DIRECT DISCRIMINATION AND INDIRECT DISCRIMINATION: A DISTINCTION WITH A DIFFERENCE

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INTRODUCTION

Outside of discrimination law it is common to think that discrimination somehow requires the intention to discriminate. Accordingly, many think that failing to demonstrate intent defeats a discrimination claim. Early on, discrimination law aligned with this common view. Courts required complainants to show evidence of direct discrimination—also known as intentional discrimination or explicit discrimination. More recently, an expanded scope of liability under discrimination law now includes indirect discrimination—also known as unintentional discrimination or adverse effect discrimination. The success of indirect discrimination claims does not hinge on discriminatory intent. The broad scope of liability shifts the focus from the alleged discriminator’s wrongdoing to the complainant’s suffering. The shift is undoubtedly welcome.

Criticism by courts and scholars of the distinction between direct and indirect discrimination leads to viewing the distinction as one that is now without a difference.¹ Perhaps one thinks that the distinction is merely an artifact from a bygone era that reinforces a simplistic and discredited conception of discrimination. Relatedly, one might think the distinction pointlessly distracts from the substantive concerns of discrimination law. However, in the context of Canadian human rights codes, the distinction between direct and indirect discrimination remains significant.² Despite attempts to abandon the distinction, it carries practical benefits and seems to hold intuitive appeal. I submit that it is a distinction with a difference that encourages

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1 See e.g. *British Columbia (Public Service Employee Relations Commission) v BCGEU*, [1999] 3 SCR 3 at paras 27–29, 50–53 [*Meiorin*]; Sophia Moreau, “Discrimination as Negligence” (2010) 40:sup1 Can J of Philosophy 123, DOI: <10.1080/00455091.2010.10717657>. For the debate on the distinction between direct and indirect discrimination generally, see Hugh Collins & Tarunabh Khaitan, *Foundations of Indirect Discrimination Law* (Oxford: Hart Publishing, 2018).

2 The distinction has a place in discrimination law in other jurisdictions too. See e.g. *Equality Act 2010* (UK), 2010, c 15, ss 13, 19, which distinguish between direct discrimination and indirect discrimination.

adjudicators to consider more carefully discrimination without discriminatory intent, thus identifying cases of genuine discrimination they might otherwise miss.

Writing before *Meiorin*, Day and Brodsky suggest that “[t]he case law that reinforces the distinction between direct and adverse effect discrimination may therefore represent an error in charting the course of human rights jurisprudence.”³ In the landmark case of *Meiorin*, the Supreme Court of Canada cited several difficulties with the distinction, including problems associated with application and the availability of different remedies, and abolished it.⁴ McLachlin J, as she then was, states that the distinction is not relevant and there is no unified analysis for distinguishing between the two kinds of discrimination.⁵ In *Grismer*, the Supreme Court affirms *Meiorin* and extends the case’s application from the employment context to other contexts by announcing that “[t]he distinction between direct and indirect discrimination has been erased.”⁶ Despite this development, I argue that the distinction corresponds to a difference and ought to be maintained.

My argument begins by identifying in case law two subtly different characterizations defining the distinction. Next, I explain that since *Meiorin*, courts have suggested that the distinction is insignificant. I push back against this trend in the jurisprudence and suggest that the distinction remains significant. Although adjudicators explicitly reject the assumption that discrimination requires discriminatory intent or discriminatory purpose,⁷ I submit that they often implicitly rely on this criterion. The tendency to import additional requirements into the analysis of prima facie discrimination⁸ raises the concern that adjudicators are unconsciously considering only direct discrimination and especially direct discrimination of a malicious nature. Thus, having adjudicators consciously distinguish between direct and indirect discrimination decreases the likelihood that they will succumb to this temptation.

I. DIRECT AND INDIRECT DISCRIMINATION

The Supreme Court of Canada held that mandatory retirement at age 60 directly discriminated on the prohibited ground of age.⁹ The court also held that a workplace schedule requirement adversely impacting Seventh Day Adventists indirectly

³ Shelagh Day & Gwen Brodsky, “The Duty to Accommodate: Who Will Benefit?” (1996) 75:3 Can Bar Rev 433 at 459.

⁴ *Supra* note 1 at paras 25–53.

⁵ See *ibid* at paras 27–29, 50–53.

⁶ *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 at para 19 [*Grismer*].

⁷ See *Québec (Commission des droits de la personne et des droits de la jeunesse) c Bombardier*, 2015 SCC 39 at para 40 [*Bombardier*].

⁸ See e.g. *Stewart v Elk Valley Coal Corp*, 2017 SCC 30 at paras 79–81 [*Stewart*].

⁹ See *Ontario (Human Rights Commission) v Etobicoke (Borough)*, [1982] 1 SCR 202 [*Etobicoke*].

discriminated on the prohibited ground of religion.¹⁰ But what are direct and indirect discrimination? One might try distinguishing indirect discrimination by simply claiming it is any discrimination that is not direct, and vice versa for defining direct discrimination. However, this strategy problematically assumes these two kinds of discrimination are jointly exhaustive. Any attempt to characterize discrimination must account for other forms of discrimination that do not fit neatly into the direct or indirect categories, such as systemic discrimination.

Typically, human rights codes do not define direct and indirect discrimination. However, they do distinguish between direct and indirect discrimination by treating them differently. The Ontario *Human Rights Code*¹¹ (*OHRC*) prohibits infringing a person's right to equal treatment in certain contexts by offering protection from discrimination on the prohibited grounds in sections 1–9. However, the *OHRC* also distinguishes “constructive discrimination” in section 11.¹² The distinction's place in the *OHRC* and the different results of analyzing the distinction pre-*Meiorin* led adjudicators to establish their own characterizations.¹³

There are two main characterizations of the distinction. The characterization adjudicators explicitly invoke most often is formulation-based; it depends on the formulation of the allegedly discriminatory standard.¹⁴ Applying this characterization, direct discrimination involves a standard that facially discriminates based on a prohibited ground. Conversely, indirect discrimination involves a standard that is facially neutral and nonetheless differentially and adversely impacts a group identifiable by a prohibited ground. While this characterization is not explicitly couched in terms of intentionality, it engages intent insofar as a facially discriminatory standard is one that readily reveals intent to discriminate.

The distinction's other characterization is intent-based. This characterization depends on the intention of the person in adopting the discriminatory standard.¹⁵ Therefore, using the intent-based characterization, direct discrimination involves a standard that one adopts with the intention to discriminate. Conversely, indirect discrimination involves a standard adopted without the intention to discriminate and

¹⁰ See *Ontario (Human Rights Commission) v Simpsons-Sears Ltd.*, [1985] 2 SCR 536 [*O'Malley*].

