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The Charter of Rights and Off-Reserve First Nations People:

A Way to Fill the Public Policy Vacuum?

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The Charter of Rights and Off-Reserve First Nations People: A Way to Fill the Public Policy Vacuum?

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Introduction

There is a great deal of talk in government and public policy circles about the need to improve the social outcomes of Aboriginal peoples in Saskatchewan, and in Canada generally. Yet, one of the most serious impediments to effective programming is bureaucratic wrangling over which level of government should be responsible for providing social programs to Aboriginal peoples, particularly those Aboriginal people who reside off reserves. The federal government regularly makes a distinction between on-reserve and off-reserve First Nation members in the provision of a wide array of social programs and, over the last decade, has several times unilaterally ended the provision of various types of social spending for First Nation members living off reserves. As Doug Durst and Mary Bluechardt noted in a recent article:

> The jurisdictional issues create serious problems for many Aboriginal persons. What government and what department provides what service or program is a major barrier to access. … It is confusing and frustrating and many persons just give up or make no attempt, therefore not accessing services or programs to which they are fully entitled.[1]

The new Prime Minister, Paul Martin has indicated his interest in rethinking the federal government's Aboriginal policy. His statements are promising, but officials involved in Aboriginal policy have heard such statements before. Indeed, Mr. Martin's predecessor, Jean Chretien, made similar statements no more than three years ago, when he created the Prime Minister's Reference Group of Ministers on Aboriginal Policy. What First Nation people and provincial officials have seen from the federal government during this period, though, has been more of the same: a series of gradual, unilateral reductions in the benefits that the Government of Canada provides to First Nation members. Provincial officials have described this phenomenon as "creeping off-loading", while Saskatchewan newspaper columnist Doug Cuthand, in a recent article, described it as "an abdication of responsibility on the part of the federal government, which has constitutional responsibility for First Nations people."[2] At best, such an approach leads First Nation members to end up seeking services from their province of residence, rather than from their First Nation, thus reducing their connection to their First Nation and increasing their sense of dislocation in urban areas. At worst, it leaves First Nation members unable to access services that they need, because of the barriers of bureaucracy or the need to pay for services that the federal government would provide for free to on-reserve members.

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[1] Doug Durst and Mary Bluechardt, *Aboriginal People with Disabilities: A Vacuum in Public Policy* (Regina: Saskatchewan Institute of Public Policy, 2004), p. 6.

Cuthand suggests that what is required is the political will on the part of the Government of Canada to end its abandonment of off-reserve First Nations members and begin to fund First Nations-delivered services for off-reserve members.[3] The history of federal off-loading of service provision onto the provinces, however, understandably leaves one skeptical that the political will exists within the federal government to take its responsibility for off-reserve First Nations members seriously. In the absence of political will, though, First Nations people may need to find an alternative strategy that will force the federal government to treat off-reserve First Nations members to the same level of services, and respect, as their on-reserve counterparts receive. The use of the *Canadian Charter of Rights and Freedoms* (the *Charter*), particularly section 15, which protects equality rights, may be the tool for such a strategy.

It is clear from the Supreme Court of Canada's 1999 decision in *Corbiere* v. *Canada (Minister of Indian and Northern Affairs)* [4] that denying off-reserve members of First Nations the right to vote in band elections merely because they live off-reserve is discriminatory and that any distinction between off-reserve and on-reserve First Nation members is suspect. On its face, the distinction in the federal government's delivery of social programs between on-reserve and off-reserve First Nation members also seems discriminatory, if one follows the logic of *Corbiere*.[5] It is important, however, to look at what services are provided to on-reserve First Nation members that are denied to their off-reserve counterparts and at how the Supreme Court of Canada has previously treated equality rights challenges to limitations in the provision of social benefits, if one wishes to predict the likelihood of the Court overturning the federal government's limitation of benefits to reserve residents. While the outcome of such a challenge is uncertain, depending as it does at least partly on the degree of deference the Supreme Court would show to legislative decisions about the provision of public services, there are good reasons to believe that the federal limitation in the provision of social programs to on-reserve First Nation members is unconstitutional.

