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Chronic pain, impairment, workers compensation and equality: Downey v Nova Scotia (Workers Compensation Appeals Tribunal)

Mel Cousins, *Glasgow Caledonian University*

Chronic Pain, Impairment, Workers Compensation and Equality: *Downey v. Nova Scotia (Workers Compensation Appeals Tribunal)*

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This note examines the issue of the treatment of chronic pain under workers compensation law in the context of the right to equality set out in section 15 of the *Canadian Charter of Rights and Freedoms*.[1] Workers compensation is under provincial jurisdiction and systems of workers compensation vary significantly from province to province. In the case of *Nova Scotia (Workers' Compensation Board) v. Martin*, the Supreme Court of Canada ruled that the exclusion of compensation for chronic pain from the general Nova Scotia workers compensation scheme was in breach of section 15 of the *Charter*.[2] Following this decision, Nova Scotia enacted new legislation which brought chronic pain within the general scheme but subject to a limit of the amount of compensation payable. These provisions were challenged in the *Downey* case but have been upheld by the Nova Scotia Workers Compensation Appeals Tribunal (WCAT)[3] and by the Nova Scotia Court of Appeal in *Downey v. Nova Scotia (Workers Compensation Appeals Tribunal)*.[4] Although the case itself directly concerns only the treatment of chronic pain-related

* School of Law and Social Sciences, Glasgow Caledonian University

1 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*]. Note that federal and provincial human rights legislation may also be relevant as it has been held that workers compensation falls within the concept of "services" under such legislation; see *Saskatchewan (Workers' Compensation Board) v. Saskatchewan (Human Rights Commission)* (1998), 169 Sask.R. 316, 163 D.L.R. (4th) 336 (Q.B.); *O'Quinn v. Nova Scotia (Workers' Compensation Board)* (1995), 147 N.S.R. (2d) 28, 131 D.L.R. (4th) 318 (C.A.); *Saskatchewan (Human Rights Commission) v. Saskatchewan (Department of Social Services)* (1988), 72 Sask.R. 115, 52 D.L.R. (4th) 253 (C.A.); *Alberta (Minister of Human Resources and Employment) v. Weller*, 2006 ABCA 235, 273 D.L.R. (4th) 116. The British Columbia (BC) chronic pain policy is currently under challenge before the British Columbia Human Rights Tribunal; see *British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)*, 2010 BCCA 77, [2010] B.C.J. No. 259 (QL).

2 2003 SCC 54, [2003] 2 S.C.R. 504 [*Martin*].

3 WCAT 2006-109-AD (10 August 2006), online: Nova Scotia Workers Compensation Appeals Tribunal <www.gov.ns.ca/wcat/documents/2006-109-AD.pdf> [*Downey* (WCAT)].

4 2008 NSCA 65, 267 N.S.R. (2d) 364, leave to appeal to the S.C.C. refused, [2008] S.C.C.A. No. 405 [*Downey*].

impairment, it is suggested that the equality provisions of the *Charter* may have broader implications for the general scheme of compensation based on impairment.

Part 1 of this article sets out the context, while part 2 highlights the key points in the Supreme Court decision in *Martin*. The note goes on in parts 3 and 4 to outline the legislative response and the decisions of WCAT and the Nova Scotia Court of Appeal. Part 5 discusses the implications of the *Charter* for the Canadian workers compensation codes and the possible broader consequences for the system of assessment of impairment under those codes.

1. Chronic Pain and Workers Compensation

Historically workers compensation legislation provided compensation for "injury by accident" (or industrial diseases not caused by a specific accident).[5] Thus the focus tended to be on "physical" injuries caused by "physical" accidents.[6] "Mental" injuries and impairments without a clear medical link to a physical injury proved difficult to integrate into this approach. To a certain extent, those funding workers compensation were concerned that such injuries were less easy to verify. Thus many states in the United States (US) have excluded so-called "mental-mental" injuries – psychological injuries caused by psychological stress or trauma without accompanying physical injury – from compensation under their workers compensation codes.[7] Similarly, some Canadian jurisdictions have limited compensation for "mental stress."[8] Chronic pain has also

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5 In the United Kingdom (UK), see the *Report of the Departmental Committee on Compensation for Industrial Diseases* (Great Britain: Home Dept. Committee on Compensation for Industrial Diseases, 1907). For Canada see Sir William Meredith, *Final Report on Laws Relating to the Liability of Employers to Make Compensation to their Employees for Injuries received in the Course of their Employment which are in force in other Countries, and as to how far such laws are found to work satisfactorily* (Toronto: L.K. Cameron, 1913).

6 Of course the concepts of "injury" and "accident" are by no means self-evident either but this is another article.

7 Challenges to these restrictions under the equal protection guarantee of the US Constitution have generally been rejected; see e.g. *Stratemeyer v. MACO Workers Comp. Trust*, 259 Mont. 147, 855 P.2d 506 (Mont. Sup. Ct. 1993); *McCrone v. Bank One Corp*, 107 Ohio St. 3d 272 (Ohio Sup. Ct. 2005).