¹¹ RSO 1990, c H-19.

¹² *Ibid.*, ss 1–9, 11.

¹³ See *Meiorin*, *supra* note 1 at paras 30–31.

¹⁴ See e.g. *O'Malley*, *supra* note 10 at 551, 558; *Canadian Civil Liberties Assn v Toronto Dominion Bank*, [1998] 4 FC 205 at para 70, Isaac CJ, dissenting [*TD*]; *ibid* at para 27, Robertson JA; *Grismer*, *supra* note 6 at para 15; *Moore v British Columbia (Ministry of Education)*, 2012 SCC 61 at para 62 [*Moore*].

¹⁵ See e.g. *Robichaud v Canada*, [1987] 2 SCR 84 at paras 10, 15; *Canadian National Railway v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at 1141, 1143 [*CNR*]; *Radek v Henderson Development (Canada) Ltd.*, 2005 BCHRT 302 at paras 474, 482, 514, 621; *Bombardier*, *supra* note 7 at paras 39, 48–49; *Stewart*, *supra* note 8 at paras 79–80; *Day & Brodsky*, *supra* note 3 at 457. For *Charter* cases, see *Andrews v Law Society (British Columbia)*, [1989] 1 SCR 143 at 173 [*Andrews*].

nonetheless differentially and adversely impacts those identifiable by a prohibited ground.

The two characterizations are meaningfully distinct. Although practically unlikely, adopting a facially discriminatory standard without actually intending to discriminate is theoretically possible. It is possible provided that the person adopting the standard is genuinely ignorant of the standard's likely impact. Such discrimination is direct on the formulation-based characterization, but indirect on the intent-based one. Similarly, it is possible to intentionally discriminate on a prohibited ground by adopting a facially neutral standard knowing the standard differentially and adversely impacts a group identifiable by a prohibited ground. This is called *covert discrimination* and is direct on the intent-based characterization and indirect on the formulation-based characterization.

To avoid confusion, note that discriminatory intent does not require malice.¹⁶ Similarly, discriminatory intent does not require a discriminatory purpose.¹⁷ Adopting a discriminatory standard with knowledge that it discriminates establishes intention to discriminate in the relevant sense, irrespective of the overall purpose or any intention to cause harm. Discriminatory intent is strictly a matter of knowledge.

While adjudicators rarely invoke the intent-based characterization explicitly, they often rely on this subtly different characterization, even if they do not do so consciously.¹⁸ One explanation for this is that the gap between the two characterizations is minimal, making it easy to conflate them in practice. Often, one who adopts a facially discriminatory standard does so because they intend to discriminate in the relevant sense—that is, one knows adopting the standard will discriminate. Moreover, even if one who adopts the standard does not actually intend to discriminate, it is reasonable to ascribe the relevant kind of knowledge to the individual adopting the standard.¹⁹ Direct discrimination occurs when one adopts a standard they know or ought to know will have a discriminatory effect. Another explanation of why adjudicators seemingly make recourse to the intent-based characterization is that the distinction it prescribes is intuitively compelling. There seems to be something worse about discrimination in cases where the discriminator intends to discriminate.

Entrop provides a useful example of how adjudicators explicitly invoke the formulation-based characterization while implicitly focusing on intent.²⁰ The Ontario Court of Appeal's inconsistent approach to characterization led to an uneven

¹⁶ *CNR*, *supra* note 15 at paras 28–29; Denise Réaume, “Harm and Fault in Discrimination Law: The Transition from Intentional to Adverse Effect Discrimination” (2001) 2:1 *Theor Inq L* 349 at 366–67.

¹⁷ *Personnel Administrator of Massachusetts v Feeney*, 442 US 256 at 278–79 (1976); Réaume, *supra* note 16 at 383.

¹⁸ See e.g. *Entrop v Imperial Oil Ltd*, [2000] 189 DLR (4th) 14 (Ont CA) [*Entrop*].

¹⁹ See Réaume, *supra* note 16 at 367.

²⁰ See *Entrop*, *supra* note 18.

application. The complainant alleged that the alcohol and drug testing policy for employees discriminated based on the prohibited ground of disability.²¹ Laskin JA explicitly invoked the formulation-based characterization.²² However, he had difficulty classifying the case: he questioned whether the case concerned direct discrimination, because the standard at issue “target[ed]”²³ substance abusers (and perceived substance abusers), or whether it concerned indirect discrimination, because the standard was facially neutral but adversely impacted that specific group.²⁴ Evident in his characterization of indirect discrimination as “focus[ing] not on the intention of the employer,”²⁵ and his reference to “employers with a discriminatory intent,”²⁶ Laskin JA’s solution was to implicitly invoke the intent-based characterization. It seems Laskin JA had difficulty classifying the case only because he equivocated between the two characterizations. The policy at issue required all employees in safety-sensitive positions to undergo random alcohol and drug testing. However, since the policy did not mention a prohibited ground, it was facially neutral. Thus, on the formulation-based characterization, the case concerned indirect discrimination. When Laskin JA considered whether the case concerned direct discrimination because the policy “target[ed]” substance abusers, he implicitly relied on the intent-based characterization. What he likely had in mind was that the employer may have adopted the standard to “target”²⁷ substance abusers, thus intending to discriminate against them. If this targeting were to occur, on the intent-based characterization, the case would have concerned direct discrimination.

Orillia provides insight on how adjudicators conflate intent with purpose.²⁸ The complainant alleged that certain provisions of the collective agreement—those regarding service accrual and employer premium contributions—discriminated based on the prohibited ground of disability.²⁹ While active employees and employees on paid leaves of absence received full accrual of service and full hospital contribution, employees on unpaid leaves of absence and those receiving long-term disability payments received limited accrual of service and limited hospital contribution.³⁰ Rosenberg JA, as he was then known, considered each of the policies on service accrual

²¹ See *ibid* at para 1.

²² See *ibid* at para 65.

²³ *Ibid* at para 70.

²⁴ See *ibid* at para 80.

²⁵ *Ibid* at para 71.

²⁶ *Ibid*.

²⁷ *Ibid* at para 70.

²⁸ *Ontario Nurses’ Association v Orillia Soldiers Memorial Hospital*, [1999] 169 DLR (4th) 489 (Ont CA) [*Orillia*].

²⁹ See *ibid* at paras 1–17.

³⁰ See *ibid*.

and contributions as involving direct discrimination but also considered the alternative: indirect discrimination.³¹ However, it seems clear that the case concerned direct discrimination on the formulation-based characterization. The benefits scheme, which allocated different benefits for those whose employment status was “Receiving Long-term Disability Payment,” facially discriminated. Since the adoption of a facially discriminatory standard implies intention to discriminate in the relevant sense, it seems equally clear that the policy amounted to direct discrimination on the intent-based characterization. Rosenberg JA suggested there was no direct discrimination because the purpose of the relevant provisions was to provide compensation in exchange for work: “[h]aving chosen to provide this form of compensation, the employer could not discriminate on a prohibited basis.”³² This reasoning seems mistaken; discriminatory intent concerns knowledge rather than purpose.

