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Justice Gonthier and Disability Rights: The Case of *Nova Scotia (Workers' Compensation Board) v. Martin*

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I. INTRODUCTION

In a speech given in 2003 at Queen's University, Justice Gonthier remarked that one purpose of law is to promote morality by protecting the dignity of individuals from threats.[1] Justice Gonthier has been perceived by some court-watchers as a traditionalist.[2] In this paper, we challenge this perception through a discussion of his reasons in *Nova Scotia (Workers' Compensation Board) v. Martin*,[3] which unanimously held that section 10B of the Nova Scotia *Workers' Compensation Act*[4] ("the Act") and the associated regulations for workers with chronic pain[5] violated the equality rights of workers with chronic pain under section 15

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1 Justice Charles D. Gonthier, "Law and Morality" (2003) 29 Queen's L.J. 408, at para. 37.

2 See, *e.g.*, *Sauvé v. Canada (Chief Electoral Officer)*, [2002] S.C.J. No. 66, [2002] 3 S.C.R. 519 (S.C.C.) (Gonthier J. dissenting). Justice Gonthier, joined by L'Heureux-Dubé, Major and Bastarache JJ., held that s. 51(e) of the *Canada Elections Act*, S.C. 2000, c. 9, which prohibited prisoners serving federal sentences of two years or more from voting, violated s. 3 of the Canadian *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"], but was saved by s. 1. For a commentary, see Richard Haigh, "Between Here and There is Better than Anything Over Here: The Morass of *Sauvé v. Canada (Chief Electoral Officer)*" (2003) 20 S.C.L.R. (2d) 353.

3 [2003] S.C.J. No. 54, [2003] 2 S.C.R. 504 (S.C.C.) [hereinafter "*Martin*"].

4 S.N.S. 1994-95, c. 10.

5 *Functional Restoration (Multi-Faceted Pain Services) Program Regulations*, N.S. Reg. 57-96 [repealed and replaced by N.S. Reg. 187/2004].

of the Canadian *Charter of Rights and Freedoms*[6] and could not be saved by section 1.[7] In Part II, we describe the holding in *Martin* and discuss how it has been applied by the courts. In Part III, we provide an account of critical disability theory and illustrate its importance and relevance for legal analysis generally and understanding workers' compensation specifically. In Part IV, we demonstrate how Justice Gonthier's reasons exemplify the best of critical disability theory. In Part V, we offer some brief conclusions and provide some directions on how *Martin* might be used to push the law forward, especially in light of the Nova Scotia Court of Appeal's recent decision in *Downey v. Nova Scotia (Workers' Compensation Appeals Tribunal)*.[8] In Part VI, we present an overview of the paper's findings.

II. *NOVA SCOTIA (WORKERS' COMPENSATION BOARD) V. MARTIN*

The *Martin* decision arose out of amendments made to the Act in the late 1990s. These amendments gave statutory force to regulations that the Nova Scotia legislature had recently enacted, which eliminated long-term workers' compensation benefits for certain workers with chronic pain conditions.[9] Chronic pain syndrome and related conditions have generally been defined to consist of pain that persists beyond the normal recovery time for the originating injury or exceeds what would be expected for the injury.[10] At present, medical techniques have been unable to give an explanation for or a clear and objective means of confirming chronic pain conditions, which had, at the time of the *Martin* decision, created substantial evidentiary problems for individuals bringing claims for compensation on the basis of their chronic pain.[11] This was the problem sought to be addressed by the 1990 Functional Restoration (Multi-Faceted Pain Services) Program Regulations ("FRP Regulations"), which replaced compensation with a four-week Multi-faceted Pain Services Program. The program provided a temporary

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6 *Supra*, note 2.

7 *Id.*, s. 1.

8 [2008] N.S.J. No. 314, 2008 NSCA 65 (N.S.C.A.), leave to appeal refused [2008] S.C.C.A. No. 405, 2008 CanLII 65719 (S.C.C.) [hereinafter "*Downey*"].

9 *Martin v. Nova Scotia (Workers' Compensation Board)*, [2000] N.S.J. No. 353, 192 D.L.R. (4th) 611, at para. 1 (N.S.C.A.) [hereinafter "*Martin*, CA"].

10 *Martin*, *supra*, note 3, at para. 1.

11 *Id.*

earnings-replacement benefit during the worker's involvement in the program.[12] Beyond this, no further benefits were available.

Donald Martin was a foreman at Suzuki Dartmouth who sustained a lumbar sprain injury on February 6, 1996, after lifting and moving a tow dolly. He attempted to return to work several times following his injury but was forced to stop in each instance due to recurring pain. He attended work conditioning and hardening programs and received temporary benefits from the Workers' Compensation Board ("the Board") until August 1996, when the Board refused to continue the benefits. Martin sought a review of this decision, but his claim was denied. The Review Officer based this denial on signs that Martin was developing a chronic pain condition, which was no longer a compensable claim.[13] Martin appealed to a Hearing Officer but was denied appeal because his injury was not compensable under the new regulations.[14]

He then appealed to the Workers' Compensation Appeals Tribunal ("the Tribunal"), arguing that the FRP Regulations violated section 15(1) of the Charter. He argued that he belonged to a particular category of persons with disabilities, those with work-related chronic pain conditions, who were treated in a discriminatory fashion by the regulations when compared to other individuals with work-related disabilities.[15] The Board challenged the Tribunal's jurisdiction to hear the matter. The Tribunal held that it had jurisdiction to decide on the Charter issue on the basis that the Board was given the authority to decide all questions of law under section 185(1) of the Act and the Tribunal was granted the power to confirm, vary or reverse these decisions under section 252(1). Logically, the Tribunal concluded, this must include the power to confirm, vary or reverse Charter decisions.[16] It found the FRP Regulations and section 10B(c) of the Act to be unconstitutional as they created a distinction between individuals with different categories of disabilities which was based upon stereotypical assumptions about the legitimacy of chronic pain claims.[17] The Tribunal awarded Martin benefits from August to October 1996. The Board appealed from the Charter decision, and

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12 *Martin*, CA, *supra*, note 9, at para. 8.
13 *Id.*, at paras. 12-14.
14 *Id.*, at para. 16.
15 *Id.*, at para. 191.
16 *Id.*, at para. 46.
17 *Id.*, at para. 158.

Martin cross-appealed seeking an extension of benefits beyond October.[18]

Ruth Laseur was a bus driver who sustained wrist and back injuries after falling from her bus in 1987. She returned to work and continued until February 1988, when continuing back pain forced her to leave. She received temporary disability benefits for three months before attempting to return to work. She worked for a month before having to once again leave due to back pain. This pattern continued until October 1990, when the Workers' Compensation Appeal Board of the time awarded further temporary disability benefits until an assessment for permanent partial disability could be made. The assessment concluded that Laseur had a chronic pain condition which could not justify a Permanent Medical Impairment ("PMI") diagnosis. A permanent partial disability award was denied.[19] Laseur appealed, but the Appeal Board held that as she was in ongoing training at the time, through a computerized accounting course, it would be premature to make a permanent partial disability award. Following this course, Laseur enrolled in a further business computer course and in 1994, she moved to Alberta and obtained employment. She continued to have chronic back pain and sought retroactive permanent partial disability benefits back to January 1991. In 1994, the Board held that her chronic pain syndrome was a non-compensable condition and rejected her claim.[20]

Laseur appealed first to the Hearing Officer and then to the Appeals Tribunal, challenging the constitutionality of the sections of the Act which had since come into force and precluded further benefits.[21] On the basis of its decision in the *Martin* case, the Tribunal found that it had jurisdiction over Charter questions and found that sections 10A, 10B(b), and 10B(c) of the Act, which barred compensation for chronic pain conditions subject to transitional provisions, violated section 15(1) of the Charter and could not be saved under section 15(2) or section 1. Discrimination was found, once again, because the distinction between types of disabilities was premised on the view that chronic pain was less valid than other injuries.[22] Applying the PMI guidelines, however, the Tribunal found that Laseur was not entitled to permanent partial disability or vocational rehabilitation benefits. The Board appealed the Charter

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18 *Id.*, at paras. 15-18.
19 *Id.*, at paras. 19-24.
20 *Id.*, at para. 27.
21 *Id.*, at paras. 24-28.
22 *Id.*, at para. 153.

decision, and Laseur cross-appealed to challenge the finding that she was not entitled to benefits.[23]

The Nova Scotia Court of Appeal decided both Martin and Laseur's appeals together. Speaking through Cromwell J.A., as he then was, the Court held that there were three main principles applicable to the question of whether the Tribunal had the jurisdiction to hear and decide Charter challenges: (1) the question was one of statutory interpretation; (2) the power to interpret and apply the Charter could not be inferred from the Tribunal's authority to interpret and apply its own enabling statute; and (3) where the authority to decide questions of law had not been expressly granted or withdrawn, it could be implied "from the scheme of the Act and the role of the tribunal".[24] The Court of Appeal rejected the Tribunal's assertion that it had the jurisdiction to decide Charter matters by virtue of its appellate role over Board decisions.[25] Instead, the Court of Appeal found that the Board did not have the jurisdiction to refuse to apply provisions of its enabling Act for Charter reasons.[26] There were also indications in the Act that the role of the Tribunal in these matters did not exceed that of the Board,[27] as it had no power to consider questions of law of its own. As such, the Court of Appeal held that the Tribunal had erred in finding the provisions of the Act unconstitutional.[28]

