³ Similarly, the *Vander Schaaf* case demonstrates that the three stage analysis to establish a *prima facie* human rights claim does not assist adjudicators in deciding whether to acknowledge intersectionality at the first stage of analysis where the existence of the factor must be shown, or in the second stage where the effect of the factor is relevant.²⁰⁴ Certainly there is nothing in the third stage of this framework to specifically alert adjudicators that the claimants may belong to overlapping protected groups.²⁰⁵

Recognition of intersectionality and the inclusion of both objective and subjective evidence and contextual factors, including individual narratives, are important steps towards developing an intersectional analysis in human rights cases, because it is a recognition that we are capable, in applying our anti-discrimination laws, of working within the parameters of some type of categorization but still recognizing the individual's unique characteristics and lived experience within that categorization. The lack of a separate and distinct analytical framework has resulted in a lack of a consistent thread to indicate a progression in understanding intersectionality and its impact on discrimination and individual experience in human rights cases. What we need, particularly given the recent tendency to at least identify more than one ground of discrimination and other contextual factors in both section 15 *Charter* cases and human rights cases, is to develop an independent framework that can be utilized by adjudicators as a guideline for an intersectional approach. These guidelines should assist them in identifying where intersectionality exists; not every case may have intersectional issues as they are claimed. The guidelines should also help adjudicators understand where and how objective and subjective

²⁰³ *Corbiere*, *supra* note 130, at paras 9 and 19.

²⁰⁴ *Vander Schaaf*, *supra* note 115.

²⁰⁵ *Ibid.*

analysis should occur, and what type of evidence is necessary to effectively examine contextual factors, including those not specifically listed as prohibited grounds.

Chapter 3

Introduction

In this section, I briefly review the institutional framework as the vehicle to achieve the goals of administrative justice and its relationship to human rights legislation. Following a brief summary of the objectives of administrative justice, I will examine the use of an institutional framework to achieve human rights justice. I will argue that the objectives of administrative justice require an intersectional approach to human rights claims if we are to achieve success with our anti-discrimination laws.

Objectives of Administrative Justice

The traditional rules of procedural fairness, based on the principles of natural justice, require clear, simple procedural rules before, during and after a hearing. Individuals must be made aware of their right to apply to a tribunal and have public access to policies, rules and guidelines. Procedural fairness includes the right to representation and the right to be heard, or a fair hearing, which would include the right to present evidence and cross-examine witnesses.²⁰⁶ After the hearing, individuals should be made aware of the tribunal's decision and the written reasons for it. These written reasons should clearly articulate the issues, allegations and reasons for the conclusions reached by the decision maker. These rules are intended to ensure an individual's access to justice that is not hindered by intimidating and complex procedures. Individuals must also be made aware of any rights of appeal or review that may be available.²⁰⁷ Public access to policies, rules and guidelines is essential, and once a decision is reached by the tribunal, written

²⁰⁶ *Nicholson v. Haldimand-Norfolk (Regional) Police Commissioners*, [1979] 1 S.C.R. 311. See also David J. Mullan, *Administrative Law: Cases, Text and Materials*. (Toronto: Emond Montgomery Publications Limited, 2003) at 107-112 [Mullan].

²⁰⁷ *Ibid.* at 151. See also Mullan, *Ibid.* at 112.

reasons should be provided to the parties.²⁰⁸ These rules are intended to ensure an individual's access to justice that is not hindered by intimidating and complex procedures.

The Institutional Framework

The Supreme Court of Canada has acknowledged the significance of the human rights legislation and the need for accessibility to the institutional framework necessary to achieve its objectives:

Human rights legislation is amongst the most pre-eminent category of legislation. It has been described as having a special nature, not quite constitutional but certainly more than the ordinary . . . One of the reasons such legislation has been so described is that it is often the final refuge of the disadvantaged and the disenfranchised.²⁰⁹

Because administrative tribunals are generally designed to have exclusive jurisdiction over disputes related to their enabling legislation, it is imperative that the institutional framework is conducive to achieving the objectives of administrative justice and success with an intersectional approach to human rights claims. A significant part of the justification for a comprehensive institutional framework for administrative justice is an analysis of why the judicial process would not be the appropriate path for the specific issues at hand, in this case human rights claims. In the past, Ontario determined that human rights issues are not considered issues that focus primarily on legal analysis and legal issues that require judicial expertise.²¹⁰ However, in Ontario human rights claims can be heard by the human rights tribunal or the civil courts if the claim is related to a civil action. Although tribunals are not subject to the judicial principle of *stare decisis*, the case law demonstrates that if an analytical framework is available and can be applied in a human rights claim, human rights tribunals will do so.²¹¹ A consistent, methodical

²⁰⁸ Mullan, *supra* note 206 at 112.

²⁰⁹ Comments by Sopinka J. in *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321 (S.C.C.) at para. 18. See also *Azem*, *supra* note 111 at para.139.