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[2] Doug Cuthand, "Ottawa Neglect Exacerbates Native Health Woes," *Saskatoon Star-Phoenix*, January 23, 2004, p. A13.
[3] Ibid.
[4] [1999] 2 S.C.R. 203.
[5] Indeed, it is interesting to note that the federal government chose not to appeal the Federal Court of Appeal decision in *Canada (Attorney General)* v. *Misquadis*, 2003 FCA 473, in which the Federal Court of Appeal decided that, by funding Indian bands to provide labour market programming on reserves but not funding off-reserve First Nations' representatives to deliver services to off-reserve First Nation people, Human Resources Development

Law* v. *Canada*: the Test for Violations of Section 15 of the *Charter of Rights

What has since become the definitive test of whether a government has violated the equality guarantee in section 15 of the *Charter* was set down by the Supreme Court of Canada in 1999, in the case of *Law* v. *Canada (Minister of Employment and Immigration)*.[6] This was the test the Supreme Court of Canada used in *Corbiere* to determine that preventing off-reserve First Nation members from voting in band elections was unconstitutional. In *Law*, the Court started from the premise that the essential purpose of section 15 of the *Charter* was to:

> prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.[7]

The Court laid out three broad inquiries one must undertake to determine whether this essential purpose is being violated by the purpose or effect of an impugned law. The first inquiry is whether the impugned law draws a formal distinction between the claimant and others on the basis of personal characteristics, or fails to take into account the claimant's already disadvantaged position within Canadian society, resulting in substantively different treatment between the claimant and others on the basis of their personal characteristics.[8] The second inquiry is whether the claimant is subject to differential treatment based on grounds either enumerated in section 15 or analogous to them.[9] Finally, the third inquiry is whether the differential treatment actually discriminates, by imposing a burden upon or withholding a benefit from the claimant in a manner that reflects the stereotypical application of presumed personal characteristics, or which otherwise has the effect of perpetuating or promoting a view of the individual as less capable or worthy of recognition or value as a human being.[10]

Of these three inquiries, the third has been where the most difficult analyses, and the most confusing conclusions, occur. It will be obvious if legislation creates a distinction on the basis of a personal characteristic and if the distinction is based on a ground enumerated in section 15 of the *Charter*. Though somewhat less obvious, it should also be fairly clear if legislation ignores a pre-

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Canada discriminated against off-reserve First Nation people. The Federal Court of Appeal also decided that this distinction was not a reasonable limit on off-reserve First Nation people's equality right.

[6] [1999] 1 S.C.R. 497.
[7] Ibid., 529.
[8] Ibid., 548-9.
[9] Ibid., 549.
[10] Ibid.

existing disadvantage so that it leads to substantively different treatment of affected individuals or groups on the basis of personal characteristics. To provide an example from a case that went to the Supreme Court of Canada before *Law*, if medical services are available to all Canadians but sign language interpretation was not made available to allow the deaf to communicate with the medical staff, it would ignore the pre-existing disadvantage of deaf people in a way that would effectively deny them equal benefit of the law.[11]

It is somewhat more complicated, of course, to determine if a distinction is made on the basis of a ground analogous to those enumerated in section 15. The Supreme Court of Canada has, however, provided a great deal of guidance on how to determine whether a claimed ground of discrimination is analogous. In summary, an analogous ground exists where the differential treatment has the potential to bring into play human dignity because it is based on a personal characteristic that is unchangeable or only changeable at great personal cost and which is irrelevant to a fair assessment of the person's actual ability, capacity or need.[12] *Corbiere* v. *Canada*, discussed below, is a good example of the process of determining that an analogous ground exists.

The third line of inquiry is certainly the most difficult to undertake rigorously. To assist in making a determination about whether legislation is actually discriminatory, the Court in *Law* broke this last line of inquiry down further, attempting to define more concrete indicia of discrimination. The Court noted that there were certain important contextual factors that would aid in determining whether a reasonable person in the position of the claimant would feel their dignity demeaned. The indicia the court identified, while recognizing that there are likely others, were whether the claimant or a group to which the claimant belongs experiences pre-existing disadvantage, stereotyping, prejudice, or vulnerability; the correspondence, or lack thereof, between the grounds for differential treatment and the actual need, capacity, or circumstances of the claimant compared to others; whether the impugned law has the purpose or effect of ameliorating the disadvantage of a more disadvantaged person or group in society; and the degree to which the legislation affects a significant or fundamental interest of the claimant's group.[13]

As an aside, I would note that the Court commented in *Law* that legislatures may use generalizations as a proxy for the actual situations of individuals to demonstrate that distinctions

[11] *Eldridge* v. *British Columbia (Attorney General)* [1997] 3 S.C.R. 624.
[12] See, for example, *Miron* v. *Trudel* [1995] 2 S.C.R. 418, at 494-7.
[13] *Law*, 550-2.

correspond to the actual circumstances of the claimant in some situations.[14] In other situations, for example when an individual or group subject to differential treatment is already disadvantaged or vulnerable within Canadian society, a more precise correspondence will be required, however, between the differential treatment and the actual need, capacity or circumstances of a claimant for the differential treatment to be valid.[15] It seems likely that the stricter test would be the appropriate one to use in determining whether the denial of federally funded services to off-reserve First Nation members is discriminatory.