Although this decision on the jurisdictional issue was sufficient to resolve the appeal, the Court of Appeal also considered the substantive Charter issue. The Court found that there was differential treatment on the basis of disability.[29] It held, however, that this differential treatment was not discriminatory as it did not demean the dignity of the respondents. In so finding, the Court held that individuals with chronic pain conditions had not been historically disadvantaged in relation to the accepted comparator of individuals with disabilities which were compensable under the Act.[30] It also held that while the FRP Regulations were in part to control costs, they also simplified, clarified and made more consistent the Board's approach to chronic pain claims. This was in addition to the overall ameliorative purpose of the workers' compensa-

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23 *Id.*, at paras. 28-30.
24 *Id.*, at paras. 92-94.
25 *Id.*, at para. 127.
26 *Id.*, at para. 133.
27 *Id.*, at para. 142.
28 *Id.*, at para. 150.
29 *Id.*, at para. 235.
30 *Id.*, at para. 255.

tion scheme.[31] Finally, the Court found that the only prejudice suffered by individuals with chronic pain conditions was economic and that in most cases, these individuals were not in a worse position than they would have been in prior to the amendments.[32] Even had the Court found in favour of Martin and Laseur on the question of jurisdiction, it found that the challenged provisions were not unconstitutional.[33]

Martin and Laseur appealed this decision to the Supreme Court of Canada. In a unanimous decision, the Supreme Court overturned the Court of Appeal's decision and found both that the Appeals Tribunal had the necessary jurisdiction to deal with Charter matters and that the provisions challenged in this case were unconstitutional. On the jurisdiction question, Gonthier J., for the Court, re-emphasized that pursuant to section 52(1) of the Constitution and the principle of constitutional supremacy, the invalidity of a legislative provision did not flow from a declaration of invalidity but from the operation of section 52(1) itself.[34] As a practical matter, therefore, citizens should be able to assert their constitutional rights in the "most accessible forum available, without the need for parallel proceedings before the courts".[35] Administrative tribunals with the jurisdiction, either explicitly or implicitly granted, to decide questions of law under a legislative provision thus had concomitant jurisdiction to decide the constitutional validity of that provision.[36] This presumption could only be rebutted by showing a clear intention on the part of the legislature to exclude Charter matters from the tribunal's authority.[37] On the basis of these reasons and the particular factors highlighted by Gonthier J., the Court of Appeal erred in concluding that the Appeals Tribunal did not have the appropriate jurisdiction to hear and decide on the constitutionality of the FRP Regulations and challenged provisions.[38]

On the section 15(1) challenges, the Supreme Court held that the Court of Appeal had erred in finding that the differential treatment of individuals with chronic pain conditions was not discriminatory.[39] The Court adopted the comparator group used by the Court of Appeal and

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31 *Id.*, at para. 282.
32 *Id.*, at para. 285.
33 *Id.*, at para. 289.
34 *Martin*, *supra*, note 3, at para. 28.
35 *Id.*, at para. 29.
36 *Id.*, at para. 3.
37 *Id.*, at para. 42.
38 *Id.*, at para. 43.
39 *Id.*, at para. 5.

similarly found the FRP Regulations and the Act clearly imposed a different form of treatment on individuals such as Martin and Laseur on the basis of the category of their disability. This fell within an enumerated ground of section 15(1) of the Charter and could not be displaced by the argument that differential treatment required all members of an enumerated ground to be mistreated equally.[40] This differential treatment was found to be discriminatory because, as a blanket preclusion from long-term benefits, it paid no heed to the actual needs and circumstances of injured workers with chronic pain conditions.[41] It also ignored the needs of individuals who were permanently disabled by chronic pain despite treatment and forced those individuals with only partial impairment to fund their own vocational rehabilitation.[42] The Supreme Court also rejected the Court of Appeal's finding that the provisions in question were ameliorative. As Justice Gonthier wrote, "While the legislature's concern to efficiently allocate resources within the workers' compensation system so as to give priority to the most severe cases is laudable, it cannot serve to shield an outright failure to recognize the actual needs of an entire category of injured workers from *Charter* scrutiny."[43] Finally, the Court held that in addition to being deprived of an economic interest, individuals with chronic pain conditions were barred from other benefits, such as vocational rehabilitation, which had a profound effect on their working lives.[44] The differential treatment within the statute also reinforced assumptions that chronic pain conditions were not real and that individuals with such conditions were not "equally valued members of Canadian society".[45] For these reasons, the challenged provisions were found to be discriminatory.

The Supreme Court found that the portions of the Act in question could not be saved under section 1. The Court rejected budgetary considerations and the objective of developing a consistent response to chronic pain claims as not capable of serving as free-standing pressing and substantial objectives for the purpose of the section 1 analysis. However, it accepted the objective of avoiding fraudulent claims based on chronic pain as pressing and substantial.[46] It also found that the

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40 *Id.*, at para. 81.
41 *Id.*, at para. 97.
42 *Id.*, at para. 98.
43 *Id.*, at para. 102.
44 *Id.*, at para. 104.
45 *Id.*, at para. 105.
46 *Id.*, at para. 109.

provisions of the Act and the FRP Regulations could be rationally connected to this objective. Nonetheless, the analysis failed at the minimal impairment stage. As a blanket exclusion of chronic pain claims, the provisions made "no attempt whatsoever to determine who is genuinely suffering and needs compensation and who may be abusing the system".[47] A final objective — implementing early medical intervention and return to work for chronic pain claims — was similarly rejected because no evidence had been shown that the cut-off to benefits was necessary to achieve this objective.[48]

Since the decision of Gonthier J. and the Supreme Court of Canada, *Martin* has become a frequently cited case for the principles it established both in regard to the administrative question of when tribunals and boards have jurisdiction to consider the constitutionality of their enabling legislation, and for its approach to the substantive issues raised by the section 15 challenge. As an important precedent in those areas, *Martin* has become a strong point of reference for courts seeking guidance regarding when to extend recognition, whether it is in terms of jurisdiction or section 15, and when to limit it. In order to examine the legacy of the *Martin* decision, its impact on a number of cases will now briefly be considered.

On the administrative issue, *Martin* has been greatly influential in expanding the powers of administrative tribunals. Through application of the *Martin* factors for determining when jurisdiction has been implicitly or explicitly granted, the power to consider and apply the Constitution has been recognized in regard to a variety of additional boards, tribunals and commissions.[49] It has also been extended to other contexts, particularly to arbitrators and grievance officers involved in deciding workplace disputes.[50] In some cases, this extension has come about due to analogizing the legislative schemes of the *Martin* tribunals to the forum under consideration or through statutory interpretation in accordance with *Martin*'s guideline.[51] Overall, however, it is Justice Gonthier's assess-

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[47] *Id.*, at para. 6.

[48] *Id.*, at para. 116.

[49] See, *e.g.*, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] S.C.J. No. 34, [2003] 2 S.C.R. 585 (S.C.C.) [hereinafter "*Paul*"] (jurisdiction granted to Forest Appeals Commission); *Canada (Procureur général) c. Sam Lévy et Associés Inc.*, [2005] F.C.J. No. 208, 271 F.T.R. 77 (F.C.) (jurisdiction granted to delegates of the Superintendent of Bankruptcy); *Gascon v. Alberta (Appeals Commission for Alberta Workers' Compensation)*, [2004] A.J. No. 113, 2004 ABQB 96 (Alta. Q.B.) (jurisdiction granted to Appeals Commission for Alberta Workers' Compensation).

[50] *Morissette v. Canada (Attorney General)*, [2003] O.J. No. 4192, 29 C.C.E.L. (3d) 133 (Ont. S.C.J.); *Galarneau c. Canada (Procureur général)*, [2005] F.C.J. No. 42, 2005 FC 39 (F.C.).

[51] See, *e.g.*, *Paul*, *supra*, note 49, at para. 8.

ment that citizens must be able to assert constitutional rights in the most accessible forum which has become the most frequently repeated proposition.[52] In many ways, it is the motivating reason for the broader recognition of new forums for addressing constitutional disputes, on the basis that these forums may be more accessible and less onerous for the average individual.