²¹⁰ *Ibid.* at 10.

²¹¹ See case law discussion in Chapter 2 of this paper.

intersectional analysis is difficult to achieve without a “bridge” between human rights tribunal and court decisions and without a precedent that can be followed by both the administrative and the judicial process.

Because Ontario already developed procedural guidelines for tribunals in the *Statutory Powers Procedures Act* decades ago, efforts for reform were focused on the human rights regime and not the institutional framework for tribunals in general.²¹² To identify the institutional framework that would be most effective to achieve the goals of administrative justice in human rights, several factors must be considered.²¹³ The values and core principles of administrative justice must be identified, and they must also determine what programs were “essential, relevant and sustainable.”²¹⁴ Assessing the public interest, determining the affordability of the institutional framework, the effectiveness and the role of the public sector in administrative justice, the efficiency of the system in its ability to provide direct, simple access to justice, and the accountability of the government offices involved in administrative processes, are key elements to considering the nature of reforms that may be necessary.²¹⁵

The criteria for the selection of decision makers must also be considered.²¹⁶ Who should the adjudicators be? What should their qualifications be? The process requires transparency and accountability to prevent allegations of bias and unfairness, be it perceived or actual. The qualifications of the decision makers are also relevant to the goal of achieving transparency and

²¹² It is useful to compare the approach to reform taken by British Columbia (B.C.) to the approach taken by Ontario in the last decade. See British Columbia Administrative Justice Project, “On Balance – Guiding Principles for Administrative Justice Reform in British Columbia”, July, 2002 [White Paper], online: <http://www.gov.bc.ca/ajo/down/white_paper.pdf>. Because B.C. had never implemented a statute for administrative tribunal procedures, the province looked at institutional frameworks as a whole to determine the changes that were needed. Unlike Ontario, until 2004 British Columbia did not have a provincial statute like the *Statutory Powers Procedure Act*, R.S.O. 1990 c.S.22 (*SPPA*) that codified the principles of natural justice and protected individuals’ rights and outlined procedures in government tribunals. See also Wendi J. Mackay, “Administrative Institutions from Principles to Practice: Guidelines for Review and Design”, *Canadian Journal of Administrative Law and Practice*, 19 (April 2006) 63.

²¹³ *Ibid.* at 5.

²¹⁴ *Ibid.*

²¹⁵ *Ibid.* at 6.

²¹⁶ *Ibid.*

accountability to prevent the apprehension of real or perceived bias. Administrative justice has been distinguished from the judicial justice in part based on the choice of adjudicators. This can impact the process and the results in human rights claims. Specialized expertise in human rights should influence the outcome of a human rights claim positively.²¹⁷ Decision-makers are selected based on previous knowledge and experience in a particular field.²¹⁸

Furthermore, the repetition of claims before decision-makers increases their experience in the field. Decision-makers with specialized expertise may pose another advantage to administrative tribunals: if there is an imbalance in the quality of legal representation, the decision-maker is not dependent on their submissions to identify the critical issues, process the evidence and reach an impartial and fair decision.²¹⁹ We have seen in Ontario, however, that the distinction between the qualifications of human rights adjudicators and the judiciary is not as relevant as it may have been in the past. Although a different methodological approach is applied to questions of law, and legal issues are analyzed in the context of the law and not facts and evidence alone,²²⁰ statutory interpretation and legal issues are just one part of human rights analysis. The broader social and economic purposes of a statute are more the focus than in the judicial system, where legal precedents are more relevant.²²¹

The earlier analysis of the case law shows us that where issues of intersectionality exist, the consistency of decisions is lacking whether the case is before the tribunals or the courts.²²² For intersectional human rights claims, the separation of administrative justice and judicial justice has some implications. First, while expertise developed over time in human rights analysis is beneficial to complainants, the lack of application of the principle of *stare decisis* in a tribunal

²¹⁷ Report of the Committee of the JUSTICE – All Souls Review of Administrative Law in the United Kingdom, “Administrative Justice: Some Necessary Reforms”. (Oxford: Clarendon Press, 1988) at 7.

²¹⁸ *Ibid.*

²¹⁹ *Ibid.* at 9.

²²⁰ *Ibid.* at 11.

²²¹ *Ibid.*

²²² *Ibid.* at 12.

setting is a hindrance. We have seen from the case law involving intersectional human rights claims that lack of development of a legal precedent or an analytical framework has resulted in incomplete analysis of the implications of intersectionality. Second, because intersectional analysis is complex and requires a multidisciplinary approach, judges need to be able to go beyond a legal analysis should a human rights claim come before them in a related civil action. Again, to do so requires a comprehensive analytical framework for intersectional human rights claims.