8 See the recent judgment of the Court of Appeal for British Columbia in which the Court ruled that aspects of the BC approach were inconsistent with the *Charter*, *Plesner v. British Columbia Hydro and Power Authority*, 2009 BCCA 188, 308 D.L.R. (4th) 624 [*Plesner*].

given rise to similar concerns, although these appear to be greater in some Canadian jurisdictions than elsewhere.[9]

Chronic pain can be defined as pain that persists longer than the temporal course of natural healing, associated with a particular type of injury or disease process. The Nova Scotia legislation adopted the following definition:

> "chronic pain" means pain (i) continuing beyond the normal recovery time for the type of personal injury that precipitated, triggered or otherwise predated the pain; or (ii) 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.[10]

This is typical of definitions of chronic pain in compensation systems. However, there is not always a good match between this type of definition and the medical approach to chronic pain.[11]

Although chronic pain is, to a certain extent, conceptualised as a psychological condition,[12] it should be noted that the parties argued both *Martin* and *Downey* on the basis that chronic pain was a *physical* disability.[13]

One particular area in which it has proved difficult to incorporate injuries not "supported by significant, objective, physical findings" has been in relation to the concepts of "impairment" and "assessment of disablement" which are (in somewhat modified forms) features of

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9 Brock Smith, *Report of the Chair of the Chronic Pain Panels* (Ontario: Ontario Workplace Safety and Insurance Board, 2000), online: Ontario Workplace Safety and Insurance Board <http://www.wsib.on.ca/wsib/wsibsite.nsf/LookupFiles/DownloadableFileChronicPainReport/$File/chronicp.pdf>; James E. Dorsey *et. al.*, *The Nova Scotia Workers Compensation Program: A Focused Review* (Nova Scotia: Communications Nova Scotia, 2002), online: Dept. of Labour Workforce Development <http://www.gov.ns.ca/lwd/pubs/docs/WCRCFinalReport.pdf>.

10 *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, s. 10A.

11 For example, the legal definition covers a number of medical conditions (such as myofascial pain, fibromyalgia, etc.) which are considered to be quite distinct medical conditions.

12 See e.g. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV-TR), 4th rev. ed., (Washington, D.C.: American Psychiatric Association, 2000) at 307.80.

13 See e.g. Smith, *supra* note 9 at 4.

workers compensation statutes across the common law world. In Nova Scotia, entitlement to permanent disability benefits is based on the claimant's "permanent impairment rating" (PRI). The PRI is

> a percentage assigned to an injured worker's permanent injury or injuries. This percentage rating is intended to reflect the degree of impairment of body function. It is not intended to and does not reflect either anatomical loss or disability, that is, the extent of the impact of the injury on the worker's ability to earn income … .[14]

The current system of assessment of PRI in Nova Scotia (which applies since 2000)[15] provides that injuries are to be rated according to the Board's *Permanent Medical Impairment (PMI) Guidelines* which are in turn based on the American Medical Association's *Guides to the Evaluation of Permanent Impairment*.[16] The PMI Guidelines list various injuries under headings and assign either a specific percentage or a range or percentages to each injury. The respective percentages are, as the Court of Appeal aptly put it, "not intuitive."[17]

In Nova Scotia, concern about the implications of chronic pain for the workers compensation code initially led to the establishment of a separate regime for such injuries. The effect of this was generally to preclude workers from receiving any benefits for chronic pain except as provided by the relevant Regulations. The chronic pain provisions also maintained the bar against suing employers, so that no additional compensation could be obtained through tort actions in the courts.[18] These provisions were challenged in *Martin*.

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14 *Downey*, *supra* note 4 at 367.

15 Counsel for the Board gave evidence that the rating schedule used for Mr. Downey's injury (which occurred pre-1990) was very similar to or the same as the PMI Guidelines adopted by the Board in 1995. Despite this the Court perversely concluded that "there is no evidence about the rating schedule used for injuries, like the appellant's, occurring before 1990;" see *Downey*, *supra* note 4 at 368.

16 6th ed. (Chicago: American Medical Association, 2010) [AMA Guides]; in the US many states rely (to a greater or lesser extent) on these guidelines. In the UK and Ireland "prescribed degrees of disablement" are set out in secondary legislation. Note that these relate solely to physical disabilities such as amputations and that impairments not specifically prescribed are individually assessed.

17 *Downey*, *supra* note 4. For example, total loss of sight in one eye is categorised at 16% while loss of one kidney is 10%; see Nova Scotia, Workers' Compensation Board of Nova Scotia, *Guidelines for Assessment of Permanent Medical Impairment*, online: Workers' Compensation Board of Nova Scotia http://www.wcb.ns.ca/policymanual/pmi.html [PMI Guidelines].

18 *Martin*, *supra* note 2 at 549.

2. Nova Scotia (Workers Compensation Appeals Tribunal v. Martin

The Supreme Court decision in *Martin* was an important step forward in the Court's jurisprudence on section 15 as it applied to disability. It clarified that distinctions based on type of disability were covered by section 15; and outlined the approach to be taken to the interpretation of what amounted to discrimination in breach of section 15. The Court applied the (then) standard test in *Law v. Canada (Minister of Employment and Immigration)*[19] to the challenged provisions.[20] This sets out three steps in considering section 15 challenges:

> 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?[21]

A) Type of Disability as an Enumerated Ground

The Court in *Martin* found that the appropriate comparator group in this case was "the group of workers subject to the Act who do not have chronic pain and are eligible for compensation for their employment-related injuries"[22] The Court rejected the argument that distinguishing *within* a group of persons with a disability did not amount to discrimination on an enumerated ground, holding that to distinguish

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19 [1999] 1 S.C.R. 497.