The jurisdictional principles in *Martin* have also been raised and considered in the context of legislation other than the Constitution. In *Tranchemontagne v. Ontario (Director, Disability Support Program)*,[53] two individuals were denied support under the *Ontario Disability Support Program, 1997*[54] because they were found to have alcoholism and thus were not eligible under section 5(2). In reaching this decision, the Social Benefits Tribunal concluded that it did not have the jurisdiction to consider whether section 5(2) was inapplicable under the Ontario *Human Rights Code*.[55] The matter was appealed to the Supreme Court, where the appeal was allowed and the case remitted to the Tribunal for a ruling on the applicability of the section.[56] The majority of the Court repeated that, as held in *Martin*, administrative bodies are presumed to have the jurisdiction to go beyond their enabling statute when empowered to decide questions of law.[57] The Court concluded that the distinction made in *Martin* between application of the Constitution and external statutes was deliberate; the power to consider constitutional issues could be excluded while the power to consider external statutes remained.[58] As a result, the majority found that the Tribunal had the jurisdiction to consider the Code, despite the specific exclusion of jurisdiction over constitutional issues.[59]

At the same time, however, these propositions and the *Martin* factors have placed clear limits on the forums in which constitutional matters can be heard. Cases have arisen where the courts have found express limitations on the ability of administrative bodies to consider constitutional matters, often due to an exclusive grant of power to another body; without the express or implied grant of jurisdiction required by *Martin*, the courts have ruled that the forums in these cases do not have the

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52 *Martin*, *supra*, note 3, at para. 29.
53 [2006] S.C.J. No. 14, [2006] 1 S.C.R. 513 (S.C.C.).
54 S.O. 1997, c. 25, Sch. B.
55 *Id.*, at paras. 5-8. *Ontario Human Rights Code*, R.S.O. 1990, c. H.19.
56 *Id.*, at para. 53.
57 *Id.*, at para. 24.
58 *Id.*, at para. 32.
59 *Id.*, at para. 41.

power to interpret and apply the Constitution.[60] The courts have also used the factors set out in *Martin* to consider the practical abilities of administrative bodies to consider constitutional matters; for example, the Ontario Superior Court refused jurisdiction to the Consent and Capacity Board in *Ontario (Attorney General) v. Patient* on the basis that, unlike the tribunals in *Martin*, the board did not have authorization to extend its time limits and as such could not consider longer and more complex matters such as constitutional issues.[61] More broadly, however, the "accessible forum" principle has been adopted to also prohibit the raising of constitutional issues in the courts when a more accessible forum with the jurisdiction to hear such matters exists. This is particularly true where such an action would create a parallel, duplicative proceeding.[62] On this reasoning, the Federal Court stated in *Bernath v. Canada*, "The plaintiff in this proceeding has submitted no facts or submissions of law that would explain why the Charter arguments were not, could not or should not have been submitted within the grievance proceeding. … In short, the only 'injustice' cited by the plaintiff is that he has been deprived of the right to present his case before a court."[63] Under the *Martin* precedent, this "injustice" does not override the importance of ensuring that constitutional issues are not divided from a case where jurisdiction lies with an administrative body and division is unnecessary.

In many ways, the impact of *Martin* on the interpretation of section 15 and section 1 of the Charter has remained far more unsettled. In the section 15 context, most directly, *Martin* has become a precedent for ensuring that the differential treatment of individuals with chronic pain conditions is recognized as discriminatory under the enumerated ground of disability, when the treatment is harmful to human dignity and suggests that the individuals are less worthy than others.[64] More generally, it has served as precedent for closely examining instances in which legislation excludes a specific category of injury or disability from compensation. In *Plesner v. British Columbia (Hydro and Power Author-*

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[60] See *Kroon v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 857, 252 F.T.R. 257, at para. 32 (F.C.); *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, [2004] S.C.J. No. 35, [2004] 2 S.C.R. 223, at para. 26 (S.C.C.).

[61] *Ontario (Attorney General) v. Patient*, [2005] O.J. No. 631, 250 D.L.R. (4th) 697, at para. 48 (Ont. Div. Ct.).

[62] See *Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General); Zorilla v. Quebec (Attorney General)*, [2005] S.C.J. No. 16, [2005] 1 S.C.R. 257 (S.C.C.); *Desrosiers v. Canada (Attorney General)*, [2004] F.C.J. No. 1940, 2004 FC 1601 (F.C.).

[63] *Bernath v. Canada*, [2005] F.C.J. No. 1496, 275 F.T.R. 232, at para. 68 (F.C.).

[64] *Valic v. Northwest Territories and Nunavut (Workers' Compensation Board)*, [2005] N.W.T.J. No. 103, 2005 NWTSC 105 (N.W.T.S.C.).

ity),[65] for example, the British Columbia Court of Appeal analogized to *Martin* in finding that the exclusion of individuals with work-related mental stress injuries from workers' compensation entitlement was unconstitutional. The Court held that like the workers in *Martin*, these workers had been "stamped" with a label that subjected them to suspicion and barred them from receiving compensation and other benefits, such as vocational rehabilitation.[66]

In the section 1 analysis, *Martin* serves as a precedent for approaching proposed cost-cutting objectives under the first branch of the *Law* test with skepticism.[67] In the *B.C. Health Services* case, this provided grounds for rejecting the government's cost-cutting argument in response to charges that the *Health and Social Services Delivery Improvement Act* violated freedom of association guarantees by restricting collective bargaining on some matters.[68] The section 1 analysis ultimately proceeded on other proposed objectives.[69] In *N.A.P.E*, the Supreme Court considered cost-cutting as an objective in the context of legislation extinguishing a pay equity obligation on the government of Newfoundland and Labrador. In so doing, the Court reaffirmed that *Martin* stood for the principle that budgetary constraints could not normally serve as a free-standing objective for section 1 analysis. On the facts of the case, however, the Court found this to be "an exceptional financial crisis that called for an exceptional response"[70] and allowed the argument to proceed.[71]

Nonetheless, the principles and precedent set by *Martin* have become a barrier that some defendants must overcome in making out their argument. Frequently, courts have distinguished *Martin* on the basis that the program considered in that case was a complete denial of coverage for individuals with chronic pain syndromes. Individuals attempting to analogize in situations involving only a partial denial or a cap have had

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65 [2009] B.C.J. No. 856, 95 B.C.L.R. (4th) 1 (B.C.C.A.).

66 *Id.*, at para. 137.

67 *Health Services and Support – Facilities Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, [2007] 2 S.C.R. 391 (S.C.C.) [hereinafter "*B.C. Health Services*"]; *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees (N.A.P.E.)*, [2004] S.C.J. No. 61, [2004] 3 S.C.R. 381 (S.C.C.) [hereinafter "*N.A.P.E.*"].

68 *B.C Health Services*, *id.*, at para. 147. *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, c. 2.

69 *B.C. Health Services*, *id.*

70 *N.A.P.E.*, *supra*, note 67, at para. 97.

71 *Id.*

their arguments rejected.[72] In *Chevalier*, for example, the Court considered an appeal by Chevalier challenging a section of the *Income Tax Act*[73] which barred claims for the medical expense tax credit when claimed for natural, organic and herbal products, and naturopathic and osteopathic treatments. The Court held that the provision of the tax credit was not under-inclusive because it did provide partial tax relief for individuals with conditions such as fibromyalgia and chronic fatigue syndrome, which differentiated it from the total exclusion found in *Martin*.[74] Attempts to analogize *Martin* where the key issue was not a legislative distinction based on a kind of condition have also been resisted. In *Vail v. Prince Edward Island (Workers' Compensation Board)*,[75] the Prince Edward Island Court of Appeal dismissed a Charter challenge to legislation limiting the retroactivity of workers' compensation benefits. The Court held that a distinction based on the timing of the injury could not benefit from the precedent laid out in *Martin* and was not a proper foundation for a claim of discrimination.[76] Similarly, in *Toussaint v. Canada (Attorney General)*,[77] the Federal Court rejected an application for judicial review of a decision denying the request to pay the medical and hospitalization fees of Toussaint, an individual who had stayed in Canada illegally and developed severe medical problems subsequently. The Court rejected the *Martin* analogy here because it was not her medical condition which resulted in the denial of funding but her illegal status.[78] Having reviewed some of the key decisions influenced by *Martin*, we turn now to a discussion of critical disability theory.

III. CRITICAL DISABILITY THEORY

Critical disability theory is, at root, based on the notion that people with disabilities are marginalized by the physical and attitudinal barriers imposed on them by an ableist society which is not designed with their needs in mind. From buildings that preclude entry to people with mobility impairments to websites that are not accessible to those with

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[72] *Morrow v. Zhang*, [2009] A.J. No. 621, 307 D.L.R. (4th) 678 (Alta. C.A.); *Chevalier v. Canada*, [2008] T.C.J. No. 5, 2008 D.T.C. 2477 (T.C.C.) [hereinafter "*Chevalier*"].

[73] R.S.C. 1985, c. 1 (5th Supp.).

[74] *Chevalier*, *supra*, note 72, at para. 62.

[75] [2009] P.E.I.J. No. 37, 288 Nfld. & P.E.I.R. 69 (P.E.I.C.A.).

[76] *Id.*, at para. 39.

[77] [2010] F.C.J. No. 987, 323 D.L.R. (4th) 338 (F.C.).