Comprehensive procedural guidelines eliminate or reduce the possibility of needing to remedy poor administration of the process, and these clear guidelines should enhance transparency and accountability of the institution and its processes.²²³ The absence of due administrative process defeats the objectives of administrative justice. In Ontario, where an administrative process was already in place, the existing guidelines were meant to ensure efficient administration of the process. As I will discuss in the next Section of this paper, a lack of procedural guidelines developed specifically for intersectional human rights issues and claims means that access to justice is more limited for those applicants.

A clearly outlined process, including consideration for regulations and practice directions to be issued by the tribunals, is essential for any human rights applicant, but it is particularly true for applicants with complex, multidimensional claims.²²⁴ The results of this critical step impact the eventual efficiency, or lack thereof, of an institutional framework. Ontario has already achieved this important step with the enactment of the *SPPA* and its applicability to most administrative tribunals.²²⁵ However, in Ontario awareness of the need for guidelines for intersectional claims is only now emerging, and given the OHRC's awareness of the need for guidelines in 2001 prior to the recent changes to the Ontario human rights system, specific attention should have been given to this critical issue.

²²³ *Ibid.*

²²⁴ *Ibid.* at 21-26.

²²⁵ *SPPA*, *supra* note 212.

Ontario's recent changes to the human rights institutional framework were based on the need to increase applicants' access to justice. The Task Force created in Ontario to revamp the human rights regime looked at B.C.'s Project to assess its relevance to Ontario's quest for reform, although the extent to which this was done is indiscernible.²²⁶ In any event, it seems that careful consideration was given to the stated objectives of administrative justice and the context within which this could be achieved in an institutional framework. I could find nothing in the Task Force reports however, to indicate that any specific attention was given to intersectionality.

Conclusion to Chapter 3

An intersectional approach to human rights claims requires an assessment of the institutional framework within which it would be applied. Both the cases before the human rights tribunals in Canada and the Supreme Court of Canada demonstrate that although the intersection of grounds has been acknowledged in many cases and impacted the decisions in a few, no proper analytical framework has been developed in either forum. My conclusion, based on the congruency of section 15(1) *Charter* cases with human rights cases before tribunals, and the congruency of many of the key objectives of administrative justice, is that an intersectional approach is viable but will need to be initiated by the Supreme Court of Canada in order for it to be adopted by the Ontario human rights tribunal in assessing the claims before it.

The procedural rules for the tribunal will also need to directly address the possibility of the intersection or overlap of more than one ground of discrimination. For example, instructions to applicants for completion of forms should alert them to consider the possibilities and potential complexities of their circumstances in making their claims. Opponents to this suggestion may argue that this would encourage complex claims in circumstances that don't reflect the need to address more than one ground of discrimination. However, in order to make the institutional framework accessible to individuals the system must expose all aspects of the process and the potential elements of a claim in order to achieve the goals of administrative justice. Without full

²²⁶ Ontario Human Rights Commission, Consultation Report, "Strengthening Ontario's Human Rights System: What We Heard", (October 6, 2005) at 21-22.

knowledge and understanding of the nature of discrimination and the potential grounds, an individual cannot properly articulate a human rights claim. Any claim that illegitimately puts forth multiple grounds can be examined and determined in the same manner as any claim of discrimination.

Chapter 4

Introduction

In this section, I examine whether the newly created institutional framework and legal processes for human rights claims in Ontario frustrate the viability of an intersectional approach to human rights claims in Ontario. To accomplish this task, I will identify the changes significant to intersectional human rights claims in the legal processes and the institutional framework under Bill 107 that became effective June 30, 2008 (subject to transitional provisions).

I will examine three significant issues that I have identified as problematic for the development of an intersectional approach to human rights claims under the new regime. These issues are: (1) the deficiencies of the new Legal Support Centre and the consequences for intersectionality; (2) the lack of clear and concise procedural guidelines to assist applicants, lawyers, and adjudicators in identifying and articulating intersectional issues in discrimination claims; and (3) the structural and purposive deficiencies of the new Anti-Racism Secretariat and the Disability Rights Secretariat. I conclude that these issues, until resolved, are frustrating the potential implementation of an intersectional approach to human rights claims.²²⁷ The recent amendments and efforts to create an institutional framework are no better able to handle intersectional claims of discrimination than the old system.

The Human Rights Legal Support Centre

Severe case backlog, a significant lack of resources, no direct access to a Tribunal hearing, all led advocacy, community and political groups to conclude that a massive overhaul of the human rights process was necessary in order to successfully implement the principles of administrative justice.²²⁸ The new institutional framework for human rights in Ontario has three pillars: the

²²⁷ The transitional provisions will be discussed but not emphasized, given that these provisions are undergoing constant change until past complaints have been fully resolved.