TD demonstrates adjudicators explicitly invoking the formulation-based characterization while implicitly invoking the intent-based characterization. This further conflates intent with motive. *TD* concerned a policy that required all employees be tested for drug use. Since the policy was facially neutral, the case was not recognized as direct discrimination on the formulation-based characterization. If the employer had adopted the facially neutral policy with intent to discriminate against addicts, there would have been covert discrimination. The case would have concerned direct discrimination on the intent-based characterization. In the absence of intent, as the facts suggest, the case would not concern direct discrimination even on the intent-based characterization. Thus, in explicitly adopting the formulation-based characterization and conceding the absence of any explicit reference to the prohibited ground of disability, Robertson JA mistakenly identified the case as one of direct discrimination.³³ After incorrectly claiming that direct discrimination requires a motive, which is false on both characterizations, Robertson JA classified the case as direct discrimination because the policy adversely “target[ed]” persons identifiable by a prohibited ground and “by design ... [was] directed at all those who use illegal drugs and, by necessity, those who are drug dependent.”³⁴ Taking place pre-*Meiorin*, the distinction was doctrinally significant at the time, because whether the discrimination was direct or indirect affected the availability of defences and remedies.³⁵ Robertson JA’s classification let him strike the policy—an outcome that would not have been possible if the policy had

³¹ See *ibid* at paras 25–82.

³² *Ibid* at para 31.

³³ See *TD*, *supra* note 14 at paras 27, 32–34, Robertson JA.

³⁴ *Ibid* at paras 27, 31, Robertson JA.

³⁵ See *ibid* at paras 25–26, Robertson JA. See also *O’Malley*, *supra* note 10 at 555; *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*, [1990] 2 SCR 489 [*Dairy Pool*].

been identified as indirect discrimination.³⁶ The justness of the outcome does not excuse the mistake in classification.

The apparent difficulty associated with applying the distinction seems remediable by carefully attending to the subtle differences between the characterizations. There is little inherent complexity in classifying cases as concerning direct discrimination or indirect discrimination. Classificatory inconsistencies arise only when one equivocates between the characterizations of the distinction—notably, by explicitly invoking the formulation-based distinction but implicitly adhering to the intent-based one. Granted, it may be genuinely difficult to classify cases insofar as it is hard to ascertain the intent one has in adopting a standard. However, this sort of evidentiary problem is pervasive throughout the law. If other areas of the law can navigate the attendant difficulties of measuring intention, then the same is possible in discrimination law.

XY presents a more difficult classificatory challenge, but even it is surmountable.³⁷ In this case the impugned statutory scheme required that birth certificates identify individuals by their sex, following the sex assigned at birth. The scheme also required that transgendered persons must have had “transsexual surgery” and have such surgery certified before changing the sex identified on their birth certificates.³⁸ The complainant alleged this scheme discriminated based on the basis of sex or disability—both of which are prohibited grounds.³⁹ The challenge, in terms of classification, was that transgender status was not a prohibited ground at the time. However, the adjudicator accepted the respondent’s concession that discrimination based on such status qualified as discrimination based on sex or disability.⁴⁰ The adjudicator found the case could not be “neatly characterized” as involving direct discrimination.⁴¹ However, a more straightforward approach to classification is possible. The statutory scheme clearly did not facially discriminate on the basis of transgender status. Thus, on the formulation-based characterization the case did not concern direct discrimination. There was limited evidence regarding the rationale behind the statutory scheme and no evidence the government adopted the scheme for the purpose of discriminating.⁴² Therefore, even on the intent-based characterization, the case did not concern direct discrimination.

³⁶ TD, *supra* note 14 at para 14, McDonald JA.

³⁷ XY v Ontario (Government and Consumer Services), 2012 HRTO 726 [XY].

³⁸ See *ibid* at paras 5, 83, 143, 150.

³⁹ See *ibid* at para 5.

⁴⁰ See *ibid* at para 89. Note that since the passage of *Toby’s Act (Right to be Free from Discrimination and Harassment Because of Gender Identity or Gender Expression)*, 2012, SO 2012, c 7, transgender status in the form of “gender identity” and “gender expression” are prohibited grounds.

⁴¹ XY, *supra* note 37 at para 235.

⁴² *Ibid* at para 40.

I propose that the courts adopt the intent-based characterization of the distinction between direct and indirect discrimination. Although it departs from the formulation-based characterization, which adjudicators explicitly invoke, it is the one that matters. When applying the formulation-based characterization, the distinction between direct and indirect discrimination seems irrelevant. Consider cases of covert discrimination: there is no meaningful difference between an employer adopting a facially discriminatory rule that women need not apply and adopting a facially neutral rule that requires candidates to pass a test created to eliminate female candidates. Conversely, the distinction remains relevant if applying the intent-based characterization. Again, the distinction in the intent-based characterization is intuitively compelling.

II. ADJUDICATORS OFTEN IMPLICITLY ASSUME THAT DISCRIMINATION REQUIRES DISCRIMINATORY INTENT

I now turn to examine the case law revealing the implicit assumption that discrimination requires discriminatory intent or even discriminatory purpose. Although *Etobicoke* and *O'Malley* suggest the threshold for showing prima facie discrimination is low, adjudicators have since reinterpreted the traditional approach to prima facie discrimination. Two specific trends exemplify this general phenomenon. First, adjudicators have imported substantive considerations from the *Charter* analysis into their analysis of human rights codes.⁴³ Such considerations are associated with discriminatory intent and even discriminatory purpose. Second, and relatedly, adjudicators have imported the discriminatory intent requirement when determining whether the required link between a prohibited ground and adverse impact exists.⁴⁴ In both cases, the adjudicators unconsciously consider only direct discrimination—sometimes only direct and malicious discrimination. I purport that adhering rigorously to the distinction between direct and indirect discrimination, with respect to the intent behind adopting a standard, will decrease the likelihood of adjudicators overlooking indirect discrimination.

It is worth briefly reviewing the traditional human rights codes analysis of discrimination. A discrimination claim includes the prima facie stage and the bona fide

⁴³ See e.g. *Orillia*, *supra* note 28; *Preiss v British Columbia (AG) (No 3)*, 2006 BCHRT 587 [*Preiss*]; *Stopps v Just Ladies Fitness (Metrotown) Ltd*, 2006 BCHRT 557 [*Stopps*]; *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4 [*McGill*]; *Ontario (Director of Disability Support Program) v Tranchemontagne*, 2010 ONCA 593 [*Tranchemontagne*].