[78] *Id.*, at paras. 80-81.

visual impairments, Canadian society is filled with barriers that marginalize people with disabilities. As Devlin and Pothier have so eloquently remarked, critical disability theory is ultimately about questions of politics, power and powerlessness.[79] Barriers occur in all aspects of life, including educational systems, the working environment, disability benefit systems, health care, transportation, housing, public buildings and negative images in the media.[80] Critical disability theory seeks to eliminate all of these barriers and thereby poses a fundamental challenge to liberal theory in which disability has been closely associated with personal misfortune, pity and tragedy.[81] In this paradigm, often referred to as the medical model, the primary focus has been on correction or medical treatment of physiological impairments of people with disabilities so that they better fit the environment. Where this is impossible, the person with a disability is frequently regarded as an object of pity and charity and consigned to a place outside the labour market where she or he must survive on a meagre income provided by social assistance programs.[82] Accordingly, Jill's inability to climb stairs because of a spinal cord injury is regarded as a medical issue which requires her to undergo extensive physiotherapy, bracing or surgery to improve her mobility. If this is unsuccessful, her limbs are regarded as pathological, and Jill is seen at best as a victim or at worst as a failure. The medical model left a powerful legacy that often resulted in abuse, the institutionalization of people with disabilities and the segregation of children with disabilities in separate schools where the primary focus was on physical

[79] Richard Devlin & Dianne Pothier, "Introduction: Toward a Critical Theory of Dis-Citizenship" [hereinafter "Devlin & Pothier"] in Dianne Pothier & Richard Devlin, eds., *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law* (Vancouver: University of British Columbia Press, 2006) [hereinafter "Pothier & Devlin"] 1, at 2.

[80] Michael Oliver, "The Social Model in Action: If I Had a Hammer" in Colin Barnes & Geoff Mercer, eds., *Implementing the Social Model of Disability: Theory and Research* (Leeds: The Disability Press, 2004) 18, at 23. To this list, one must add the many barriers created for some people with disabilities by the Internet.

[81] Devlin & Pothier, *supra*, note 79, at 9.

[82] See Marcia H. Rioux & Fraser Valentine, "Does Theory Matter? Exploring the Nexus between Disability, Human Rights, and Public Policy" in Pothier & Devlin, *supra*, note 79, 47, at 49. There are many variants of the medical model. Medical sociologists often advocated a social deviance paradigm that analyzes how individuals with disabilities cope with their deviation from the norm. One classic account is Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Englewood Cliffs: Prentice-Hall, 1963).

therapy to correct perceived deficits and the teaching of life skills rather than fostering intellectual development.[83]

In contrast, the animating theory behind critical disability theory is what has become known as the social model of disablement, as pioneered by scholars such as Michael Oliver and Colin Barnes in Britain.[84] The social model switches the focus from the physiological impairments of people with disabilities, such as Jill's inability to climb stairs because of an injury to her spine, to the removal of barriers to independence and dignity of people with disabilities created by obstacles such as staircases. Inaccessible workplaces, public services and amenities as well as attitudes are regarded as the fundamental problems that create disabilities. Geographers employing critical disability theory have identified how mass urbanization and a spatiality deeply influenced by the needs of a rising capitalism have created cities that are inaccessible and oppressive for many people with disabilities.[85] The emphasis in critical disability theory is now on removing barriers that create disabilities rather than correcting impairment. In articulating this analysis of disability as social construct, it mirrors the work of Critical Race Theory ("CRT") anti-racist legal scholars and activists who have analyzed how race has operated as a social construct that has privileged some "racial groups" over others.[86]

There is not a single paradigm for operationalizing the social model of disablement. In some cases, it can involve grassroots mobilization of movements for social justice.[87] Often, veterans who acquired physical or sensory injuries during wartime have returned as catalysts for social

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[83] See Nancy Hansen, "Spaces of Education: Finding a Place That Fits" (2005) 1:3 Rev. of Disability Stud. 22. A classic account of institutions is, of course, Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. by Alan Sheridan (New York: Vintage, 1995).

[84] Michael Oliver, *The Politics of Disablement* (London: Macmillan, 1990); Colin Barnes, Mike Oliver & Len Barton, eds., *Disability Studies Today* (Cambridge: Polity Press, 2002). See also Gary L. Albrecht, Katherine D. Seelman & Michael Bury, eds., *Handbook of Disability Studies* (Thousand Oaks, California: Sage, 2001); Jerome E. Bickenbach, *Physical Disability and Social Policy* (Toronto: University of Toronto Press, 1993).

[85] Carol Thomas, *Sociologies of Disability and Illness: Contested Ideas in Disability Studies and Medical Sociology* (London: Palgrave, 2007), at 54. For an insightful recent collection of radical geography theorists, see Kanishka Goonewardena *et al*., eds., *Space Difference, Everyday Life: Reading Henri Lefebvre* (New York: Routledge, 2008). This has also garnered increasing attention among legal scholars. See Nicholas Blomley, David Delaney & Richard T. Ford, eds., *The Legal Geographies Reader* (Oxford: Blackwell, 2001).

[86] Camille A. Nelson, "Racializing Disability, Disabling Race: Policing Race and Mental Status" (2010) 15 Berkeley J. Crim. L. 1, at 13-14. The literature on critical race theory is vast and cannot be cited comprehensively here. For an overview, see Kimberlé Crenshaw *et al.*, eds., *Critical Race Theory: The Key Writings That Formed the Movement* (New York: New Press, 1995).

[87] See Ravi Malhotra, "The Politics of the Disability Rights Movements" (2001) 31 New Pol. 65.

change that has transformed physical and attitudinal barriers for both disabled veterans and civilians with disabilities. Having sacrificed tremendously for their country and possessing a strong sense of identity, veterans were particularly well-situated to develop what some have described as an oppositional consciousness, demanding transformative change in society to improve accessibility for people with disabilities and resisting being consigned a marginal role in society without dignity.[88] Similarly, parents of children with disabilities, often stigmatized and marginalized by society including by professionals dealing with disability, were among the first to develop self-help groups to advocate for change even while articulating sentiments that were not always in accordance with what people with disabilities would themselves argue lie at the heart of the disability rights movement.[89] The Independent Living movement, originating in the activism of a group of students with disabilities in California in the early 1970s known as the Rolling Quads, established hundreds of Independent Living Centers ("ILCs") run by and for people with disabilities to encourage self-help and promotion of the idea that people with disabilities are the experts regarding their own needs and concerns.[90] People with disabilities have occasionally organized dramatic protests, most notably the lengthy sit-ins in government offices in San Francisco and other American cities in 1977 to protest the Carter Administration's failure to promulgate regulations pursuant to the 1973 *Rehabilitation Act*. After the San Francisco occupation lasted 25 days, garnering significant media coverage, the disability rights activists won a complete victory and also fostered a sense of common identity through the sit-in itself.[91]

Not surprisingly, however, many have sought to articulate their vision of equality for people with disabilities in the form of establishing

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[88] The role played by returning American veterans of the Vietnam War in sparking many modern disability rights movements in the 1960s is well known. Furthermore, the massive anti-war protests of that era also created an environment that encouraged protests by social movement actors, including disability rights activists. See Sharon K. Barnartt & Richard K. Scotch, *Disability Protests: Contentious Politics 1970-1999* (Washington: Gallaudet University Press, 2001), at 24 [hereinafter "Barnartt & Scotch"]. However, this was also true for Canadian soldiers blinded in the First World War. See Serge M. Durflinger, *Veterans with a Vision: Canada's War Blinded in Peace and War* (Vancouver: University of British Columbia Press, 2010), at 47-56.

[89] Barnartt & Scotch, *id.*, at 16. See also Patricia A. Feindel, "Narrating Resistance: A B.C. Mother's Story of Disability Rights Activism" (M.A. Thesis, Vancouver: Simon Fraser University, 2008).

[90] Samuel R. Bagenstos, "The Americans with Disabilities Act as Welfare Reform" (2003) 44 Wm. and Mary L. Rev. 921, at 987-91. There are today many ILCs across Canada.

[91] Joseph P. Shapiro, *No Pity: People with Disabilities Forging a New Civil Rights Movement* (New York: Times Books, 1993), at 64-69.

legal rights.[92] The social model is consequently reflected in the prohibition of discrimination on the basis of disability contained in the Human Rights Codes of the various provinces and in the federal jurisdiction, and the duty to accommodate people with disabilities up to the point of undue hardship.[93] It is also reflected in the admittedly reluctant inclusion of a prohibition on discrimination on the basis of disability in the equality rights provision of the Charter.[94] Its most famous and influential legal manifestation is likely the comprehensive set of regulations outlined in the *Americans with Disabilities Act* of 1990 ("ADA") which prohibits discrimination in employment, services and public accommodations.[95] The ADA has inspired disability rights movements in numerous countries around the world such as Israel and Britain.[96] More recently, the United Nations *Convention on the Rights of Persons with Disabilities* ("CRPD"),[97] which Canada ratified in 2010, prohibits discrimination by state parties in a wide range of areas, including rights that protect the person with a disability, rights that facilitate autonomy of the person with a disability, rights that enable access and participation, liberty rights, and economic, social and cultural rights.[98] In doing so, the CRPD transcends the traditional division between positive and negative rights, encompassing both civil and political rights that restrict government interference in

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[92] For a compelling study of how rights consciousness has a recursive relationship with disability identity whereby the formation of identity strengthens efforts to establish rights and the establishment of rights strengthens the salience of disability identity, see David M. Engel & Frank W. Munger, *Rights of Inclusion: Law and Identity in the Life Stories of Americans with Disabilities* (Chicago: University of Chicago Press, 2004).