²²⁸ Kamini Steinberg, "The Ontario Human Rights Commission: Are Recent Structural and Procedural Changes An Improvement?" University of Toronto Law Course, Litigation and Social Change, LAW316H1S (April 30, 2009). at 13. And

Human Rights Legal Support Centre (HRLSC), the Tribunal and the Commission. Unlike the previous organizational structure, a human rights claim is now made directly to the Tribunal. The Commission no longer investigates, mediates or settles applications. It is worth noting that the first draft of Bill 107 did not include a legal support centre. It was loosely promised by the government, but was not incorporated into Bill 107 until enormous pressure from community and advocacy groups in 2006.²²⁹ In particular, advocates for the disabled and those with low incomes argued that access to justice would be seriously limited without proper access to legal counsel. They demanded not only that the HRLSC exist but argued that adequate resources should be provided so that the Centre could function properly. These groups also demanded that rural areas be taken into account when providing legal resources to applicants.²³⁰

It was intended that the HRLSC operate independently as a separate and distinct office from the Commission and the Tribunal, in accordance with the principles of administrative justice, but it is nonetheless a part of the Commission.²³¹ Under the new provisions, the Commission has retained the power to initiate and file applications with the Tribunal and to act as intervener in cases where it believes it is in the public interest to do so.²³² Although this power was not often exercised in the past, there is an expectation that the Commission will increase its involvement in this regard, but whether it becomes pro-active remains to be seen. If time and resources are dedicated to developing education and training in intersectionality for Commission and HRLSC staff, the ability to intervene could become particularly significant in claims where there are multiple grounds of discrimination alleged.

see Mary F. Cornish, Fay Faraday, Kate Hughes and Jo-anne Pickel, "Ontario's New Human Rights Code: Impetus for Reform and New Choices and Strategies", Ontario Bar Association Continuing Legal Education Materials, (June 11, 2007), Tab 2 at 8 [Cornish *et al.*]. See also Achieving Equality, Report on the Ontario Human Rights Code Review Task Force. (Ontario: Queen's Printer, 1992). [Cornish Task Force Report]; OHRC Discussion Paper (2005), *supra* note 226 at 21-22; Barbara Hall, Chief Commissioner, *Preliminary Comments on Proposed Reforms to Ontario Human Rights System* (10 March 2006); Ontario Public Service Employees Union, *Making Ontario's Human Rights Commission Work* (January 2006) at 15; and Mark Hart and Geri Sanson, "Getting Rid of the Gatekeeper: A Practical Model for Human Rights Reform (February 2005) at 3-4, online: <http://www.law.utoronto.ca/visitors_content.asp?iitemPath=5/7/0/0/0&contentId=998>.

²²⁹ Cornish *et al.*, *supra* note 228 at 2.

²³⁰ *Ibid.*

²³¹ Cornish *et al.*, *supra* note 228 at 1.

²³² *Code*, *supra* note 10 at s. 35(1) and s. 37(1).

Applicants (previously called “complainants”) are encouraged to go to the HRLSC if they need assistance in determining if they have a potential human rights claim and for completion of documents, although they are allowed to initiate a human rights application on their own. Several problems have arisen which indicate that the HRLSC is struggling to meet its mandate. Firstly, the case backlog which existed prior to the institutional changes in 2008 has worsened instead of improved. Because of the enormous backlog of active cases still on file at the old Commission, combined with the transferred and new complaints to the Tribunal, there are estimated to be over 4,000 unresolved cases at the time this paper was written.²³³ Surprisingly, the Commission and the Tribunal did not anticipate the excessive caseload caused by more than 700 cases being transferred by complainants to the Tribunal.²³⁴ In addition, more than 2,700 cases remained with the Commission, and 4,000 new applications are anticipated in 2009.²³⁵

Secondly, a lack of adequate allocation of resources to the HRLSC has created a number of problems that are particularly detrimental to intersectional human rights applications. The number of lawyers on staff at the HRLSC is inadequate to accommodate the number of applications and ongoing cases.²³⁶ This means that even human rights cases with only a single ground of discrimination being alleged are facing time delays and potentially inadequate investigation, compilation of evidence and preparation of cases. Consequently, it also means that any cases that have intersectional issues face even bigger challenges of being identified at the earlier stages of preparation, or comprehensively investigated, argued and resolved.

Thirdly, there is no evidence to suggest that the new HRLSC lawyers received any specific or comprehensive training in intersectionality. This is surprising given that the OHRC recognized the significance of acknowledging intersectionality in human rights claims in 2001, and

²³³ OHRC, online: <<http://www.ohrc.on.ca>>.

²³⁴ Human Rights Tribunal of Ontario, online: <<http://www.hrto.ca/NEW/>>.