⁴⁴ See e.g. *Stewart*, *supra* note 8; *Armstrong v British Columbia (Ministry of Health)*, 2010 BCCA 56 [*Armstrong CA*], *rev'g Armstrong v BC (Ministry of Health) (No 5)*, 2008 BCHRT 19 [*Armstrong BCHRT*]; *Pivot Legal Society v Downtown Vancouver Business Improvement Assn*, 2012 BCHRT 23 [*Pivot*].

requirement (BFR) stage.⁴⁵ At the prima facie stage, the complainant must make a case that, if believed, completely and sufficiently demonstrates discrimination in the absence of a reply from the respondent.⁴⁶ Specifically, the complainant must show that they are identifiable by a prohibited ground, they experienced an adverse impact in the relevant context, and the prohibited ground was a factor in the adverse impact.⁴⁷

Once the complainant shows prima facie discrimination, the respondent can avoid liability by either negating prima facie discrimination or justifying it as a BFR. Availability of the BFR justification differs depending on whether the case concerns direct discrimination or indirect discrimination.⁴⁸ However, under the unified treatment of discrimination post-*Meiorin*, the BFR stage is often the same regardless of the kind of discrimination.⁴⁹ On the *Meiorin* analysis, which informs the interpretation of human rights codes justifications,⁵⁰ the respondent can justify their conduct by showing that they adopted the standard for a purpose rationally connected to job performance; they adopted the standard in an honest and good faith belief that it was necessary to fulfill the legitimate work-related purpose; and the standard is reasonably necessary to fulfill the legitimate work-related purpose. The complainant's discrimination claim succeeds if the respondent fails to negate or justify prima facie discrimination.

Importing Substantive Considerations from the *Charter* Analysis

While human rights codes and section 15 of the *Charter* both aim to address discrimination, and it might be conceptually pleasing to treat them similarly, their distinct contexts suggest it is wise to consider them somewhat independently.⁵¹ Notably, justification of discrimination under section 15 occurs under section 1 of the *Charter*, but justification of discrimination under human rights codes occurs within the codes themselves.⁵² The OHRC's "byzantine" structure suggests a treatment notably different from section 15.⁵³ Nonetheless, over the last 20 years a new approach to analysis, which imports apparently additional "substantive" considerations from the *Charter* analysis,

⁴⁵ See *Meiorin*, *supra* note 1 at para 54.

⁴⁶ See *O'Malley*, *supra* note 10 at para 28.

⁴⁷ See *Moore*, *supra* note 14 at para 33.

⁴⁸ See also *Dairy Pool*, *supra* note 35 at para 60; *Commission scolaire régionale de Chambly v Bergevin*, [1994] 2 SCR 525; *Entrop*, *supra* note 18 at paras 66–69.

⁴⁹ See *Meiorin*, *supra* note 1 at paras 45–46. See also *Grismer*, *supra* note 6 at paras 15–20; *VIA Rail Canada Inc v Canadian Transportation Agency*, 2007 SCC 15.

⁵⁰ *Potash Corp of Saskatchewan Inc v Scott*, 2008 SCC 45 at paras 14–20.

⁵¹ See e.g. OHRC, *supra* note 11; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s 15 [*Charter*].

⁵² See OHRC, *supra* note 11, ss 11(a), (b).

⁵³ Denise Réaume, "Defending the Human Rights Codes from the *Charter*" (2012) 9 JL & Equality 67 at 87.

has emerged.⁵⁴ In *Law*,⁵⁵ the Supreme Court emphasizes section 15's guarantee of substantive equality is "purposive and contextual" in considering prejudice and stereotyping, echoing *Andrews*,⁵⁶ as well as human dignity.⁵⁷ The Supreme Court in *Kapp* then distilled the *Law* approach into two steps: the first step considers whether the disputed law creates a distinction based on an enumerated or analogous ground, while the second step considers whether the distinction creates a disadvantage by perpetuating prejudice or stereotyping.⁵⁸ Initially inconspicuous in the traditional analysis of prima facie discrimination, such substantive considerations now sometimes appear in the analysis.⁵⁹

Importing these substantive considerations may seem appropriate because the respondent is the government. When the respondent is the government the complainant may claim discrimination under section 15 rather than under human rights codes. Importing substantive considerations ensures the proper approach to discrimination does not depend on the path the complainant chooses.⁶⁰ However, importing substantive considerations into the prima facie analysis in the government context risks injecting such considerations into non-government contexts. Problematically, because such considerations are associated with discriminatory intent, or discriminatory purpose, they lead adjudicators to overlook indirect discrimination and focus on direct discrimination of the malicious kind.

Orillia is an early case where the Supreme Court imported substantive considerations. Rosenberg JA for the court emphasized the employer's purpose in defeating the complainant's discrimination claims relating to provisions of a benefits scheme. In doing so, he took inspiration from several *Charter* cases.⁶¹ He found the employer's purpose was compensation in exchange for work. Crucially, he took this to dictate the relevant comparator group and thus the outcome with respect to the policy on employer premium contributions.⁶² If the case was found to concern direct discrimination, there was no prima facie discrimination.⁶³ Alternatively, if the case

⁵⁴ See *ibid*; Benjamin Oliphant, "Prima Facie Discrimination: Is *Tranchemontagne* Consistent with the Supreme Court of Canada's Human Rights Code Jurisprudence?" (2012) 9 JL & Equality 33, DOI: <10.2139/ssrn.2037576>.

⁵⁵ *Law v Canada (Minister of Employment & Immigration)*, [1999] 1 SCR 497 [*Law*].

⁵⁶ *Supra* note 15.

⁵⁷ *Supra* note 55 at para 88.

⁵⁸ *R v Kapp*, 2008 SCC 41 at para 17 [*Kapp*]. However, the court downplayed the emphasis in *Law* on human dignity.

⁵⁹ *Orillia*, *supra* note 28; *Preiss*, *supra* note 43; *Stopps*, *supra* note 43; *McGill*, *supra* note 43; *Tranchemontagne*, *supra* note 43.

⁶⁰ See *Preiss*, *supra* note 43; *Armstrong CA*, *supra* note 44; *Tranchemontagne*, *supra* note 43.

⁶¹ See *Orillia*, *supra* note 28 at paras 30, 47, 54, 73.

⁶² *Ibid* at para 59.