20 The status of the *Law* test is rather unclear in the light of the recent Supreme Court decisions in *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 [*Kapp*] and *Ermineskin Indian Band and Nation v Canada* 2009 SCC 9, [2009] 1 S.C.R. 222. See J. Watson Hamilton and Jennifer Koshan "The End of *Law*: A New Framework for Analysing Section 15(1) *Charter* Challenges" (20 February 2009), online: ABlawg.ca <http://ablawg.ca/2009/02/20/the-end-of-law-a-new-framework-for-analyzing-section-151-charter-challenges/>.

21 *Law supra* note 19 at 523-24. In *Kapp*, *ibid*. at 502, the Supreme Court recently suggested a two stage test: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? The Court stated, however, that it saw the test as, in substance, the same as that in *Law*.

22 *Martin*, *supra* note 2 at 551.

injured workers with chronic pain from those without is still a disability-based distinction.[23] It was satisfied that the appellants were treated differently from the comparator group.[24]

B) Differential Treatment as Discrimination

Turning to the third branch of the *Law* test, which sets out four "contextual factors" to be considered,[25] the Court was satisfied that the appellants belonged to a group – disabled persons – who have experienced historical disadvantage or stereotypes. The Court did not find it necessary to establish that chronic pain sufferers were affected by particular disadvantage although commenting that "many elements seem[ed] to point in that direction."[26]

Gonthier J. (for the Court) went on to say

> Sometimes, as in the case at bar, the lack of correspondence between the differential treatment to which the claimants are subject and their actual needs, capacities and circumstances is at the heart of the s. 15(1) claim to such an extent as to make a relative disadvantage analysis largely inappropriate. This is particularly true when distinctions are drawn between various types of mental or physical disabilities, because, as I noted above, the rationale underlying the prohibition of disability-based discrimination is the imperative to recognize the needs, capacities and circumstances of persons suffering from widely different disabilities in a vast range of social contexts.[27]

Examining the issue of correspondence, the Court asked whether the separate regime for chronic pain took into account the actual needs, capacity or circumstances of workers suffering from chronic pain in a manner that respected their value as human beings and as members of Canadian society. The Court held that it was vital to keep in mind the rationale underlying the prohibition of discrimination based on disability which is "to allow for the recognition of the special needs and actual capacities of persons affected by a broad variety of different disabilities

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23 *Ibid*. at 556.

24 *Ibid*. Indeed, differential treatment was conceded by the respondents.

25 These factors 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, capacities 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. See *Law*, *supra* note 19 at 534-41.

26 *Martin*, *supra* note 2 at 562.

27 *Ibid*.

in many different social contexts."[28] While accepting that classification and standardization were in many cases "necessary evils," the Court stated that such classification "should always be implemented in such a way as to preserve the essential human dignity of individuals."[29]

A second vital consideration was the overall purpose of the legislative scheme at issue. A classification that resulted in depriving a class of access to certain benefits was "much more likely to be discriminatory when it is not supported by the larger objectives pursued by the challenged legislation"[30] Although the objective of the workers compensation legislation was to guarantee a reasonable amount of compensation to persons injured at work (in return for a bar on court proceedings against the employer), in this case the impugned legislation, while maintaining the bar on court actions, excluded chronic pain from the general compensation scheme provided for by the Act. The Court was "unable to agree that the challenged provisions are sufficiently responsive to the needs and circumstances of chronic pain sufferers to satisfy the second contextual factor."[31] By excluding chronic pain sufferers from the protection available to other injured workers, by ignoring the real needs of workers permanently disabled by chronic pain by denying them any long-term benefits, and by excluding them from the duty imposed upon employers to take back and accommodate injured workers, the impugned legislation sent a clear message that chronic pain sufferers were "not equally valued and deserving of respect as members of Canadian society"[32]

As to ameliorative purpose, the Court held that there could be no serious argument that the differential treatment was aimed at improving the circumstances of some other, more disadvantaged group.[33] Finally, as to the nature of the interests affected, the Court clarified the status of "economic" interests in section 15 analysis, and held that "[i]n many circumstances, economic deprivation itself may lead to a loss of dignity. In other cases, it may be symptomatic of widely held negative attitudes towards the claimants and thus reinforce the assault on their dignity."[34] It took the view that the loss of financial benefits in this case could not be said to be a "trivial matter."[35]

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28 *Ibid*. at 564.
29 *Ibid*.
30 *Ibid.* at 564-65.
31 *Ibid*. at 566.
32 *Ibid*. at 569.
33 *Ibid*. at 569-70.
34 *Ibid*. at 570.
35 *Ibid*. at 570-71.