²³⁵ *Ibid.*

²³⁶ OHRC, *supra* note 233.

encouraged community dialogue to assist in identifying intersectional issues and developing guidelines to assist applicants, lawyers and adjudicators.²³⁷

Fourthly, there are no longer any investigators employed by the OHRC, so no one is available to assist HRLSC lawyers in gathering evidence, visiting sites and interviewing witnesses, and investigating allegations made by applicants. The remaining, most senior investigators were phased out in December 2008.²³⁸ The Centre's lawyers are required to provide support, information, assistance in completion of forms, legal advice and representation before the Tribunal.²³⁹ In the past, the Commission's investigators worked closely with the Commission's legal department to gather evidence and interview witnesses. Without training in identifying intersectional issues, combined with no assistance from investigators in case preparation, HRLSC lawyers are not adequately prepared to handle the complexities of human rights cases where there are multiple and overlapping grounds of discrimination. Knowledge of intersectionality is critical to the compilation of relevant evidence, as we have seen from the valuable information obtained from statistical evidence in cases like *Kearney*.²⁴⁰ Given the complexities of intersectional issues, these cases need sufficient time for preparation and should not be rushed.

Lack of Procedural Guidelines

Human rights application forms are available on line at the OHRC website.²⁴¹ An application can be completed by an applicant or group of applicants with the same claim on their own, with independent counsel, or with legal assistance from the HRLSC.²⁴² At this time, there are no

²³⁷ *Ibid.*

²³⁸ *Ibid.*

²³⁹ *Code*, s. 45.12.

²⁴⁰ *Kearney*, *supra* note 111.

²⁴¹ OHRC online, *supra* note 233.

²⁴² *Ibid.*

instructions accompanying the application which alert an applicant or applicant's counsel to consider whether there is more than one ground of discrimination to be identified and described in the application.²⁴³ The procedural rules for the tribunal need to directly address the possibility of the intersection or overlap of more than one ground of discrimination. For example, instructions to applicants for completion of forms should alert them to consider the possibilities and potential complexities of their circumstances in making their claims. Opponents to this suggestion may argue that this would encourage complex claims in circumstances that don't reflect the need to address more than one ground of discrimination. However, in order to make the institutional framework accessible to individuals the system must expose all aspects of the process and the potential elements of a claim in order to achieve the goals of administrative justice. Without full knowledge and understanding of the nature of discrimination and the potential grounds, an individual cannot properly articulate a human rights claim. Any claim that illegitimately puts forth multiple grounds can be examined and determined in the same manner as any claim of discrimination. It is up to legal counsel, and subsequently the Tribunal hearing the case, to determine the legitimacy of any claims made, whether they have been substantiated and how they should be decided.

Comprehensive procedural guidelines for handling intersectional issues should be provided to applicants and legal counsel for the preparation of their application for any settlement conferences or hearings. These guidelines would serve as a useful tool for the Tribunal adjudicators as well. These guidelines could alert applicants and legal counsel, including those employed by the HRLSC, to the kinds of issues relevant to intersectional cases, and could also assist them in identifying the kind of evidence that may be needed to establish that intersectional issues exist and substantiate their impact on the discrimination that has been experienced.

It may also be possible to assist applicants and counsel with specific procedural guidelines for the presentation of evidence in intersectional cases. We have seen some efforts to provide assistance for evidence presentation in the Ontario Small Claims Court, where a large number of

²⁴³ *Ibid.*

plaintiffs are unrepresented and require more detailed guidelines.²⁴⁴ For example, the guidelines could specify that if there are multiple grounds of discrimination that overlap, it is necessary to present evidence not only of each ground alleged, but also of how those grounds intersect and have impacted the nature and extent of the discrimination experienced by the applicant. Procedural rules could also provide examples of some of the types of evidence, such as statistics, that may be helpful in substantiating an intersectional claim.

Secretariats

Previously, the OHRC was divided into two branches consisting of a Tribunal and a Commission. The Commission had a number of branches within it, including a branch for complaints and investigations, a legal branch, and an educational and policy development branch.²⁴⁵ It also had a race relations division, headed by a Commissioner of Race Relations, which was responsible for any matter related to race, ancestry, and place of origin, colour, ethnic origin or creed that was referred to it by the Commission.²⁴⁶

Within the Commission, two secretariats were also created, one for Disability Rights and one for Anti-Racism.²⁴⁷ The Disability Rights Secretariat was likely created for political reasons. Advocates for the disabled, including the Ontarians with Disabilities Alliance, pushed for a separate government tribunal or centre for the disabled.²⁴⁸ The government response was to create this secretariat. With respect to the Anti-Racism Secretariat, the Commission's statistics indicate that this is their largest complaint group, and thus required a distinct office to deal with

²⁴⁴ Rules of the Small Claims Court, O.Reg. 258/98, as amended.

²⁴⁵ *Ontario Human Rights Code*, R.S.O. 1990, c.H.19, ss.28 and 29 (prior to 2006 amendments).

²⁴⁶ *Ibid.* at s.28.

²⁴⁷ *Code*, as amended 2006, *supra* note 10 at ss. 31.3 and 31.4.