⁶³ *Ibid* at para 31.

concerned indirect discrimination, then the respondent employer had a successful BFR argument.⁶⁴ Rosenberg JA applied essentially the same reasoning to the policy on service accrual.⁶⁵ Thus, Rosenberg JA's "purpose of the enterprise" argument imported a substantive consideration—purpose—into the prima facie analysis. As suggested above, the case plausibly concerned direct discrimination, because the benefits scheme facially discriminated, and one who adopts such a standard intends to discriminate in the relevant sense. Rosenberg JA conflated intent with purpose and therefore found that the case was concerned with indirect discrimination. Rosenberg JA took the purpose to preclude the possibility of direct discrimination in the prima facie analysis.

In the meantime, adjudicators at tribunals were openly importing substantive considerations from the *Charter* analysis more regularly. Importing substantive considerations gives rise to the implicit assumption that discrimination requires discriminatory intent and even discriminatory purpose. The complainant in *Preiss*, a male correctional officer, alleged that the government employer's policy—which allowed only female officers to temporarily transfer to a female correctional centre while keeping their seniority—discriminated on the prohibited ground of sex.⁶⁶ The adjudicator held there was no prima facie discrimination because there was no "substantive" disadvantage.⁶⁷ Invoking *Law*, she found there was insufficient stereotyping or violation of human dignity.⁶⁸

Similarly, in *Stoppes*, the male complainant alleged a women-only gym discriminated on the basis of sex.⁶⁹ Invoking *Law*, the adjudicator held there was no prima facie discrimination and no violation of human dignity.⁷⁰ In *Harrington*, the adjudicator found that since a city bylaw restricting waste collection did not substantively discriminate against larger families (which activated concerns based on the prohibited ground of family status), there was no reasonable prospect of a successful discrimination claim.⁷¹

This tendency toward importing substantive considerations eventually reached the Supreme Court in *McGill*.⁷² The complainant experienced mental and physical trauma and worked part-time during rehabilitation before a prolonged absence from her job. The complainant alleged the termination of her employment was discrimination

⁶⁴ *Ibid* at para 58.

⁶⁵ *Ibid* at para 60. Rosenberg JA employs a somewhat different analysis to the provisions for seniority.

⁶⁶ *Preiss*, *supra* note 43 at paras 1–3.

⁶⁷ *Ibid* at paras 255, 297.

⁶⁸ *Ibid* at paras 257, 263, 299–302.

⁶⁹ *Stoppes*, *supra* note 43 at paras 1–4.

⁷⁰ *Ibid* at paras 90–113.

⁷¹ *Harrington v Hamilton (City)*, 2010 HRTO 2395 at paras 9–14 [*Harrington*].

⁷² *McGill*, *supra* note 43.

based on the prohibited ground of disability.⁷³ Abella J, concurring, held there was no prima facie discrimination because there was insufficient stereotyping or arbitrariness. Citing *Andrews*, Abella J found that standards are discriminatory insofar as they attribute stereotypical or arbitrary characteristics, and that the “essence of discrimination is in the arbitrariness of its negative impact, that is, the arbitrariness of the barriers imposed, whether intentionally or unwittingly.”⁷⁴ Abella J asserted “it is the link between ... group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or in its impact” that grounds discrimination.⁷⁵ In this case, there is no arbitrariness because three years of job protection for a disabled employee was not an arbitrary disadvantage. Thus, Abella J apparently introduced arbitrariness as a new requirement for prima facie discrimination. Failing to establish arbitrariness may add a barrier for complainants to succeed. It is unclear exactly what arbitrariness might be in the context of these claims. While Abella J claimed it need not be facial or intentional, it can be hard to understand how an adverse impact attributable to a non-facial standard or unintentional conduct could be arbitrary. Perhaps establishing arbitrariness effectively requires discriminatory intent and even discriminatory purpose.

In *Tranchemontagne*, the trend of importing substantive considerations into the prima facie analysis reached a new level.⁷⁶ The complainants, two alcoholics whose alcoholism qualified as a disability, alleged that the Ontario Disability Support Program discriminated based on the prohibited ground of disability.⁷⁷ The relevant provision disqualified persons who are solely disabled because of alcohol, drug, or substance dependence from eligibility for disability benefits. Simmons JA for the Ontario Court of Appeal held there was discrimination but imported substantive considerations into the prima facie analysis. Citing *Andrews* and *Kapp*, she affirms the requirement that there be “disadvantage” that “perpetuates prejudice or stereotyping.”⁷⁸ Disadvantage “in the sense of withholding a benefit available to others or imposing a burden not imposed on others” may suggest perpetuation of prejudice or stereotyping.⁷⁹ However, in some cases “a more nuanced inquiry” is required to determine whether there is such perpetuation.⁸⁰ Without explaining what such an inquiry might involve, Simmons JA cited Abella J’s strictly obiter concurrence in *McGill* to support the proposition that discrimination requires more than disadvantage.⁸¹ In *Tranchemontagne*, Simmons JA

⁷³ *Ibid* at para 1.

⁷⁴ *Ibid* at paras 48, 53, 56.

⁷⁵ *Ibid* at paras 49, 54.

⁷⁶ *Tranchemontagne*, *supra* note 43.

⁷⁷ See *ibid* at paras 1–4.

⁷⁸ *Ibid* at paras 72–86.

⁷⁹ *Ibid* at para 90.

⁸⁰ *Ibid* at para 91.

⁸¹ See *ibid* at paras 92–94.

agreed with the adjudicator's conclusion that the relevant provision "denies income support and imposes restrictions because of assumed or unjustly attributed characteristics," but does not explain how the perpetuation of prejudice or stereotyping arose.⁸² To say the provision was disadvantageous "because of assumed or unjustly attributed characteristics" is merely to say the provision was disadvantageous because of prejudice or stereotyping.⁸³ Simmons JA added that addicts are "subjects of stigma and prejudice," but this also does not clarify why the disadvantage perpetuated prejudice or stereotyping.⁸⁴

Since substantive considerations such as arbitrariness, prejudice, and stereotyping are associated with discriminatory intent and even discriminatory purpose, the new analysis tempts adjudicators to consider only direct discrimination—potentially only direct discrimination of the malicious kind. Unsurprisingly, the likely result is that indirect discrimination claims are less likely to succeed.⁸⁵ Other than *Eldridge v British Columbia*, indirect discrimination claims rarely succeed on *Charter* grounds.⁸⁶ The new analysis makes it similarly difficult for such claims to succeed under human rights codes. The complainants in *Tranchemontagne* did succeed; however, that case concerned direct discrimination rather than indirect discrimination.⁸⁷ In cases similar to XY, which concerned transgendered persons, it may be easier to find prejudice and stereotyping. However, this is not always the case. Insofar as arbitrariness, prejudice, and stereotyping are demanding requirements, their absence should not prevent complainants from succeeding under human rights codes, because courts suggest interpreting human rights codes broadly. Human rights codes are interpreted broadly given their quasi-constitutional status.⁸⁸

Stewart suggests backtracking on *Tranchemontagne*. In this recent case, McLachlin CJ suggests arbitrariness and stereotyping are not "stand-alone" requirements for prima facie discrimination, but are incorporated into the third step of the analysis.⁸⁹ In doing so, she apparently conceded making them stand-alone requirements would "improperly focus on 'whether a discriminatory *attitude* exists, not a discriminatory impact'" [emphasis in original].⁹⁰ McLachlin CJ's suggestion is a step

⁸² *Ibid* at para 106.