On balance the Court concluded that the contextual enquiry mandated by *Law* "could hardly lead to a clearer conclusion" and that the challenged provisions had the effect of demeaning the dignity of chronic pain sufferers.[36] Finally, it found that the exclusion was not saved by section 1 of the *Charter*.[37]

3. The Response to Martin and the WCAT Decision in Downey

In response to the *Martin* judgment, Nova Scotia introduced significant reforms in the manner in which its workers compensation code addressed chronic pain. In particular it adopted new Chronic Pain Regulations.[38] Under section 3 of the Regulations, workers with chronic pain were brought into the general scheme of the *Workers' Compensation Act*, subject to the terms and conditions of the Regulations. Under section 7, where a worker has chronic pain that is causally connected to a compensable injury, the Workers Compensation Board must pay the worker a permanent benefit based on a permanent impairment rating of (a) three per cent, if the worker experiences a slight pain-related impairment; or (b) six per cent if the worker experiences a substantial pain-related impairment. The Regulations provide that in determining whether a worker has a pain-related impairment, the Board must use an individualised approach based on the AMA Guides[39] as modified by the Regulations or Board policy.[40] However, the Chronic Pain Regulations provide for a modified application of the AMA Guides.[41] In addition to allowing a higher (six per cent) impairment rating than the three per cent set out in the AMA Guides, the AMA's requirement for an existing permanent medical impairment as a prerequisite for an assessment of a pain-related impairment is waived. The Board must also apply the slight pain-related impairment and substantial pain-related impairment percentages outlined in section 7 to "unratable pain" as described in the

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36 *Ibid*. at 571. The *Martin* judgement was followed by the Northwest Territories Supreme Court in *Valic v. Workers' Compensation Board et al,* 2005 NWTSC 105, 145 A.C.W.S. (3d) 188. In the Northwest Territories, although the Workers' Compensation Board had not set up an entirely different regime applicable to chronic pain sufferers, it did, through its policies, treat chronic pain sufferers differently from other injured workers by denying them access to disability benefits. Applying *Martin*, the Court found that this was in breach of section 15 and not saved by section1.

37 This issue was not considered in *Downey* given the findings as to section 15 but is discussed *infra*, part 5.

38 N.S. Reg 187/2004 . The following description is based on that set out in *Downey* (WCAT), *supra* note 3 at 5.

39 *Supra* note 16.

40 *Supra* note 38 at section 5.

41 *Ibid*. at section 6.

AMA Guides. The Board adopted a Chronic Pain Policy to provide a framework and general eligibility criteria for compensation for chronic pain.[42]

Mr. Downey, who was originally injured at work in 1989 and whose claim pre-dated the *Martin* litigation, was found to have chronic pain. Following the adoption of the Chronic Pain Regulations in 2004, he was found to be entitled to benefits based on a six per cent permanent impairment rating (that is, substantial pain-related impairment).[43] The Nova Scotia legislation is unfortunately somewhat convoluted and has changed a number of times since 1989, both as a result of legislative change and court action.[44] In short (and without going into all the changes over time), the current *Workers' Compensation Act* provides that permanent benefits for injuries after February 1, 1996, are to be determined on the basis of impairment. Section 34 of the Act allows the Board to establish a permanent impairment rating schedule to be applied in calculating the awards for permanent impairment. The current *Workers' Compensation Act* also contains transitional provisions to determine how injuries prior to February 1, 1996 are to be treated. The effect of these provisions was that Downey was awarded permanent benefits based on the permanent impairment rating of 21 per cent (15 per cent permanent medical impairment plus 6 per cent pain-related impairment). Downey appealed arguing that the six per cent cap on impairment for workers with chronic pain discriminated against him contrary to section 15(1) of the Charter.[45]

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42 Nova Scotia, Workers' Compensation Board of Nova Scotia, *Policy 3.3.5* (effective 10 September 2004). See now: Nova Scotia, Workers' Compensation Board of Nova Scotia, *Policy 3.3.5R*, online: Workers' Compensation Board of Nova Scotia <http://www.wcb.ns.ca/downloads/policy/334R.pdf> (effective 19 November 2007).

43 This, combined with assessment of other injures gave him a total permanent impairment rating of 21%; see *Downey*, *supra* note 4 at 372-73.

44 In addition to the *Martin* case, see *Hayden v. Nova Scotia (Workers' Compensation Appeal Board)* (1990), 96 N.S.R. (2d) 108, 20 A.C.W.S. (3d) 160 (C.A.) [*Hayden*].

45 A somewhat similar approach has been adopted in British Columbia but the BC Workers Compensation Appeals Tribunal does not have jurisdiction to consider constitutional challenges to chronic pain provisions as it is excluded from doing so by ss. 44-45 of the *Administrative Tribunals Act*, S.B.C. 2004 , c. 45. See WCAT-2007-03959 (18 December 2007), online: British Columbia Workers' Compensation Appeal Tribunal <http://www.wcat.bc.ca/research/decisions/pdf/2007/12/2007-03959.pdf>; WCAT-2008-01460 (15 May 2008), online: British Columbia Workers' Compensation Appeal Tribunal <http://www.wcat.bc.ca/research/decisions/pdf/2008/05/2008-01460.pdf>; WCAT-2008-00619 (26 February 2008), online: British Columbia Workers' Compensation Appeal Tribunal <http://www.wcat.bc.ca/research/decisions/pdf/2008/02/2008-00619.pdf>. As mentioned at note 1, there is currently a challenge to the BC chronic pain policy under human rights law.