²⁴⁸ AODA Alliance, Accessibility For Ontarians with Disabilities Act Alliance, online: <http://www.aodaalliance.org/reform/update/strong_effective-aoda/02122009.asp>.

race-related research and policy development.²⁴⁹ However, this secretariat is new in name only, since under the old provisions the Commission had a race relations division which essentially had the same purpose.²⁵⁰

There are several problems with the creation of these secretariats. First of all, their mandate is the same as the Commission had before. They simply lacked the resources. For these programs to continue, every subsequent provincial government must ensure that adequate resources are available. The legislation does allow community groups to be parties (as did the previous legislation), and the Commission has the power to request that the Tribunal to process an application at their initiation.²⁵¹ But the secretariat is dependent on the expertise of the Tribunal to acknowledge its reasons for pursuing a particular application.

Secondly, the new provisions of the *Code* do not provide an adequate definition of the term “secretariat”, and the statement of their objectives is ambiguous and unclear.²⁵²

Thirdly, perhaps an even more important concern about the creation of these secretariats is the perception, and arguably the reality, that the other grounds of discrimination are neglected. No secretariats exist to conduct research, develop policies or educational programs for issues such as age, disability, religion, sexual orientation, family status, or marital status, to name a few. Individuals or groups who fall into one or more of these categories of discrimination may already be marginalized to varying degrees in society, and it would appear that their collective political voice was not strong enough to demand secretariats. Two of the most important examples of individuals or groups that require critical attention to their problems are those with gender-related issues and aboriginal or First Nations groups.

This apparent neglect of other groups vulnerable to discrimination is further frustrated by the lack of a systemic framework to deal with circumstances where there are allegations of multiple

²⁴⁹ Cornish et al, *supra* note 228 at 13.

²⁵⁰ *Code*, *supra* note 245 at s. 28(2) (prior to 2006 amendments).

²⁵¹ *Ibid.* at s.29.

²⁵² *Code*, *supra* note 10.

grounds of discrimination and there is a need for a contextualized approach that recognizes individual experiences. It is only in 2001 that the OHRC first recognized and began to research “intersectionality”, an approach to human rights complaints that recognizes the complexities of discrimination that often involve more than one ground.²⁵³ No laws or procedures have been set up to acknowledge the intersectionality of grounds of discrimination, or to encourage dialogue between the existing secretariats.

Given the significant issues around gender inequality, discrimination and the direct link of some issues to gender, such as domestic violence, single parenthood and poverty, community and advocacy groups are dismayed that a secretariat for gender issues was not established.²⁵⁴ The vulnerability of Aboriginal women, as we have seen from the Supreme Court of Canada cases discussed in Chapter 2 of this paper, shows a clear link or intersection between race and sex or gender, and so in addition to a lack of secretariats to investigate these problems, no structural framework has been created to address the need for investigation into intersectionality of these human rights issues. Furthermore, aboriginal groups have been and continue to be marginalized and should have some kind of unique human rights division or secretariat as well. The Ontario government continues to neglect them, which is evidenced by a lack of attention to their communities’ socio-economic, educational and health issues, to mention a few. The diversity of First Nation cultures, language and religion needs to be taken into account, and the discrimination against them, often in combination with other grounds of discrimination, needs to be specifically and earnestly addressed by the OHRC. The Supreme Court of Canada has recognized that there are circumstances where native people are owed special consultation rights, and this should have been reflected in the design of the new OHRC.²⁵⁵ The Commission has been given the power to create advisory committees,²⁵⁶ and this may give human rights

²⁵³ OHRC Discussion Paper, *supra* note 1.

²⁵⁴ DAWN Ontario, DisAbleD Women Network Ontario, online: <<http://www.dawn.thot.net/human-rights-reform-action.html>>.

²⁵⁵ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388.

²⁵⁶ *Code*, as amended 2006, *supra* note 10 at s.31.5.

advocates an opportunity to be pro-active in identifying public needs and interests for the Commission.²⁵⁷

Fourthly, no structural framework has been created to establish consistent, comprehensive dialogue between the two secretariats that now exist. Separate secretariats with distinct objectives are a hindrance to the development of an intersectional approach to human rights claims. If each secretariat is focused on research and development of policy guidelines for their specified ground of discrimination, the focus is once again on a single ground of discrimination and ignores the complexities of the discrimination experienced by many individuals and groups. The creation of distinct secretariats reinforces the concept of a single-axis framework for human rights claims. It would have been an innovative concept to have a secretariat with the objective of examining intersectionality and developing policies and procedural guidelines. In this way, the legal community, advocates and community groups could be invited once again, as they were in 2001, to contribute to the research and development of ground-breaking intersectional policies and procedural guidelines. To date, the OHRC has published many policies that are directed at a single ground of discrimination.²⁵⁸ The drafting of these policies for each ground of discrimination is inconsistent and does not reflect an across-the-board dedication to identify and resolve intersectional issues of discrimination.