⁸³ *Ibid* at para 125.

⁸⁴ *Ibid* at para 121.

⁸⁵ See Oliphant, *supra* note 54 at 58–59.

⁸⁶ *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624. For failed cases under the *Charter*, see *Hutterian Brethren of Wilson Colony v Alberta*, 2009 SCC 37; *Withler v Canada (AG)*, 2011 SCC 12; *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30.

⁸⁷ For successful cases, see *Hendershott v Ontario (Ministry of Community and Social Services)*, 2011 HRTO 482; XY, *supra* note 37.

⁸⁸ *Bombardier*, *supra* note 7 at paras 29–30.

⁸⁹ *Stewart*, *supra* note 8 at paras 45–46.

⁹⁰ *Ibid*, citing *Quebec (AG) v A*, 2013 SCC 5 at para 327.

in the right direction; however, it does not go far enough. It does not overrule *Orillia* and *McGill* that seemingly import the problematic requirements in the first place. Gascon J's dissent in *Stewart* goes further by clearly rejecting that arbitrariness and stereotyping are necessary requirements.⁹¹ However, Gascon J's dissent does not authoritatively announce a return to the pre-*Orillia* prima facie analysis. Thus, the spectre of *Tranchemontagne* remains.

Indirect discrimination cases that may have succeeded on the traditional analysis have failed on the *Tranchemontagne* analysis. In *Siemens* the complainant was a single mother with two daughters, including a severely disabled daughter requiring regular care.⁹² The complainant alleged that her employer's refusal to pay her for holidays was discrimination based on the prohibited ground of family status. The employer was obliged to pay if the employee worked the regular scheduled work day immediately before and after the holiday or gave reasons satisfactory to the employer.⁹³ The employer refused to pay the complainant because she did not work the day before and after, and the employer did not accept the complainant's reason for those absences.⁹⁴ The reason given to the employer for the employee's absences was that the complainant had to care for her daughter. Citing *Orillia* and *Tranchemontagne*,⁹⁵ the arbitrator found the complainant's disadvantage "was not arbitrary and did not perpetuate prejudice or stereotyping."⁹⁶ Instead, he found the employer's refusal had the legitimate purpose of ensuring adequate staffing and thus there was no prima facie discrimination.⁹⁷ Had arbitrariness, prejudice, and stereotyping not been requirements, perhaps the court would have found prima facie discrimination. Similarly in *Helm*, the complainant, whose ankle constituted a disability, alleged that a golf club's increased rental fee for power carts discriminated based on a prohibited ground.⁹⁸ Citing *Law*, *Orillia*, and *Tranchemontagne*, the adjudicator found that while the golf club's policy created a disadvantage, it did not create a "substantive" disadvantage.⁹⁹ The arbitrator concluded that there was no prima facie discrimination.¹⁰⁰ Had 'mere' disadvantage sufficed in the Supreme Court's analysis, as it would have on the traditional analysis, perhaps the complainant would have made out prima facie discrimination.

⁹¹ *Stewart*, *supra* note 8 at paras 106–9.

⁹² *Siemens Milltronics Process Instruments Inc and Employees Assn of Milltronics (CNFIU, Local 3005) (Moore) Re* (2012), 112 CLAS 325 (Arbitrator: John Stout).

⁹³ See *ibid* at para 3.

⁹⁴ See *ibid* at para 30.

⁹⁵ See *ibid* at paras 53–57, 60–65, 83.

⁹⁶ *Ibid* at para 79.

⁹⁷ See *ibid* at paras 63, 79, 82–84.

⁹⁸ *Helm v Deer Ridge Golf Club*, 2014 HRT0 1722.

⁹⁹ *Ibid* at para 23.

¹⁰⁰ *Ibid*.

Tellingly, there is doubt about whether past cases where indirect discrimination claims succeeded at the prima facie stage would succeed on the new analysis.¹⁰¹ Was the policy in *Pannu* arbitrary in requiring those potentially exposed to poisonous gases to wear a mask?¹⁰² If not, Abella J's reasoning in *McGill* would have prevented the complainant from showing prima facie discrimination in *Pannu*, even though the adjudicator found he showed such discrimination. Did the workplace scheduling requirement adversely impacting Seventh Day Adventists in *O'Malley* perpetuate prejudice or disadvantage?¹⁰³ The requirement meant having to work on certain Friday evenings and Saturdays, but there was little evidence that this perpetuated prejudice or stereotyping.¹⁰⁴ Similarly, did the fitness tests for forest firefighters adversely impacting women in *Meiorin* perpetuate prejudice or stereotyping?¹⁰⁵ There was little evidence that requiring forest firefighters to meet fitness tests perpetuated prejudice or stereotyping. In both cases, the complainants succeeded in their discrimination claims. However, on the new analysis their claims would have failed if they did not establish prima facie discrimination.

On the brighter side, notions such as arbitrariness, prejudice, and stereotyping are malleable requirements and thus may be rendered less demanding through more deflationary interpretation. Perhaps asking adjudicators to attend to the distinction between direct and indirect discrimination will encourage such interpretations and remind adjudicators that discrimination does not require discriminatory intent, let alone discriminatory purpose.

Importing Intention into the Required Link Between a Prohibited Ground and Adverse Impact

A related phenomenon to importing substantive considerations from the *Charter* analysis into the human rights codes analysis is infusing the link required between a prohibited ground and adverse impact with a requirement for intention. Adjudicators implicitly assume discrimination requires discriminatory intent and even discriminatory purpose.

The recent case of *Stewart* exemplifies this phenomenon.¹⁰⁶ The respondent employer implemented an alcohol, illegal drugs, and medication policy aimed at ensuring safety in the workplace mine. The policy required employees to disclose dependence or addiction issues before any drug-related incident occurred. If employees

¹⁰¹ See Oliphant, *supra* note 54 at 58–59.

¹⁰² See *Pannu v Skeena Cellulose Inc*, 2000 BCHRT 56 [*Pannu*].

¹⁰³ See *O'Malley*, *supra* note 10 at para 18.

¹⁰⁴ See *ibid* at para 2.

¹⁰⁵ See *Meiorin*, *supra* note 1 at para 69.