It is also interesting to note the strict limitations that the Court placed on the use of the "ameliorative purpose" test to avoid a finding of discrimination. Mr. Justice Iacobucci, for the Court, stated:

> I emphasize that this factor will likely only be relevant where the person or group that is excluded from the scope of the ameliorative legislation or other state action is more advantaged in a relative sense. Underinclusive ameliorative legislation that excludes from its scope the members of an historically disadvantaged group will rarely escape the charge of discrimination.[16]

Unfortunately, the Supreme Court of Canada has subsequently undermined the analytical rigour of their decision in *Law*, in particular through a misconstruction of the "ameliorative purpose" test to insulate government decisions that have a fairly obvious discriminatory purpose or effect from constitutional scrutiny simply because the government program was designed to aid another disadvantaged group.[17] Nonetheless, *Law*'s analysis is still the framework that the Court has claimed to apply in all equality cases since 1999.

***Corbiere* v. *Canada*: Off-Reserve Residency and Discrimination**

Corbiere v. *Canada (Minister of Indian and Northern Affairs)* challenged the limitation of the right to vote in First Nation band elections under the *Indian Act* to reserve residents as a denial of the equality guaranteed by section 15 of the *Charter*. Likely the most important aspect of the Supreme Court of Canada's decision in this case is the determination that "Aboriginality-residence" (i.e. off-reserve residency of First Nation members) is an analogous ground of discrimination for the purposes of section 15 analysis. Justices McLachlin and Bastarache, for the majority, determined that

[14] Ibid., 561.
[15] Ibid.
[16] Ibid., 539.
[17] see, in particular, *Lovelace* v. *Ontario* [2000] 1 S.C.R. 950.

Aboriginality-residence was an analogous ground by looking to what the enumerated grounds have in common. They stated that:

> what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable personal cost.[18]

Justices McLachlin and Bastarache then concluded that Aboriginality-residence is an analogous ground because it is a personal characteristic essential to a band member's personal identity, which is no less "constructively immutable", or unchangeable except at unacceptable personal cost, than religion or citizenship.[19] Further, they noted that off-reserve band members can only change their status to on-reserve band members at great personal cost, if at all.[20] Thus, the decision to live on or off a reserve is a profound decision, assuming choice is possible, unlike ordinary decisions about place of residence faced by other Canadians.[21] Madame Justice L'Heureux-Dubé expanded upon why Aboriginality-residence is an analogous ground in her concurring judgment, stating that:

> From the perspective of off-reserve band members, the choice of whether to live on- or off-reserve, if it is available to them, is an important one to their identity and personhood, and is therefore fundamental. It involves choosing whether to live with other members of the band to which they belong, or apart from them. It relates to a community and land that have particular social and cultural significance to many or most band members. Also critical is the fact that…band members living off-reserve have generally experienced disadvantage, stereotyping, and prejudice, and form part of a "discrete and insular minority" defined by race and place of residence. In addition, because of the lack of opportunities and housing on many reserves, and the fact that the *Indian Act*'s rules formerly removed band membership from various categories of band members, residence off the reserve has often been forced upon them, or constitutes a choice made reluctantly or at high personal cost.[22]

Justices McLachlin and Bastarache made a further important determination on the "analogous grounds" issue, in disagreeing with the apparent suggestion, in Madame Justice L'Heureux-Dubé's concurring judgment, that a ground can be an analogous ground in some circumstances but not in others.[23] Justices McLachlin and Bastarache decided that the finding of a ground as analogous to those enumerated in section 15 of the *Charter* makes all distinctions on this basis suspect for the purposes of determining whether governmental distinctions are discriminatory. They stated that:

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[18] *Corbiere*, 219.
[19] Ibid., 220.
[20] Ibid.
[21] Ibid.
[22] Ibid., 253-4.
[23] see *Corbiere*, at 253 for L'Heureux-Dubé J.'s statement.

> If "Aboriginality-residence" is to be an analogous ground (and we agree with L"Heureux-Dubé J. that it should), then it must always stand as a constant marker of potential legislative discrimination, whether the challenge is to a governmental tax credit, a voting right or a pension scheme. This established, the analysis moves to the third stage: whether the distinction amounts, in purpose or effect, to discrimination on the facts of the case.[24]

Thus, Aboriginality-residence is now enshrined as an analogous ground of discrimination for the purposes of section 15 analysis.