The Nova Scotia WCAT applied the *Law* test discussed above. It followed *Martin* as to the comparator group – "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"[46] – and found that Downey was part of a group subject to differential treatment relative to the comparator group. Again following *Martin*, it found that the difference in treatment was on the basis of physical disability, an enumerated ground under the *Charter*. It then turned to the key issue as to whether this difference in treatment amounted to discrimination. The WCAT accepted that many elements point to the conclusion that chronic pain sufferers have historically been subject to disadvantage or stereotyping beyond that affecting other injured workers.[47] It also agreed with the Supreme Court's analysis that the differential treatment is not aimed at improving the circumstances of some other, more disadvantaged group,[48] and, on the basis that the benefits were "calculated in the same manner as workers in the comparator group," the WCAT found that the fourth contextual factor did not point to discrimination in this case.

The WCAT gave more extensive consideration to the second contextual factor, that of correspondence with needs, capacities and circumstances. It contrasted the regime of the Chronic Pain Regulations – under which workers who are found to have a pain-related impairment are entitled to permanent benefits and become eligible for all benefits associated with having a permanent impairment, regardless of whether their impairment is pain-related or not – with that found in breach of the Charter in *Martin*. Downey had argued that that the Act and the Chronic Pain Regulations ignored his real needs by denying him long-term benefits which correspond to his actual disability. However, the WCAT rejected this argument on the basis that that compensation was calculated on the basis of "permanent impairment" and not disability in the sense of decreased capacity or loss of ability of an individual to meet personal, social or occupational demands.[49] This is correct as far as it goes. However, while section 15 does not require that compensation reflect the level of a person's disability, it might be argued that a compensation scheme discriminates on the basis of disability if it could be shown that the scheme systematically disadvantaged those with a particular type of disability.[50]

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46 *Downey* (WCAT), *supra* note 3 at 8.

47 *Ibid*. at 9. Perhaps going beyond the letter of what the *Martin* Court actually said – if not the spirit.

48 *Ibid*. at 12.

49 *Ibid*. at 10-11.

50 The point is discussed further in part 4.

The WCAT pointed out that the PMI Guidelines provide that "the evaluation of permanent medical impairment is a medical matter which can be measured accurately and objectively."[51] Similarly, the AMA Guides provide that "the existence and degree of permanent medical impairment are determined by medical means and are based solely on a demonstrable loss of bodily function." The WCAT pointed out that under the PMI Guidelines, there are maximum ratings for many injuries.[52] It further emphasised that impairment ratings have no direct correlation to disability in the sense of functional ability.

The WCAT noted that the pain-related impairment regime accorded with a recognised impairment rating system like the AMA Guides. It further noted that the Chronic Pain Regulations modified the AMA pain-related impairment scheme in three ways all to the benefit of injured workers with chronic pain. Finally, it pointed out that, despite the difficulties of doing so,[53] the Nova Scotia scheme had integrated a pain-related impairment into the conventional impairment rating system. On balance the WCAT took the view that the challenged provision did not have the effect of demeaning Downey's dignity, that the differential treatment did not, therefore, amount to substantive discrimination under the Charter and that the Chronic Pain Regulations did not breach section 15(1).[54]

4. The Court of Appeal

As we have seen, the WCAT had found that the first two elements of the *Law* test were satisfied – that Downey had received different treatment on an enumerated ground. These findings were not appealed and only the finding that this difference did not amount to discrimination was at issue. However the Court of Appeal in effect returned to the first element of the *Law* test concerning whether there had been differential treatment and, in its consideration of whether differential treatment amounted to discrimination, focussed solely on whether the differential corresponded to the needs, capacities and circumstances of the appellant. Cromwell J.A. (speaking for the Court) correctly identified the purpose of the guarantee of equality in section 15 as being

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51 *Downey* (WCAT), *supra* note 3 at 11. "Impairment" is defined as the loss of, loss of use of, or derangement of any body part, system or function.

52 For example, total immobility of a hip results in a rating of 30 per cent, total immobility of the knee, 25 per cent and total immobility of the ankle, 12 per cent; and 5 per cent for tinnitus or for complete deafness in one ear; see *ibid*.

53 Discussed in AMA Guides, *supra* note 16, and quoted in *Downey* (WCAT), *supra* note 3 at 11.

54 *Downey* (WCAT), *supra* note 3 at 13.

> to remedy the imposition of unfair limitations upon opportunities, particularly for those persons or groups who have been subject to historical disadvantage, prejudice, and stereotyping.[55]

However, he then moved to narrow the focus of this examination to "the relationship between the alleged ground of discrimination and the nature of the differential treatment." He correctly pointed out that the question to be examined was not whether injured workers with chronic pain received benefits that do not reflect the impact of their injury on their ability to earn income nor whether workers who, like the appellant, were injured before 1990 received benefits that do not reflect their actual loss of earnings as compared to workers injured later. Rather the question raised by Downey's discrimination claim was whether injured workers with chronic pain received benefits that are less advantageous than the benefits available to injured workers without chronic pain who have similar levels of disability or impairment.[56]

A) Disability

The objective of the permanent impairment rating system is to reflect the degree of impairment of body function. Therefore it is arguable that Downey's contention that his impairment rating arising from chronic pain did not reflect his disability (used here in the sense of (in)ability to earn income) was misplaced. As Cromwell J.A. (and the WCAT before him) pointed out that the extent to which impairment ratings reflect ability to earn can vary greatly.[57] Assuming there is some rationale for compensation for loss of income, an issue discussed in more detail below, any difference in outcome on the basis on incapacity for work may well be justified. Cromwell J.A. rejected the claim, however, on the basis that there was no evidence about how injuries like the appellant's were rated before 1990,[58] and that in any case, assuming a rating schedule such as the PMI Guidelines applied, impairment ratings – whether for chronic pain or other injuries – are not intended to and do not in fact reflect disability in the sense of ability to earn income.[59] It is arguable, nonetheless, that *if* the system of compensation based on impairment leads to differential treatment on the basis of disability it is

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55 *Downey*, *supra* note 4 at 376, quoting *Law*, *supra* note 19.