¹⁰⁶ *Stewart*, *supra* note 8.

disclosed as required they would be offered treatment without facing disciplinary consequences. However, if employees refused disclosure, and were subsequently involved in an incident, their employment could be terminated if they tested positive for drugs. The complainant, who used cocaine outside of work, was involved in an accident and tested positive for drugs. Shortly after telling his employer he thought he was addicted to cocaine his employer terminated his employment pursuant to the policy. The complainant alleged the policy discriminated on the prohibited ground of disability which includes addiction.¹⁰⁷ A majority at the Supreme Court upheld the tribunal's decision that the complainant's termination was due to his breach of the policy rather than his addiction.¹⁰⁸ This holding precluded a finding of *prima facie* discrimination. However, the dissent correctly criticized the majority's erroneous reasoning for tacitly importing an intention requirement.

McLachlin CJ found that there was no *prima facie* discrimination. While recognizing discriminatory intent was unnecessary, McLachlin CJ found the complainant established the first and second steps but not the third step.¹⁰⁹ McLachlin CJ upheld the tribunal's finding that addiction was not "a factor" in the termination. The complainant had the capacity to comply with the policy, without facing consequence, and so his failure to comply with the policy was the reason for terminating his employment.¹¹⁰ McLachlin CJ emphasized that the termination letter suggested the policy was "the factor" leading to termination of the complainant's employment.¹¹¹ However, in a lone dissent, Gascon J found the complainant did establish the third step and there was *prima facie* discrimination.¹¹² Gascon J found the step "addresses the relationship between the ground and the harm, not between the ground and the intent to cause harm."¹¹³ While McLachlin CJ "recognize[d] that the analysis concerns discriminatory impacts, not discriminatory attitudes" and "a ground need only be 'at least one of' the factors linked to the employee's harm," she mistakenly took the tribunal to have followed this "established approach."¹¹⁴ In particular, she "approvingly summarize[d] how the Tribunal limited its reasoning to discriminatory intent rather than effect ... , despite expressly recognizing discriminatory intent is not required for *prima facie* discrimination."¹¹⁵ Conversely, Gascon J criticized the tribunal's reasoning itself, observing the tribunal "narrowed the scope of *prima facie*

¹⁰⁷ See *ibid* at paras 1–3.

¹⁰⁸ See *ibid* at paras 28–43.

¹⁰⁹ See *ibid* at paras 24–25.

¹¹⁰ *Ibid* at para 28.

¹¹¹ *Ibid* at para 31.

¹¹² See *ibid* at para 119.

¹¹³ *Ibid* at para 85.

¹¹⁴ *Ibid*.

¹¹⁵ *Ibid* at para 90.

discrimination to direct and intentional discrimination,” even though discrimination also includes indirect discrimination.¹¹⁶ In Gascon J’s view, “addiction was at least one, if not the central, factor in [the complainant]’s termination.”¹¹⁷

The different lines of reasoning in *Stewart* are instructive. This case was heard almost two decades after *Meiorin* pronounced the insignificance of the distinction between direct and indirect discrimination. Accordingly, *Stewart* exemplifies how tempting it is for the Supreme Court to continue importing an intention requirement into the prima facie analysis. In my view, Gascon J was correct to criticize Abella J’s mistaken reasoning, which largely followed the adjudicator’s reasoning. Five other Supreme Court justices, of the nine justices deciding the case, agreed with Abella J’s reasoning. Two other justices, Moldaver and Wagner JJ, concurred with the majority’s result but agreed with Gascon J’s that there was prima facie discrimination.¹¹⁸ Unfortunately, only three justices—Gascon, Moldaver, and Wagner JJ—adopted the correct approach to the prima facie analysis that does not require discriminatory intent.¹¹⁹ This is deeply concerning; it raises a suspicion that adjudicators, and even appellate judges, still fall back on the false assumption that discrimination requires discriminatory intent and even discriminatory purpose.

Case law validates these concerns. In *Armstrong*, the British Columbia Court of Appeal upheld the adjudicator’s decision that the complainant did not prove prima facie discrimination on either of two analyses, one based on *O’Malley* and the other based on *Law*.¹²⁰ The complainant alleged that the provincial government’s refusal to pay for his cancer screening test—the prostate specific antigen (PSA) test—discriminated against him on the prohibited ground of sex because the government did pay for two types of cancer screening tests concerning women’s reproductive systems.¹²¹ In performing the *O’Malley* analysis for prima facie discrimination, the adjudicator asked whether the complainant established the following three steps: (1) he is (or is perceived to be) a member of a group identifiable by a prohibited ground; (2) he suffered adverse treatment when he was required to pay for his test, and; (3) it is reasonable to infer that the prohibited ground “played a role” in the adverse treatment.¹²² The adjudicator found the complainant established the first and second steps but not the third step. Thus there was no prima facie discrimination:

¹¹⁶ *Ibid* at para 114.

¹¹⁷ *Ibid* at para 117.

¹¹⁸ See *ibid* at paras 48–57.

¹¹⁹ See *ibid* at paras 48–145.

¹²⁰ See *ibid* at para 39. *Armstrong* CA, *supra* note 44.

¹²¹ See *Armstrong* CA, *supra* note 44 at para 1.

¹²² *Ibid* at para 10.

I do not find it reasonable to infer that the protected characteristic, his sex, played any role in the adverse treatment.

...

[S]ex is not a factor in the Ministry's decision not to pay for PSA screening tests. The tests have not been considered medically necessary because, to date, it has not been established that PSA testing, and its consequences, if publicly funded on a population-wide basis, would do more good than harm to the men taking the test. It is on this basis, and this basis alone, that the Ministry does not fund PSA screening tests. The fact that PSA screening tests would, if efficacious, only benefit men, is incidental to that decision.¹²³

The adjudicator's discussion of the government's reasons against funding the PSA screening tests suggests an inappropriate focus on whether the government intended to discriminate. The adjudicator apparently thought that because the government did not intend to discriminate there was no prima facie discrimination. In performing the *Law* analysis, the adjudicator similarly concluded there was no prima facie discrimination. The court reproduced four of the adjudicator's reasons. Two reasons concerned the intentions behind the government's decision. The other two reasons concerned stereotyping and disadvantage. The adjudicator reasoned that "the decision to fund cancer screening tests for women, but not for men, including [the complainant], is not based on the fact that [he] is male, but on the questionable scientific support for the efficacy of PSA screening as a population wide screening device and its consequences."¹²⁴ The adjudicator also reasoned that "[t]he differential treatment is based on the characteristics of the test, not on [the complainant's] gender."¹²⁵ Again, the adjudicator's discussion of the basis for the government's decision suggests an inappropriate focus on whether the government intended to discriminate. The adjudicator apparently thought that because the government did not intend to discriminate, there was no prima facie discrimination.