[93] See, *e.g.*, Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, s. 5; *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 3. Some provinces have adopted more specific legislation protecting the rights of people with disabilities. See *Accessibility for Ontarians with Disabilities Act, 2005*, S.O. 2005, c. 11. For a discussion of the timing of the inclusion of disability as a ground of discrimination in human rights legislation in the various provinces, see Dianne Pothier, "Tackling Disability Discrimination at Work: Toward a Systemic Approach" (2010) 4:1 McGill J.L. & Health 17, at 18-19 [hereinafter "Pothier"].

[94] Charter, *supra*, note 2, s. 15. See Pothier, *id.*, at 18 (noting the last-minute amendment of s. 15 of the Charter to include disability discrimination).

[95] Pub. L. No. 101-336, § 2, 104 Stat. 328 (1991). For a good overview of the ADA, see generally Frieda Zames & Doris Z. Fleischer, *The Disability Rights Movement: From Charity to Confrontation* (Philadelphia: Temple University Press, 2001). Title I of the ADA prohibits discrimination in employment. A revised edition was released in 2011.

[96] See generally Stanley S. Herr, "Reforming Disability Nondiscrimination Laws: A Comparative Perspective" (2001-2002) 35 Mich J.L. Reform 305.

[97] G.A. Res. 61/106 (2007).

[98] See Gerard Quinn, "A Short Guide to the United Nations Convention on the Rights of Persons with Disabilities" in Gerard Quinn & Lisa Waddington, eds., *European Yearbook of Disability Law, Vol. 1* (Portland: Intersentia, 2009) 89, at 104-11. See also Deborah A. Ziegler, ed., *Inclusion for All: The UN Convention on the Rights of Persons with Disabilities* (New York: 2010, The International Debate Education Association Press).

one's liberty interests as well as socio-economic rights that require governments to act positively to empower people with disabilities.[99] One is likely to see arguments based on the CRPD in domestic courts in the coming years.[100]

What are some of the key insights that one can draw from critical disability theory for legal analysis? First, it is clear that advocates must endorse and insist upon a broad definition of disability that places the emphasis on structural barriers in society rather than on fruitless searches for physiological impairment. In the United States, many years were squandered because of frustratingly narrow rulings by courts that found employees with various medical conditions did not qualify as having disabilities under the ADA either because they were not substantially limited in major life activities or because the disabilities were judged only after mitigating measures, such as medication for diabetics, were used.[101] Consequently, litigants alleging employment discrimination did not get to make arguments on the merits, as their cases were overwhelmingly dismissed on summary judgment.[102] Although in 2008, legislation was finally enacted by Congress to amend the ADA to correct these draconian rulings and require assessment of disabilities without the ameliorative effect of mitigating measures,[103] they remain as a warning sign as to the dangers of formalist reasoning.[104]

In contrast, the Supreme Court of Canada has adopted a philosophy closer to that espoused by advocates of critical disability theory in

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[99] Michael A. Stein, "Disability Human Rights" (2007) 95 Calif. L. Rev. 75.

[100] This has already started to occur. See, *e.g.*, *Brown v. Canada (National Capital Commission)*, [2008] F.C.J. No. 927, 63 C.H.R.R. D/359, at para. 144 (F.C.), rev'd [2009] F.C.J. No. 1196, 394 N.R. 348 (F.C.A.). Malhotra and Hansen analyze the CRPD in more detail in the context of education in Ravi Malhotra & Robin F. Hansen, "The United Nations *Convention on the Rights of Persons with Disabilities* and its Implications for the Equality Rights of Canadians with Disabilities: The Case of Education" (2011) 29 Windsor Y.B. Access Just. 73.

[101] Jeannette Cox, "Crossroads and Signposts: The ADA Amendments Act of 2008" (2010) 85 Indiana 187, at 201-202 [hereinafter "Cox"].

[102] Ruth Colker, "Winning and Losing Under the Americans with Disabilities Act" (2001) 62 Ohio St. L.J. 239 (noting that 93 per cent of plaintiffs under Title I of the ADA lost in American trial courts).

[103] ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(2)–(5), 122 Stat. 3553 (to be codified at 42 U.S.C. § 12101). The ADA Amendments Act, however, does make an exception excluding some individuals using corrective eye lenses. See Cox, *supra*, note 101, at 202.

[104] See, *e.g.*, *Sutton v. United Air Lines Inc.*, 527 U.S. 471 (1999) (finding prospective airline pilots who required eyeglasses and were consequently ineligible not to be people with disabilities). For a critique of formalist reasoning in this context, see Ravi Malhotra, "The Implications of the Social Model of Disablement for the Legal Regulation of the Modern Workplace in Canada and the United States" (2009) 33 Man. L.J. 1 [hereinafter "Malhotra, 'Implications'"] (emphasizing need for greater worker control of the workplace to instantiate the social model).

Montreal and *Boisbriand*.[105] In that pair of cases, the Court ruled that actual functional limitations were not required to meet the definition of handicap in Quebec's human rights legislation.[106] In *Montreal*, the municipality refused to hire a gardener at the Montreal Botanical Garden because she had scoliosis, even though this condition had absolutely no impact on her ability to perform the job. A police officer was also not hired because of anomalies in his spinal column even though it had no impact on his ability to do the job.[107] In *Boisbriand*, a police officer with asymptomatic Crohn's Disease was dismissed from his employment because the employer wanted to minimize the risk of future absenteeism even though there was no impact on current performance.[108] In finding discrimination on the part of the respective employers in both cases, the Supreme Court embraced the social model to some extent.[109] A robust critical disability theory must adopt a broad definition of disablement that puts the focus on the political choices that marginalize people with disabilities first. However, we are also clear that this analysis has defined limits based on available evidence. We do not advocate a universalist framework that simply regards people with disabilities at one extreme pole of a continuum of abilities that stretches across the entire population.[110]

Second, it is imperative that legal analysis fully acknowledge the perspective of the human rights claimant with a disability and thereby challenge standard workplace norms.[111] While not perfect, the *Meiorin* test has made some progress toward this ideal, albeit in the context of gender rather than disability discrimination. In *Meiorin*, the Supreme Court of Canada crafted a test to determine whether an employer's *prima facie* discriminatory standard constituted a *bona fide* occupational requirement ("BFOR"). The test has three prongs: (1) whether the employer adopted the standard for a purpose rationally connected to job

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[105] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)* [hereinafter "*Montréal*"]*; Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] S.C.J. No. 24, [2000] 1 S.C.R. 665 (S.C.C.) [hereinafter "*Boisbriand*"].

[106] *Id.*, at para. 71.

[107] *Id.*, at para. 3..

[108] *Id.*

[109] *Id.*, at paras. 85-86.

[110] But see Jonathan Penney, "A Constitution for the Disabled or a Disabled Constitution? — Toward a New Approach to Disability for the purposes of Section 15(1)" (2002) 1 J.L. & Equality 83.

[111] See Malhotra, "Implications", *supra*, note 104 (emphasizing need for greater worker control of the workplace to instantiate the social model).

performance; (2) whether the employer adopted the standard in an honest and good faith belief that it was necessary for the fulfilment of that purpose; and (3) whether the employer demonstrated that the standard was reasonably necessary. To demonstrate the standard is reasonably necessary, the employer must show that it is impossible to accommodate employees with the characteristics of the claimant without experiencing undue hardship.[112] Ms. Meiorin was a forest firefighter who had clearly performed her job well for several years. The British Columbia government then introduced a series of tests including an aerobics test that required firefighters to run 2.5 kilometres within a specific time.[113] Ms. Meiorin passed all the tests except the aerobics test, which she failed four times, and was consequently laid off.[114] Her union filed a grievance against her employer. The evidence indicated that the aerobics test was not essential to the performance of the job and that the vast majority of women were incapable of meeting this aerobics standard, even after training, so that the standard effectively excluded most women from the workplace.[115] Consequently, the arbitrator found that Ms. Meiorin's human rights had been violated. On appeal, the British Columbia Court of Appeal held that since Ms. Meiorin had been individually tested and the aerobic standard was necessary for the safe and efficient performance of the work, the arbitrator's decision ought to be quashed.[116]

On further appeal, the Supreme Court, speaking through McLachlin J., as she then was, held that, applying the new test it proposed in this decision, the standard was not consistent with human rights legislation promoting the equality of women. In proposing the new *Meiorin* test, the Court abolished the arbitrary distinctions that previously governed between direct discrimination, where an employer prohibits individuals who are members of a protected ground, and adverse effect discrimination, where a neutral rule disproportionately affects a protected group.[117] In the traditional bifurcated approach, complainants alleging adverse effect discrimination were only entitled to accommodation up to the point of undue hardship. In contrast, complainants alleging direct discrimination could have, where the evidence warranted, the entire

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[112] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU (Meiorin Grievance)*, [1999] S.C.J. No. 46, [1999] 3 S.C.R. 3, at para. 54 (S.C.C.) [hereinafter "*Meiorin*"].

[113] *Id.*, at para. 1.

[114] *Id.*, at paras. 1, 10.