For example, in 2007 the OHRC published “Policy and Guidelines on Discrimination Because Of Family Status”.²⁵⁹ In this policy the relationship between Family Status and other prohibited grounds of discrimination such as sex, marital status and the overlap of grounds such as disability and age and race and race-related grounds is discussed at length, but the concept of intersectionality is not specifically addressed. Other policies, like the “Policy and Guidelines on Disability and the Duty to Accommodate” have not been revised since 2000 and make no

²⁵⁷ Cornish et al, *supra* note 228 at 18.

²⁵⁸ OHRC online, *supra* note 233.

²⁵⁹ OHRC Policy and Guidelines on Discrimination Because of Family Status (approved March 28, 2007), online: <<http://www.ohrc.on.ca>>.

specific reference to intersectionality.²⁶⁰ The same is true of the OHRC’s “Policy on Discrimination and Harassment Because Of Gender Identity”.²⁶¹ The Policy on Creed and Accommodation of Religious Observances²⁶² and the Policy and Guidelines on Sexual Harassment and Inappropriate Gender-related Comments and Conduct²⁶³ have not been revised since 1996 and make no reference to the concept of intersectionality or its implications. Other prohibited grounds of discrimination in the *Code*, such as sexual orientation and aboriginal status, don’t have any published policies or guidelines.²⁶⁴

The two best examples of the OHRC’s efforts to provide education on intersectional issues can be found in its Policy on Discrimination Against Older Persons Because of Age,²⁶⁵ published in 2002, and the Policy and Guidelines on Racism and Racial Discrimination²⁶⁶ which was published in 2005. In the policy on racism, intersecting and overlapping grounds are specifically discussed, with examples of the “social construct” of related grounds.²⁶⁷ This policy also recognizes that the prohibited ground of race can be impacted by other grounds, resulting in a “unique combination” of identities.²⁶⁸ One problematic statement in this policy, however, is that we should acknowledge intersections of prohibited grounds where they are “apparent”.²⁶⁹ The

²⁶⁰ OHRC Policy and Guidelines on Disability and the Duty to Accommodate (revised November 23, 2000), online: <<http://www.ohrc.on.ca>>.

²⁶¹ OHRC Policy and Guidelines on Discrimination and Harassment Because of Gender Identity (March 30, 2000), online: <<http://www.ohrc.on.ca>>.

²⁶² OHRC Policy On Creed and Accommodation of Religious Observances (October 20, 1996), online: <<http://www.ohrc.on.ca>>.

²⁶³ OHRC Policy and Guidelines on Sexual Harassment and Inappropriate Gender-Related Comments and Conduct (September 10, 1996), online: <<http://www.ohrc.on.ca>>.

²⁶⁴ OHRC online, *supra* note 233.

²⁶⁵ OHRC Policy on Discrimination Against Older Persons Because of Age (approved March 26, 2002), online: <<http://www.ohrc.on.ca>>.

²⁶⁶ OHRC Policy and Guidelines on Racism and Racial Discrimination (approved June 9, 2005), online: <<http://www.ohrc.on.ca>>.

²⁶⁷ *Ibid.* at 15.

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid.* at 16.

complexities of intersectionality mean that where there are multiple and overlapping grounds of discrimination at play, the intersections will not always be readily apparent. Guidance on how to extrapolate the relevant information to determine that intersectionality in fact exists in a given case requires going beyond what is apparent on the face of the factual record before us.

In the OHRC Policy on Discrimination because of Pregnancy and Breastfeeding,²⁷⁰ the OHRC recognizes that homogeneity in a group does not exist because of individuals' unique experiences. For example, the OHRC acknowledges that different women and different medical and physiological needs due to pregnancy and childbirth.²⁷¹ The OHRC also identifies some of the subtle forms of marginalization that are experienced by pregnant women and women in their childbearing years.²⁷² This policy also goes beyond the listed prohibited grounds of discrimination, and examines contextual factors such as domestic violence and economic disadvantage that makes some individuals such as Aboriginals, especially vulnerable.²⁷³ In the final analysis, while there is some progress in the OHRC's recognition of intersectionality, its policies are inconsistent, and even those policies which address intersectional issues are more educational than instructional. If one secretariat were created to focus on intersectionality, policies could be developed that are comprehensive, educational and instructional for all listed prohibited grounds of discrimination and other contextual factors to be taken into account.

Conclusion to Chapter 4

The newly created institutional structures and legal processes for human rights issues hinder the comprehensive development of an intersectional analytical framework. For the HRLSC to be

²⁷⁰ OHRC Policy on Discrimination Because of Pregnancy and Breastfeeding (December 17, 2008), online: <<http://www.ohrc.on.ca>>.

²⁷¹ *Ibid.* at 22.

²⁷² *Ibid.* at 15. In this policy, the OHRC provides examples of subtle forms of marginalization and discrimination against women in the workplace.