56 *Downey*, *ibid*.

57 *Ibid*. at 370.

58 *Ibid*. at 377. It would seem surprising that the Court would reject the claim on this basis especially as it acknowledged that counsel for the Board had given oral evidence on this issue and all the parties assumed that injuries other than chronic pain were rated on the same basis as the PMI Guidelines; see *ibid*. at 367 and 377.

59 *Ibid*. at 377-78.

insufficient to justify this by saying that the objective is not to provide benefits related to disability; some more specific objective would be required. The Court did not examine whether the impairment system led to different benefits for different types of disability and the rationale for the system of compensation linked to impairment does not appear to have been considered.

B) Impairment

The Court then turned to the second aspect of the challenge, that Downey's level of impairment resulting from chronic pain was greater than that arising from many injuries rated under the PMI guidelines. Cromwell J.A. stated that "the record provide[d] no basis for comparing the appellant's condition with conditions that are rated under the PMI Guidelines."[60] This finding can, at least formally, be read as simply being the result of a failure of evidence. The Court went on to state, however, that comparison of the system of rating is not one which could be assessed by "logical reasoning and judicial notice of notorious facts"[61] which is tantamount to saying that a system which is sufficiently obscure or arbitrary to avoid such comparison will not be found to be discriminatory.[62] One might have some sympathy with Cromwell J.A. when he asks how one is

> to compare Mr. Downey's chronic pain with various injuries rated in the PMI Guidelines, such as, for example, the loss of a thumb or finger (.8% – 10%), the shortening of a leg (1.5% – 15%), a psychiatric impairment (10% – 100%) or the loss of one testicle giving rise to sterility (2%)?

Cromwell J.A. is by no means the first person to ask this sort of question. The legal position should surely be that where – as in this case – a *prima facie* case of differential treatment is made out but where the system of classification is so obscure as to prevent comparison, the onus should shift to the defendant to justify the difference in treatment.[63] That would

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60 *Ibid*. at 378.

61 *Ibid*.

62 *Ibid*.

63 See, by analogy, the European Union case of *Handels og Kontorfunkionaerenes Forbund i Danmark v. Dansk Arbejdsgiverforening*, C-109/88, [1989] E.C.R. 3199 where the European Court of Justice held that where a system of pay is totally lacking in transparency, it is for the employer to prove that this practice is not discriminatory, if a worker establishes that the average pay for women employees is less than that for men. Similarly the European Court of Human Rights has ruled that where "the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, the burden of proof may be regarded as resting on the authorities to

require the state to explain why impairment related to chronic pain is limited to a maximum of six per cent whereas, for example, that related to psychological injury can vary from 10 – 100%.[64] A court could then examine the medical and other evidence as to the degree of impairment to establish whether the difference in categorisation appeared to be justified by the detailed rationale put forward.[65]

5. Discussion

A number of issues arise from these decisions. First, is the *Downey* decision correct?[66] Second, are there implications for other aspects of permanent impairment and equality claims either under the *Charter* or human rights law?

It is possible that the issue of caps for chronic pain will be re-litigated and it is therefore relevant to consider whether the decision in *Downey* was correct. It is arguable that, while one might debate the outcome in *Downey*, the Court of Appeal judgement is fundamentally flawed.[67] The Court effectively abdicated its responsibility to assess whether the cap on compensation for chronic pain was compatible with section 15 on the basis that the system of assessment was sufficiently obscure and/or arbitrary to all not to give rise to a finding of discrimination. The Court

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provide a satisfactory and convincing explanation;" see *DH v. Czech Republic*, [2007] E.C.H.R. 922.

64 However, it should also be noted that these psychological impairment ratings are not derived from the AMA Guides and are not consistent with the AMA approach which is to rate impairment on a body part basis, and based primarily on measurable objective impairment.

65 Leave to appeal the *Downey* decision to the Supreme Court of Canada has been refused; see [2008] S.C.C.A. No. 405. It is regrettable, even if one agrees with the outcome, that the Supreme Court did not grant leave to appeal from what is a flawed judgement at a number of levels.

66 Although the refusal of leave to appeal in such a case has no precedential status, the refusal by the Supreme Court to hear an appeal in this case would seem likely to close off any challenge to the specific cap on compensation for chronic pain in Nova Scotia. The WCAT and the Court of Appeal will presumably follow *Downey* on the specific issue. However, other provinces – such as BC – apply similar caps which could be subject to challenge, and *Downey* would not create a binding precedent in those jurisdictions.