[115] *Id.*, at paras. 11-12.

[116] *Id.*, at para. 14.

[117] *Id.*, at para. 24.

standard struck down as discriminatory.[118] However, if the evidence convinced a decision-maker that the standard was a BFOR, then there was no duty to accommodate at all.[119]

Moreover, any given rule could be interpreted as constituting either adverse effect or direct discrimination. For instance, requiring all employees to take a mandatory pregnancy test obviously discriminates against women but might be characterized as a neutral test that only incidentally affects those employees who become pregnant.[120] Consequently, the Court regarded the new three-part test as analyzing workplace rules with a clear framework that probes the purposes and effects of the standard. In doing so, the Court better addresses systemic discrimination by challenging, up to a point, existing barriers that are embedded in the practice of workplaces.

The Court posed six questions that decision-makers should ask themselves in evaluating whether a workplace standard is legitimate and the employer has complied with human rights legislation. First, one must consider whether the employer has explored alternative methods of accommodation that do not discriminate against existing or prospective employees, such as individual testing against a more sensitive standard. Second, if alternative standards were investigated and could accomplish the employer's goals, one must determine why they were not adopted. Third, one must consider if it is essential that each and every employee meet the standard or if an alternative approach that respected group or individual differences could still allow the employer to accomplish objectives such as workplace productivity. Fourth, one must explore whether there is a way to rebundle or restructure the position in question that is less discriminatory while still achieving the employer's purpose. Fifth, one must consider whether the standard is appropriately structured and defined so that the desired qualification is attained without placing an undue burden on the person or group to whom the standard applies. Finally, one analyzes whether other parties, such as the employees and any union, who are obliged to assist in the search for possible accommodations, have fulfilled their roles.[121] Although written in the context of workplace standards, the underlying principle of placing the person with

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[118] *Id.*, at para. 30.

[119] Colleen Sheppard, "Of Forest Fires and Systemic Discrimination: A Review of *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*" (2001) 46 McGill L.J. 533, at 538 [hereinafter "Sheppard"].

[120] *Meiorin*, *supra*, note 112, at para. 27.

[121] *Id.*, at para. 43.

the disability at the heart of the analysis allows one to use these principles to challenge unbending rules in other areas of the law, including the intricate policies that govern workers' compensation systems.

At the same time, one must deepen the analysis to better grasp the complexities of the situation. As Sheppard has emphasized, the creation of the *Meiorin* test establishing a single, unified test for evaluating whether a standard is a BFOR in no way means that the concept of adverse effect discrimination ceases to be of central importance to anti-discrimination law.[122] In fact, it is critical to be sensitive to the different ways a neutral standard may disproportionately affect people with disabilities or other protected groups, while recognizing that discrimination likely manifests itself differently for each protected ground. Given that, unlike women, people with disabilities are a very small proportion of Canadians overall and many disabilities are highly specific in their effects on a particular individual, one has to be careful to ensure that appropriate comparator groups adequately protect the interests of people with disabilities.[123] In short, unless the person with a disability is placed at the centre of the analysis, the danger is too great that her or his views will be marginalized in the legal analysis as too expensive or too disruptive of the status quo. Having outlined two major implications of critical disability theory for legal analysis, we turn in Part IV to demonstrate how Justice Gonthier's judgment in *Martin* epitomized the best of this tradition.

IV. *NOVA SCOTIA (WORKERS' COMPENSATION BOARD) V. MARTIN* AND CRITICAL DISABILITY THEORY

Justice Gonthier's decision in the Supreme Court of Canada in *Martin* marks one of the most important moments in the Court's disability discrimination jurisprudence under section 15.[124] Few legal scholars have

[122] Sheppard, *supra*, note 119, at 541-42. However, we would dispute her claim that disability adverse effect discrimination cases entail "virtually absolute exclusion". See *id.*, at 545. Some workplace rules may well exclude some people with mobility impairments or chronic pain and not others.

[123] Dianne Pothier, "Legal Developments in the Supreme Court of Canada Regarding Disability" in Pothier & Devlin, *supra*, note 79, 305, at 313-14.

[124] Due to space constraints, our analysis will be focused solely on the s. 15 issue and not the administrative law question on whether an administrative tribunal with the power to decide questions of law may apply the Charter to its enabling statute.

analyzed it from the perspective of disability rights.[125] It is instructive to begin our analysis with an explanation of the legislation's definition of chronic pain which triggered the entry of the workers' compensation claimant, so diagnosed, into the limited assistance program that was automatically terminated after four weeks.[126] The FRP Regulations state that chronic pain is defined as:

> (a) continuing beyond the normal recovery time for the type of personal injury that precipitated, triggered or otherwise predated the pain; or
>
> (b) disproportionate to the type of personal injury that precipitated, triggered or otherwise predated the pain,
>
> and includes chronic pain syndrome, fibromyalgia, myofascial pain syndrome, and all other like or related conditions, but does not include pain supported by significant, objective, physical findings at the site of the injury which indicate that the injury has not healed.

What is clear at the outset is that the definition itself is permeated by the medical model. The definition of chronic pain in the Regulations is predicated on the idea that there is a normal recovery time for a given personal injury that can serve as a boundary to scientifically and accurately distinguish between chronic and non-chronic pain. Yet in fact, as we demonstrated in Part III, an individual's physiological impairment is transformed into disability as a result of the interaction between the impairment and the physical and attitudinal environment.[127] Consequently, response to pain will inevitably be affected by her or his interaction with the environment: a worker who has a more arduous job where the nature of the work exacerbates the injury and has a difficult and inflexible employer may well find it more difficult to recover than a worker with a relatively sedentary position and a highly creative boss. These are explicitly political questions that require political solutions, such as accommodation and the rebundling of work duties as necessary.[128] Furthermore, the distinction based on "significant, objective

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[125] One exception is Ena Chadha & Laura Schatz, "Human Dignity and Economic Integrity for Persons with Disabilities: A Commentary on the Supreme Court's Decisions in *Granovsky* and *Martin*" (2004) 19 J.L. & Soc. Pol'y. While Chadha and Schatz have attempted a critique of *Martin* using theories of disability, it is in the context of a group case comment including an analysis of *Granovsky v. Canada.* See *infra*, note 164. Relatively few pages are devoted solely to *Martin*.

[126] *Martin*, *supra*, note 3, at para. 2.

[127] See *supra*, note 79, and accompanying text.

[128] See Michael Lynk, "Disability and the Duty to Accommodate: An Arbitrator's Perspective" [2001-02] Lab. Arb. Y.B. 51.

physical findings" contained in the Regulations merely begs the question because a social model understanding of disablement would accept that people with chronic pain conditions have genuine pain that truly impacts their lives based on their self-understanding of their condition.

In sharp contrast, the FRP Regulations enacted pursuant to the *Workers' Compensation Act*[129] not only limit any assistance to individuals with chronic pain to four weeks but also maintain the standard exclusion in workers' compensation legislation precluding access to tort litigation in the courts against employers that would facilitate additional recovery where an employee was able to demonstrate that an employer was negligent. Furthermore, the Regulations purport to exclude individuals with chronic pain from the duties to re-employ and accommodate that apply to all other workers covered by workers' compensation legislation.[130] Such measures amount to the very antithesis of critical disability theory and the social model.

In keeping with the constitutional jurisprudence operative at the time, the Court applied the *Law* test to analyze the section 15 claim that workers with chronic pain were discriminated against in a manner that was inconsistent with their Charter rights. The three-part *Law* test asks:

> First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage? The second and third inquiries are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1).[131]

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[129] *Supra*, note 4.

[130] *Martin*, *supra*, note 3, at paras. 67-68. Section 28 of the Act maintains the bar against recourse in the courts through tort litigation for claimants with chronic pain. See *id.*, s. 28.

[131] *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497, at para. 39 (S.C.C.) [hereinafter "*Law*"].

Justice Gonthier found that the appropriate comparator group was workers without chronic pain who were eligible for workers' compensation for their work-related injuries and concluded that the restrictive regime mandated by the Regulations, in fact, created differential treatment between the two groups.[132] While ideally people with disabilities would be compared with able-bodied people in order to further the larger principles of equality theory, we agree that this pragmatic approach makes sense, especially as a broader comparator group, including those injured outside the workplace, risks raising questions about negligence that the claimants on these facts were unlikely to be able to answer.[133]

Second, Gonthier J.'s reasons capably rejected the arguments by the Board that there was no discrimination on an enumerated or analogous ground, as required by the second branch of the *Law* test, because both the members of the comparator group and the claimants have disabilities.[134] Justice Gonthier correctly observed that this argument has no merit. He commented that unlike other enumerated grounds, disability was distinctive because of the "widely divergent needs, characteristics and circumstances of persons affected by them".[135] He also stated that:

> In many cases, drawing a single line between disabled persons and others is all but meaningless, as no single accommodation or adaptation can serve the needs of all. Rather, persons with disabilities encounter additional limits when confronted with systems and social situations which assume or require a different set of abilities than the ones they possess. The equal participation of persons with disabilities will require changing these situations in many different ways, depending on the abilities of the person. The question, in each case, will not be whether the state has excluded all disabled persons or failed to respond to their needs in some general sense, but rather whether it has been sufficiently responsive to the needs and circumstances of each person with a disability. If a government building is not accessible to persons using wheelchairs, it will be no answer to a claim of discrimination to point

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[132] *Martin*, *supra*, note 3, at paras. 71-74.