²⁷³ *Ibid.* at 7-8.

effective in intersectional claims, comprehensive training of lawyers and support staff is necessary. In addition, the elimination of human rights investigators has left lawyers without much needed assistance in investigation and evidence gathering. These factors are compounded by the lack of adequate resources dedicated to the HRLSC in general, and the lack of resources allocated for intersectional claims specifically. The lack of procedural guidelines has left it open to claimants and the legal community to “discover” intersectional issues on their own without guidance as to how to handle them even if they are identified in any given case. Furthermore, without a clearly defined role for the Anti-Racism and Disability Rights Secretariats, and without a structural framework for dialogue between the secretariats, the effectiveness of these offices and their ability to address intersectional grounds of discrimination remains to be seen.

Chapter 5

Conclusion

There is no doubt that the reforms to the Ontario human rights institutional framework were a result of hard work and an earnest desire to improve the regime for human rights. The Ontario government, community groups and human rights advocates and members of the legal profession may have had good intentions, but inadequate attention was given to the concept of intersectionality and the institutional framework necessary to assist in identifying and effectively examining and determining intersectional human rights cases.

In the final analysis, most of the Commission's functions remain the same. Its pursuit of applications or intervener status in applications in the public interest will remain dependent on the availability of resources and pressure from community groups and human rights advocates, and a lack of resources will certainly hinder progress in understanding intersectionality in human rights cases.

The creation of the Human Rights Legal Support Centre has thus far not improved accessibility to justice for any applicants, and is particularly inadequate for applicants with intersectional claims. The number of lawyers is insufficient to handle the existing and incoming applications and is made worse by the complete elimination of human rights investigators who could have assisted in the collection of evidence, visiting sites and interviewing witnesses. No time or resources were dedicated to any special training of the lawyers hired to work in the Legal Support Centre, despite the OHRC's 2001 Discussion Papers and exploration into the critical need to acknowledge intersectional issues in human rights claims. The HRLSC's ability to screen applications and its struggle to manage its burgeoning caseload has dashed the hope of comprehensive analysis of the complexities of a given case, especially where there are intersectional issues.

The primary objectives of administrative justice must materialize in the institutional framework if it is to have any positive benefit to individuals and society. Thus, the framework must ensure procedural fairness, including accessibility, consistency, understandable procedures. How do these institutional

reforms to the framework and processes for human rights claims impact claims where there are multiple grounds of discrimination alleged? Certainly access to a Legal Support Centre from the initial stages of a claim is promising. However, because of the shortage of resources and the elimination of investigators, the Centre's lawyers are ill-equipped to complete comprehensive investigations of single ground claims of discrimination, let alone in cases of multiple grounds of discrimination being claimed.

Significant changes to the institutional framework for human rights issues and applications in Ontario were an urgent necessity. But for many different reasons, including political urgency to push new legislation through before a change of provincial government, the new legislation was not carefully researched and analyzed before implementation.

As stated earlier, the creation of two distinct secretariats for Anti-Racism and Disability Rights limits the possibility for comprehensive discourse for practical application of an intersectional approach to human rights claims. Without guidelines for dialogue between the secretariats, and without an analytical framework for recognizing the multilayered causes of discrimination and the complexity of social identity of individuals, this new framework may only serve to perpetuate the assessment of discrimination based on mutually exclusive categories. Moreover, while the omission of secretariats for gender-related, aboriginal or other issues may not have been intended as a lack of regard for their significance, the *perception* that this has occurred is just as damaging, particularly given that one of the goals of the overhaul of Ontario's institutional framework was to effectively implement the principles of administrative justice.

In the final analysis, the new model of anti-discrimination law as it is now frustrates the potential for a consistent, comprehensive intersectional approach to human rights claims. A failure to address the complexity of multiple and intersecting grounds of discrimination experienced by an individual ignores the reality of his or her experience in society, and does not take into account historical, political and socio-economic contexts. Furthermore, this failure does not acknowledge the complexity of discriminatory practices, nor does it permit effective and comprehensive analysis of human rights issues or appropriate remedies.

The OHRC's efforts to examine the possibility of an intersectional approach under the old regime were preliminary and not yet properly investigated or formulated for human rights claims in Ontario.²⁷⁴ The intersectional approach to claims of discrimination has valid components that expose the essentialist theory as inadequate. However, intersectionality requires complex and intricate examination of each individual's circumstance, which creates controversy as to which factors to consider, the weight of these factors, and the obstacles in gathering empirical evidence in support of each claim of discrimination. Furthermore, this approach is essentially an interdisciplinary approach that requires expertise in social sciences, economics and the historical and political circumstances within which each claim is situated, as well as the substantive law and the institutional framework within which the legal processes operate. The new framework, designed to hasten the processing of human rights claims, frustrates access to justice in the administrative and judicial processes on the most basic levels, and therefore also poses serious challenges to the viability of an intersectional approach to human rights claims. If, as I have suggested, adequate resources are dedicated to the task of understanding and investigating intersectionality and developing policies and procedural guidelines accordingly, there is a promising future for intersectional analysis in human rights cases.

²⁷⁴ OHRC Discussion Paper, *supra* note 1.

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