67 An alternative approach to this issue is on the basis of the appropriate comparator. Although *Downey* proceeded on the basis that chronic pain was a physical disability and, therefore, the appropriate comparator group was eligible persons who did not have chronic pain. It could be argued that chronic pain is also a psychological injury and that the comparator group should be persons with other forms of psychological injury.

of Appeal can also be criticised for failing to have any apparent regard to the contextual factors (other than correspondence).

If the cap on compensation for chronic pain is compatible with section 15, this must be on the basis of the analysis by the WCAT. While there are aspects of the panel's decision one might criticise, it did make a genuine effort to consider all the contextual factors and, in particular, to assess whether the treatment of chronic pain corresponded with the needs, capacities and circumstance of Downey. As discussed above, the WCAT concluded that it did given that (i) there were maximum ratings for many other injuries; (ii) the pain impairment regime was based on a recognised impairment rating scheme (the AMA Guides) and in fact modified the scheme in three ways all favourable to chronic pain sufferers; and (iii) it is difficult in any case to reconcile pain impairment with an impairment rating system.

The WCAT quoted the Supreme Court in *Martin* to this effect:

> Of course, government benefits or services cannot be fully customized. As a practical matter, general solutions will often have to be adopted, solutions which inevitably may not respond perfectly to the needs of every individual. This is particularly true in the context of large-scale compensation systems, such as the workers' compensation scheme under consideration. Such systems often need to classify various injuries and illnesses based on available medical evidence and use the resulting classifications to process the claims made by beneficiaries. This approach is necessary, both for reasons of administrative efficiency and to ensure fairness in processing large numbers of claims. In addition, the beneficiaries themselves benefit from the reduced transaction costs and speed achieved through such techniques, and without which large-scale compensation might well be impossible. The state should therefore benefit from a certain margin of appreciation in this exercise, but it cannot be exempted from the requirements of s. 15(1) of the *Charter*. The distinction made will not be allowed to stand when it, intentionally or not, violates the essential human dignity of the individuals affected and thus constitutes discrimination.[68]

On this basis one can make a reasonable case for the compatibility of the treatment of chronic pain with section 15 at least on the basis of current medical knowledge.

If a court were to dig deeper, however, there are questions about the use of measures such as the AMA Guides as they currently stand, despite their apparent authority. One must also acknowledge that – despite the "expert" nature of the AMA guidelines – there is a very limited empirical

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68 *Martin*, *supra* note 2 at 557-58.

base for their classifications. The AMA itself concedes that "most of the conventional ratings in the Guides are not validated by empirical research."[69] Babitsky and Mangeviti in their authoritative analysis of the AMA Guides express the view that, for persons experiencing chronic pain, the three per cent cap in the Guides "may not be indicative of the person's true level of impairment." The criticisms of this approach are by no means confined to the PMI guidelines nor to the AMA guides on which they are based. There has, for example, been considerable criticism of the UK and Irish approach to prescribed degrees of disablement.[70]

More fundamentally again, what exactly is the legislative objective in providing compensation on the basis of a rather notional concept of impairment, rather than on the basis of a work-related concept such as disability (in the sense of loss of capacity for work)? In fact, despite the widespread adoption of this approach it is far from clear *why* it has been adopted.[71] The AMA Guides are extensively used in the US workers compensations systems for similar purposes and challenges to this use on the basis of the equal protection guarantee in the US (and state) constitutions have general been rejected by the higher courts.[72] In *Brown v. Campbell Co. Board of Education*, the Tennessee Supreme Court identified a number of rationales for the impairment-based approach, including multipliers and caps, in the Tennessee code. These included (i) the desirability of reasonable uniformity in statutory awards; (ii) providing employees, employers and their insurers with a measure of

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69 AMA Guides, *supra* note 16; an earlier edition was quoted in Steven Babitsky and James J. Mangeviti, *Understanding the AMA Guides in Workers Compensation*, 4th ed. (New York: Aspen Publishers, 2008).

70 See e.g. Peter Cane, *Atiyah's Accidents, Compensation and the Law*, 7th ed. (Cambridge: Cambridge University Press, 2006) at 343-46; Robert Clark, *Annotated Guide to Social Welfare Law*, (Dublin: Sweet & Maxwell, 1995) at 143-44.

71 It is interesting to note that Nova Scotia appears to have used this (impairment) approach for years although it had legislated for compensation on the basis of *disability*; see *Hayden*, *supra* note 44.

72 See e.g. *Allen v. Natrona County School District One* , 811 P.2d 1 (Wyo. Sup. Ct. 1991) (requirement to show impairment in accordance with AMA Guides not in breach of equal protection); *Texas Worker's Compensation Commission v. Garcia*, 893 S.W.2d 504 (Tex. Sup. Ct. 1995)(requirement of minimum impairment level of 15% for compensation not in breach of Texas constitution); *Sherman v. Pella Corp*., 576 N.W.2d 312 (Iowa Sup. Ct. 1998)(Iowa system of "scheduled injuries" not in breach of equal protection); *Brown v. Campbell Co. Board of Education* 915 S.W.2d 407 (Tenn. Sup. Ct. 1995), cert. denied, 517 U.S. 1222, 116 S.Ct. 1852 (1996) [*Brown*](methods used to determine permanent partial disability benefits not violative of the equal protection provisions of the Tennessee or US constitutions).