[133] *Id.*, at para. 72 (noting that there was no evidence that the claimants had acquired their injuries as a result of the negligence of other parties). A full philosophical defence of why able-bodied people ought to be the starting point for comparator group analysis is beyond the scope of this paper, but we submit that such an approach instantiates equality more seriously than the alternatives.

[134] *Id.*, at paras. 75-83.

[135] *Id.*, at para. 81.

> out a TTY (teletypewriter) telephone for the hearing impaired has been installed in the lobby.[136]

In making these brief comments, Gonthier J. embraced two important insights that derive from critical disability theory generally. First, these comments displayed a sophisticated understanding of the social model's assertion that it is structural barriers and systems that create disabilities. Despite the fact that the implications of the social model are in fact relatively radical in their prescriptions for transforming liberalism, Gonthier J. did not flinch from identifying societal barriers that must be rectified to ensure equality rights for people with disabilities, even though he recognizes that the state is typically granted a margin of appreciation when highly complex socio-economic policies are being evaluated by the courts.[137] Second, he acknowledged the need for an individualized approach that focuses centrally on the needs of the person with a disability. As he pointed out, one type of accommodation may simply be completely irrelevant in the case of another disability.[138] He built on earlier precedents in sexual harassment law that stand for the proposition that a respondent need not have sexually harassed every woman in a workplace in order for a finding to be made that he has sexually harassed a particular woman.[139]

On the third branch of the *Law* test, Gonthier J. catalogued the four contextual factors in play when considering whether the challenged distinction discriminates in a substantive sense. They are:

(1) the presence of pre-existing disadvantage, vulnerability, stereotyping or prejudice directed at this person or group;
(2) the correspondence, or lack thereof, between the ground upon which the differential treatment is based and the actual needs, characteristics and circumstances of the affected person or group;
(3) the ameliorative purpose or effect of the legislation upon a more disadvantaged group; and
(4) the nature of the interest affected by the legislation.[140]

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[136] *Id.*

[137] *Id.*, at paras. 81-82.

[138] *Id.*, at para. 81. After this paper was written, we found that Tess Sheldon recently made a similar point in passing about *Martin*. See C. Tess Sheldon, "It's Not Working: Barriers to the Inclusion of Workers with Mental Health Issues" (2011) 29 Windsor Y.B. Access Just. 163, at 167.

[139] *Id.*, at para. 76 (discussing Supreme Court of Canada sexual harassment jurisprudence).

[140] *Law*, *supra*, note 131, at paras. 63-75.

The Court rejected the notion that claimants with chronic pain must demonstrate relative disadvantage, such as greater stereotyping, with respect to others with disabilities in order to satisfy the first contextual factor. Justice Gonthier correctly observed that claimants who are alleging discrimination on a protected ground need not demonstrate such relative disadvantage. In so doing, Gonthier J. demonstrated an appreciation for the subtlety and diversity of disability discrimination claims, a central tenet of critical disability theory. He noted that to hold otherwise might mean the defeat of disability rights claims with respect to impairments that require significant accommodation and yet have not been subjected to widespread stereotyping.[141] Yet such examples abound, including the complex accommodations required for people with multiple chemical sensitivity ("MCS") syndrome, a condition most people have never even heard of.[142] In any case, Gonthier J. correctly noted that the medical evidence on this case in fact demonstrated that there was stereotyping on the part of workers' compensation officials of the specific claimants, including commentary that clearly implied that chronic pain claimants were regarded as people with psychological problems and judged on the basis of stereotypes rather than the individual merits of their file.[143] Yet the origins of chronic pain syndrome are entirely irrelevant because both psychiatric conditions and physical impairments are clearly protected under the equality provision in section 15. Justice Gonthier specifically observes that people with mental disabilities have encountered stereotyping and historic disadvantage.[144]

With respect to the second contextual factor, Gonthier J. concluded that the respondent had failed to demonstrate that there was correspondence between the impugned measures in the FRP Regulations and the actual needs, characteristics and circumstances of the affected group.

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[141] *Martin*, *supra*, note 3, at para. 89:

> It can be no answer to a charge of discrimination on that basis to allege that the particular disability at issue is not subject to particular historical disadvantage or stereotypes beyond those visited upon other disabled persons. Indeed, the contrary position could potentially relieve the state from its obligation to accommodate or otherwise recognize many disabilities that, despite their severity, are not subject to widespread stereotypes or particular historical disadvantage. Such a result would run contrary to the very meaning of equality in that context and cannot be condoned.

[142] See Amy B. Spagnole, "The MCS Controversy: Admissibility of Expert Testimony Regarding Multiple Chemical Sensitivity under the *Daubert* Regime" (1999) 4 Suffolk J. Trial & App. Adv. 219, at 247-49 (noting that people with MCS are entitled to accommodations under the ADA according to a handbook jointly produced by the Department of Justice and the Equal Employment Opportunity Commission).

[143] *Martin*, *supra*, note 3, at para. 90.

[144] *Id.*

Rather, the Regulations in fact demeaned the dignity of workers with chronic pain conditions because it provided only a four-week rehabilitation program while barring access to either compensation through tort litigation or vocational rehabilitation services that would allow a fresh start to a worker with a chronic pain condition. Although the Court acknowledged that there was evidence that suggested a rapid return to work generated real success for workers with pain conditions, it concluded that the policy regime was simply too harsh in cases where the return-to-work paradigm failed.[145] Workers with chronic pain conditions who reached the end of the four-week rehabilitative program were simply cut off from any income support or vocational rehabilitation and left to deal with their disabilities on their own, even if their pain condition prevented them from earning a living. The regime strongly implied they were simply unworthy malingerers.[146]

In reaching this conclusion, Gonthier J. applied another central principle of critical disability theory: the need for an individualized analysis rather than basing decisions on group stereotyping. Contrasting the Board's conduct unfavourably with the respondent in the Supreme Court's decision in *Winko v. British Columbia (Forensic Psychiatric Institute)*,[147] Gonthier J. maintained that the Regulations generalized about the circumstances of people with chronic pain without providing any mechanism for individualized assessment.[148] In *Winko*, the Court concluded that section 672.54 of the *Criminal Code*,[149] which provides for detention in a hospital of an accused upon a verdict of not criminally responsible on account of a mental disorder, did not violate section 15 of the Charter precisely because the provision envisions individualized assessment of an accused's circumstances.[150]

With respect to the third contextual factor, the Court flatly rejected the idea that the Regulations were designed to assist a more disadvantaged or vulnerable group. While acknowledging that some people with workplace injuries undoubtedly had more severe injuries than many workers with chronic pain conditions, Gonthier J. rejected any suggestion that this granted deference to the legislature to craft a system that entirely excluded one sub-class of people with disabilities and shield this

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145 *Id.*, at para. 97.
146 *Id.*
147 [1999] S.C.J. No. 31, [1999] 2 S.C.R. 625 (S.C.C.).
148 *Martin*, *supra*, note 3, at para. 99.
149 R.S.C. 1985, c. C-46.
150 *Martin*, *supra*, note 3, at para. 99.

decision from Charter scrutiny.[151] In so ruling, the Court rightly recognized the need to not become entangled in debates around disability hierarchy that pit one group of people with disabilities, generally those with less understood disabilities, against another.[152] Finally, with respect to the fourth contextual factor relevant for a determination of substantive discrimination, Gonthier J. held that the interest at stake could not be regarded as purely or even primarily economic but that it went to the heart of the dignity interests of injured workers.[153] As Gonthier J. noted, work is a fundamental aspect of a person's identity and therefore an integral part of a person's sense of self-worth and sense of dignity.[154] Consequently, the draconian provisions were found to infringe the rights of workers with pain conditions to establish their eligibility for workers' compensation benefits through individualized assessment, thereby damaging their dignity by leaving the general public with the impression that they are not equally valued members of the community.[155] Taken as a whole, the Court established that there was a section 15 violation.[156]

On the question of section 1, Gonthier J. concluded that there were four main justifications for the legislation: (1) to maintain the viability of the Accident Fund, which had accumulated debts; (2) to establish a consistent administrative response to complex pain claims where both the causal relationship between the pain and a workplace injury and the quantum of money that ought to be awarded for a given injury were difficult to establish; (3) to stop fraudulent claims in an area where claims where often highly subjective; and (4) to implement early return to work programs that some experts regarded as the most likely treatment plan to re-integrate workers with pain conditions to the workforce.[157] The Court rejected the notion that obtaining cost savings alone could be a pressing and substantial objective for a regime that violated the equality rights of workers with disabilities.[158] Similarly, Gonthier J. found that an

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[151] *Id.*, at para. 102.

[152] See Judith Mosoff, "Lost in Translation? The Disability Perspective in *Honda v. Keays* and *Hydro-Quebec v. Syndicat*" (2009) 3 McGill J.L. & Health 137, at para. 20.