One might have hoped that, as in *Stewart*, at least one of the reviewing judges would notice the implicit importation of an intention requirement into prima facie discrimination. Unfortunately, any such hope would have been misplaced. The Court of Appeal unanimously upheld the adjudicator's decision. Tysoe J cited *Abella J* in *McGill* to characterize the third step of the prima facie analysis—which considers whether the prohibited ground was "a factor" or whether the discrimination was "because of" the prohibited ground—as requiring "a link or nexus between the protected ground or

¹²³ *Armstrong CA*, *supra* note 44 at para 12, citing to *Armstrong BCHRT*, *supra* note 44 at paras 355, 357.

¹²⁴ *Armstrong CA*, *supra* note 44 at para 13, citing to *Armstrong BCHRT*, *supra* note 44 at para 367.

¹²⁵ *Ibid* at para 368.

characteristic and the adverse treatment.”¹²⁶ Although this step does not mention intention, Tysoe J upheld the adjudicator’s finding that the complainant failed to establish the third step: it was the “efficaciousness of the tests that governed the funding decision, and the adjudicator found that sex was not a factor in the decision.”¹²⁷ This amounts to saying that because the government did not intend to discriminate, there was no *prima facie* discrimination. If the reviewing judges attended to the distinction between direct and indirect discrimination then they may have considered whether the government engaged in indirect discrimination despite a lack of discriminatory intent.

Another case illustrates the same point in a somewhat different context. In *Pivot*, which concerned systemic discrimination, the complainants alleged the respondent’s Ambassadors Program discriminated on the prohibited grounds of race, ancestry, colour, and disability.¹²⁸ Acknowledging *Meiorin*’s declaration that the distinction between direct and indirect discrimination no longer matters, the adjudicator observed that systemic discrimination can manifest as either direct or indirect discrimination even if it is not identical to either.¹²⁹ She took the *prima facie* analysis to involve the complainants establishing that they are identifiable by a prohibited ground, they have experienced an adverse impact, and there is a “connection or link” between the prohibited ground and the adverse impact.¹³⁰ The adjudicator added that the discrimination must be “substantive.”¹³¹ As in *Armstrong*, the adjudicator found the complainant established the first and second steps but not the third step.¹³² One reason noted was “there [was] no evidence that the actions of the Ambassadors selectively target individuals of Aboriginal ancestry, viewing them as suspicious.”¹³³ The adjudicator found insufficient evidence that “individuals were systematically targeted by the Ambassadors as a result of the perception that they were drug users.”¹³⁴ Thus, as in *Stewart* and *Armstrong*, the adjudicator seemed to implicitly import an intention requirement.

Fortunately, unlike in *Armstrong*, the reviewing court noticed the adjudicator’s erroneous reasoning. At the British Columbia Supreme Court, Sharma J held that the adjudicator “erred by importing an element of intention into the *prima facie* test by requiring the complainants to establish that the respondents ‘systematically targeted’ ... or ‘selectively target[ed]’ Aboriginal people or people with mental or physical

¹²⁶ *Ibid* at para 24.

¹²⁷ *Ibid* at para 33.

¹²⁸ *Pivot*, *supra* note 44.

¹²⁹ See *ibid* at paras 576–78, 581.

¹³⁰ *Ibid* at para 588.

¹³¹ *Ibid* at para 589.

¹³² See *ibid* at paras 633–36.

¹³³ *Ibid* at para 648.

¹³⁴ *Ibid* at para 655.

disabilities.”¹³⁵ In my view, Sharma J correctly criticized the adjudicator for inappropriately importing a requirement of discriminatory intent:

[T]he use of the phrases “systemically targeted” and “selectively targeted” is unfortunate. Targeting implies a conscious decision to “aim” at something or intent to affect certain things. The Association does not dispute that it “targeted” certain behaviours and, thus, the language of the Decision is consistent with the Association’s position. ... I have found that the Tribunal erred by misstating and misapplying the correct legal test for prima facie discrimination. In my view, the use of words such as “targeting” is simply another manifestation of the same error. The discrimination analysis in this case must be focused on the impact of the Program, not on its intent, design or goals. In my view, the Tribunal’s error in requiring stricter evidence of disproportionate impact resulted in it focussing on the wrong aspect of the Program. This had the effect of importing an element of intention into the analysis which is an error of law.¹³⁶

Sharma J concludes that an application of the correct legal test to the facts yields a finding of prima facie discrimination.¹³⁷ This favoured the complainant; however, the initial adjudicator would ideally have been sufficiently sensitive to the fact that prima facie discrimination does not require intention. If the adjudicator attended to the distinction between direct and indirect discrimination, then indirect discrimination may have been considered despite direct discrimination being precluded by a lack of discriminatory intent.

III. A DISTINCTION WITH A DIFFERENCE

As the above cases demonstrate, there is a risk that adjudicators continue making the implicit but incorrect assumption that discrimination requires discriminatory intent and even discriminatory purpose. The failure to distinguish between direct and indirect discrimination seems to contribute to the risk. This is troubling, not least because adjudicators who implicitly make the assumption sometimes also explicitly recognize the assumption is mistaken. Importing substantive considerations from the *Charter* analysis is one manifestation of this phenomenon. Another manifestation is importing an intention requirement into the link required between a prohibited ground and an adverse impact.

¹³⁵ *Vancouver Area Network of Drug Users v British Columbia Human Rights Tribunal*, 2015 BCSC 534 at para 120.

¹³⁶ *Ibid* at para 123.

¹³⁷ See *ibid* at para 145.

Given these concerns, I suggest the distinction between direct and indirect discrimination—where the presence or absence of intent characterizes the distinction—is practically significant. I agree that discrimination law appropriately focuses on impact rather than intent and my proposal is more psychological than doctrinal. Adjudicators should consciously consider the distinction between direct and indirect discrimination because doing so serves as a reminder that a lack of discriminatory intent does not preclude the possibility of discrimination, particularly indirect discrimination. This approach increases the likelihood of adjudicators identifying genuine cases of discrimination.

CONCLUSION

Despite repetitious pronouncements that the distinction between direct and indirect discrimination no longer matters, it is clear that the distinction is one with a difference. Adjudicators purport to focus on impact; however, their reasoning reveals a focus on intention. Avoiding explicit considerations of intention inadvertently gives rise to such considerations where they do not belong. The impact of misplacing these considerations is that many claims may fail even when there is discrimination. Attending to the distinction between direct and indirect discrimination—on the intent-based characterization—invites adjudicators to question whether there might be discrimination even though there is no discriminatory intent. The hope is that such contemplation will allow claims, which might otherwise fail, to succeed.