predictability since awards have defined outer limits; and (iii) assisting the State's interest in keeping workers' compensation insurance premiums from escalating. The Tennessee Court also found that the reasonable and legitimate state interests applicable to the multipliers and caps – uniformity, fairness and predictability – were equally applicable to the use of the Guides. Applying rational basis review, which is a much lower standard than would be expected under section 15 of the *Charter*, the Court found that the provisions of the code were rationally related to a legitimate state objective and were, therefore, not in breach of the equal protection clause.[73]

To return to the issue of chronic pain, if one accepts the use of the PMI guidelines and the AMA Guides, and having regard to the Supreme Court's warning that government benefits "cannot be fully customized," then one could accept that the six per cent cap on compensation for chronic pain is probably consistent with section 15 (at least in the current state of medical knowledge) in that – even assuming that chronic pain sufferers have been subject to prior disadvantage – it reasonably reflects a claimant's needs, capacities and circumstances.[74] If, however, one delves more deeply, it is certainly arguable that the six per cent cap does not reflect some persons' impairment due to chronic pain[75] and therefore that there is, in fact, a lack of such correspondence. Given the history of pre-existing disadvantage and the fact that a court could well find that chronic pain sufferers had been affected by particular disadvantage, this would suggest a breach of section 15 of the *Charter*.[76] This is particularly the case given the apparent move by the Supreme Court in *Kapp* away from the much-criticised notion of human dignity back to a focus on "perpetuation of disadvantage and stereotyping as the primary indicators of discrimination."[77]

If a breach of section 15(1) were found, could the scheme be saved by section 1? In order to show that the provisions were "reasonable limits prescribed by law" that are "demonstrably justified in a free and democratic society" under section 1, the Nova Scotia government would have to satisfy two conditions.

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73 *Brown*, *ibid.* at 415-16.

74 As in *Martin* there does not appear to be any specific ameliorative purpose. However, in contrast to *Martin*, there is clearly a less direct negative impact on the claimant's interests in that some (albeit capped) compensation is provided and access is allowed to other aspects of the code.

75 Or that even if it does reflect impairment, the notion of impairment itself discriminates against persons with chronic pain.

76 See, by analogy, the approach adopted to limitations on compensation for chronic stress in *Plesner*, *supra* note 8.

77 *Kapp*, *supra* note 19 at 505-06.

> First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right.[78]

Obviously we do not know what arguments might be advanced under section 1. In *Martin* the government had advanced two principal objectives which might also be relevant to the current treatment of chronic pain. The first concern was to maintain the viability of the fund set up by the Act to compensate injured workers. Second was the need to develop a consistent legislative response to the administrative challenges raised by the processing of chronic pain claims including the difficulties in establishing a causal link between a workplace accident and the later development of chronic pain and in assessing the degree of impairment resulting from chronic pain.[79] The Supreme Court summarily rejected these objectives, holding that budgetary considerations in and of themselves could not normally be invoked as a free-standing "pressing and substantial" objective for the purposes of section 1 of the *Charter*;[80] and that mere administrative expediency or conceptual elegance could not be sufficiently pressing and substantial to override a *Charter* right.[81]

If we look at the objectives of "uniformity, fairness and predictability" put forward in *Brown*,[82] these would appear to be pressing and substantial objectives and ones rationally related to the aim of the legislation. The critical issue, however, would be whether the impairment approach (and more specifically the cap on chronic pain impairment) minimally impairs rights under the *Charter* and is proportional. In relation to chronic pain, a higher cap or no cap would arguably impair rights to a lesser extent. In relation to the broader issue of the impairment system more generally, again it is arguable that system

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78 *Egan v. Canada* [1995] 2 S.C.R. 513 at 605, summarizing the test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103.

79 *Martin*, *supra* note 2 at 573.

80 *Ibid*. at 574. Two other objectives advanced in *Martin* would not appear particularly relevant to the current approach to chronic pain, *viz.* to avoid potential fraudulent claims based on chronic pain and to implement early medical intervention and return to work as the optimal treatment for chronic pain according to current scientific knowledge.

81 *Ibid*. at 574-75.

82 *Supra* note 72.

of assessment based on *disability* could result in greater correspondence as between degrees of disability and compensation awarded while still achieving the objectives of uniformity, fairness and predictability.

6. Conclusion

This note has outlined a spectrum of approaches which the courts might take, from accepting the Nova Scotia cap on chronic pain to striking down such as cap as inconsistent with section 15. The implications of this analysis for the broader impairment scheme depend on where the courts come down on the spectrum. If one accepts the general system of impairment-related compensation, it is arguable that the particular treatment of chronic pain attempts to integrate that disability into the overall system in a manner which is not in breach of section 15 of the *Charter*. Obviously if the courts are to accept the classification of chronic pain under the PMI guidelines/AMA Guides, they will be likely to accept classification of other injuries based on the guidelines, in the absence of some obvious irrationality. If, however, the courts were to second-guess the guidelines (on the basis of other relevant evidence) and strike down the cap, one might well envisage that other classifications might also be open to challenge. The further one pushes this investigation, however, the more one tends to the view that the entire impairment system – despite its ubiquity – owes much more to historical development than to rational policy objectives and is no longer compatible with a modern equality environment. While one would, of course, accept that poor policy is not the same as inequitable policy, poor policy may well lead to a situation where the policy outcomes are inconsistent with the *Charter*.