[153] *Martin*, *supra*, note 3, at para. 104.

[154] *Id.* For further analysis, see the seminal piece, Vicki Schultz, "Life's Work" (2000) 100 Colum. L. Rev. 1881.

[155] *Martin*, *id.*, at para. 105.

[156] *Id.*, at para. 106.

[157] *Id.*, at para. 108.

[158] *Id.*, at para. 109. The Court specifically concluded, in our view correctly, that there was no evidence that claims from workers with pain conditions alone threatened the financial viability of the plan. This would, in any case, only be relevant under the minimal impairment branch once the respondent had been able to demonstrate another valid purpose.

efficient administrative system could not, in itself, be a pressing and substantial objective.[159]

Although the Court concluded that the third justification, preventing fraudulent claims, was pressing and substantial and that the regime enacted by the Nova Scotia legislature was rationally connected to the goal of preventing fraud by its extreme streamlining of the process for workers with chronic pain conditions, Gonthier J. went on to conclude that the strict legislative approach was not minimally impairing.[160] As he bluntly stated, "one is tempted to say that they solve the potential problem of fraudulent claims by preemptively deeming all chronic pain claims to be fraudulent".[161] In reaching this conclusion, the Court took note of the fact that many other provinces had not enacted such sweeping restrictions with respect to workers claiming benefits for chronic pain.[162] Thus, the section 15 violation was not saved by section 1.[163] The decision remains one of the most important disability rights decisions to date. While earlier Supreme Court of Canada disability discrimination cases have been disappointing,[164] one can only hope that the clarity and vision of Justice Gonthier's analysis will be followed in the future. In the paper's next section, we critique the Nova Scotia Court of Appeal's recent holding in *Downey* that the 6 per cent maximum rating for pain disorders in the Nova Scotia 2004 Chronic Pain Regulations adopted by the Nova Scotia legislature as a response to the decision in *Martin* does not violate section 15 of the Charter.

V. MOVING FORWARD: *MARTIN*'S LEGACY AND THE *DOWNEY* DECISION

In *Downey*, the Nova Scotia Court of Appeal, speaking through Cromwell J.A., as he then was, unanimously held that the 6 per cent maximum rating for chronic pain related impairments, unlike other injuries which did not have a cap of 6 per cent, contained in the 2004 Chronic Pain Regulations did not violate section 15 of the Charter.[165]

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159 *Id.*, at para. 110.
160 *Id.*, at paras. 110-111.
161 *Id.*, at para. 112.
162 *Id.*, at para. 113.
163 *Id.*, at paras. 6-7.
164 *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] S.C.J. No. 29, [2000] 1 S.C.R. 703 (S.C.C.) (finding eligibility requirements for CPP benefits with respect to mandatory recency of contributions do not violate s. 15).
165 *Downey*, *supra*, note 8.

Terry Downey was injured while working as a forklift operator, which resulted in both pain impairments and non-pain impairments.[166] He was retroactively assigned the maximum pain rating permitted under the 2004 Regulations upon their passage: 6 per cent.[167] He claimed that the 2004 Regulations imposed a cap of 6 per cent, which discriminated against him in violation of section 15. The Workers' Compensation Appeals Tribunal ("WCAT") found that the appropriate comparator group was "injured workers subject to the Act who do not have chronic pain and who are eligible for permanent benefits as a result of a permanent medical impairment".[168] The Tribunal went on to find, referring to the Supreme Court's decision in *Martin*, that Downey was subject to differential treatment compared to the comparator group on the protected ground of disability.[169] However, the Tribunal concluded that there was no discrimination because the Chronic Pain Regulations corresponded to the needs of workers with chronic pain.[170]

On judicial review, the Court of Appeal held that the system used to calculate pain ratings was not less reflective of Downey's impairments or disabilities compared to workers who had non-pain injuries and that therefore there was no Charter violation.[171] The needs, capacities and circumstances of people with pain conditions were found by the Court to have been addressed by the 2004 Pain Regulations no worse than the Act's treatment of individuals with non-pain conditions.[172] It stressed that the permanent impairment ratings used to evaluate impairment losses for the purposes of workers' compensation claims in the case of non-pain conditions, known as the Guidelines for the Assessment of Permanent Medical Impairment, did not reflect in any way disabilities or the effect of the impairment on the claimant's ability to earn a living. Rather, it simply reflected degree of impairment.[173] Consequently, a pianist who

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[166] *Id.*, at para. 1. He was awarded a 15 per cent permanent impairment rating, resulting in permanent partial disability benefits, apart from his pain disorder.

[167] *Id.* Workers with pain conditions are awarded either 6 per cent or 3 per cent ratings depending on whether the pain is rated substantial or slight.

[168] *Id.*, at para. 47.

[169] *Id.*, at para. 49.

[170] *Id.*, at para. 53.

[171] *Id.*, at paras. 75-76 . Note that the Court of Appeal found that the test in *R. v. Kapp*, [2008] S.C.J. No. 42, [2008] 2 S.C.R. 483 (S.C.C.) was substantively similar to the *Law* test.

[172] *Id.*, at para. 80.

[173] *Id.*, at para. 32 (noting that "[t]he critical point is that the clinical rating approach which resulted in impairment ratings did not, for any injured worker — with or without chronic pain — produce a permanent partial disability benefit which reflected in any realistic way the worker's disability in the sense of the extent of the interference with the worker's ability to earn income").

had lost the use of part of her finger would receive the same impairment rating as a trucker with the same injury even though the impact on the pianist's ability to earn a living was clearly far greater.[174]

Moreover, Cromwell J.A. ruled that there was insufficient information on the record to determine how one type of injury is assessed compared with another injury.[175] The decision stressed that the outcomes are not intuitive. For instance, the removal of an eye is rated at 18 per cent, while the loss of a testicle resulting in sterility is rated at 2 per cent.[176] Other types of non-pain injuries also have arbitrary caps under the Regulations.[177] As the Court of Appeal concluded that there was no Charter violation, it did not engage in a section 1 analysis.[178]

We submit that the telling reasons of Cromwell J.A. demonstrate a formalist retreat from the thoughtful analysis of Gonthier J. in *Martin*. By narrowly ruling that the section 15 claim was not met because of a lack of evidence on the record and because the system in general has a capricious quality to it, the Court of Appeal did not fully engage with the deep question of whether the workers' compensation system as a whole is consistent with Charter values. Given that the Court of Appeal clearly recognizes that impairment ratings, in both the pain and non-pain contexts, have a highly arbitrary quality, it raises the question as to whether the entire system does not systematically favour some disabilities rather than others. Individuals with chronic pain, which is particularly difficult to diagnose, might be especially disadvantaged as a result.[179]

The central insight of critical disability theory and the social model is to sever analysis of physiological impairment and disability, and yet the workers' compensation system is predicated on the evaluation of impairment ratings which appear to be meaningless. Ironically, the Court of Appeal is cognizant of this in its recognition of the distinction between impairment and disability.[180] This is a good starting point. However, we would submit that it is essential to go deeper and, in a future case where there is a more robust factual record, challenge the underpinnings of the

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[174] *Id.*, at para. 27.
[175] *Id.*, at paras. 77-81.
[176] *Id.*, at para. 16.
[177] *Id.*, at para. 81.
[178] *Id.*, at para. 83.
[179] See Mel Cousins, "Chronic Pain, Impairment, Workers Compensation and Equality: *Downey* v. *Nova Scotia (Workers' Compensation Appeal Tribunal)*" (2011) 89 Can. Bar Rev. 191, at 206-207.
[180] *Downey*, *supra*, note 8, at para. 11.

ratings system. The decision in *Meiorin* points the way for paths to challenge regimes and standards that disable workers with disabilities.[181] We need a new system that takes the perspective and life experiences of workers with chronic pain conditions seriously rather than dismissing them as cranky malingerers. Most likely, this will require intervention from the legislative branch to craft a new system that more accurately reflects the impact of impairments on the worker's life. However, an arbitrary cap of 6 per cent in no way reflects the very serious effects that a pain injury may have on a worker's ability to earn a living and thrive in the community. As a society, we can and should do better. Returning to the wisdom of Justice Gonthier's reasons in *Martin* illuminates the path forward for workers with pain conditions and other disabilities.

VI. CONCLUSION

The vexing issue of fairly compensating people with chronic pain conditions is multifaceted and requires collaboration from all stakeholders. Unions, employers, injured workers' associations and disability rights advocates need to work together to find effective solutions and to lobby legislatures to craft systems that will be efficient and also render justice to injured workers. One essential task in that long-term project is translating the lessons of critical disability theory into clear and practical legal principles that can help administrative tribunals, judges and employers to understand the needs of workers with chronic pain conditions. In our view, this requires creating a workers' compensation system that will link compensation to the impact of a given injury on the ability of a worker to do her or his job. As noted in Part V, the formalist direction, as exemplified by decisions such as *Downey*, is misguided. Instead, we advocate an approach that is both flexible and fair. We submit that an important starting point and building block toward that goal is Justice Gonthier's forthright reasons in *Martin*.

[181] *Meiorin*, *supra*, note 112, and accompanying text.