Having concluded that Aboriginality-residence is an analogous ground, the Court turned to the question of whether the exclusion of off-reserve band members from voting in band elections was actually discriminatory, the third inquiry under the *Law* test. They concluded that, indeed, it was. Justices McLachlin and Bastarache noted that off-reserve band members have important interests in band governance which the distinction denies and that the distinction therefore perpetuates the historic disadvantage of off-reserve members.[25] They commented that, "the complete denial to off-reserve members of the right to vote and participate in band governance treats them as less worthy and entitled, not on the merits of their situation, but simply because they live off-reserve."[26] They also noted that the distinction comments on the cultural identity of off-reserve Aboriginal people in a stereotypical way that presumes they are not interested in maintaining meaningful participation in their band or in preserving their cultural identity, and are therefore less deserving members of their band.[27] Justices McLachlin and Bastarache commented further that the distinction is discriminatory because it implies that off-reserve band members are "persons who have chosen to be assimilated by the mainstream society."[28] To make the stereotypical nature of this assumption clear, they quoted from two passages in the *Report of the Royal Commission on Aboriginal Peoples*:

> Throughout the Commission's hearings, Aboriginal people stressed the fundamental importance of retaining and enhancing their cultural identity while living in urban areas. Aboriginal identity lies at the heart of Aboriginal peoples' existence; maintaining that identity is an essential and self-validating pursuit of Aboriginal people in cities.[29]

and:

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[24] *Corbiere*, 218.
[25] Ibid., 221.
[26] Ibid.
[27] Ibid., 222.
[28] Ibid., 224.
[29] Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, Vol. IV (Ottawa: Government of Canada, 1996), p. 521.

> Cultural identity for urban Aboriginal people is also tied to a land base or ancestral territory. For many, the two concepts are inseparable. … Identification with an ancestral place is important to urban people because of the associated ritual, ceremony and traditions, as well as the people who remain there, the sense of belonging, the bond to an ancestral community, and the accessibility of family, community and elders.[30]

These sorts of concerns about retaining a cultural connection to home communities and Aboriginal cultural identities, reflected in the Royal Commission's report and used by the Supreme Court of Canada to support the finding of discrimination in *Corbiere*, suggest that a federal refusal to provide off-reserve band members with access to federal social programs provided to on-reserve members may well also be discriminatory. Denying off-reserve First Nation members access to programs designed for First Nation people and delivered either by the federal government or First Nation governments undermines the cultural distinctiveness of off-reserve First Nation peoples' by severing their connection to both the government of Canada and their own governments (whether they take the form of bands, tribal councils, or other governance arrangements).

Madame Justice L'Heureux-Dubé undertook a more extensive and detailed analysis of the *Law* indicia in her concurring judgment. As with the majority, she found that off-reserve First Nation members suffered pre-existing disadvantage, vulnerability, stereotyping and prejudice, commenting at one point in her judgment that, "people have often been only seen as 'truly Aboriginal' if they live on reserves."[31] She also noted that off-reserve members have experienced racism, culture shock, and difficulty maintaining their identity in particular and serious ways. She found that the basis for the differential treatment did not adequately relate to the characteristics or circumstances of off-reserve members, largely because band councils have the authority to make many decisions that affect off-reserve, as well as on-reserve, band members.[32] Madame Justice L'Heureux-Dubé dismissed the possibility of the distinction having an ameliorative purpose out of hand, noting that no evidence had been presented that would suggest that the legislation, in purpose or effect, ameliorated the position of band members living on reserve, and turned directly to an analysis of the nature of the interest affected by the distinction between on-reserve and off-reserve members.[33] She found that the distinction affected financial and cultural interests that were important to off-reserve members.[34] She then documented the history of the legislative barriers that had been created to interfere with First

[30] Ibid., 525
[31] *Corbiere*, 258.
[32] Ibid., 260-3.
[33] Ibid., 257.
[34] Ibid., 263-5.

Nations people maintaining connections to their cultures, to help demonstrate why the interest in maintaining a connection with one's culture is an important interest for off-reserve First Nation members that is worthy of constitutional protection.[35] On this basis, Madame Justice L'Heureux-Dubé found the impugned legislative distinction to be discriminatory.[36]

As with all *Charter* claims, once the Court determined that there was a *Charter* violation in *Corbiere*, it turned its attention to whether the violation could be justified as a reasonable limitation on the equality right that could be demonstrably justified in a free and democratic society. The Court found that denying off-reserve First Nation members the right to vote in band elections was not justifiable.[37] The justificatory analysis to be conducted under section 1 of the *Charter* has two steps, the first being a determination of whether the objective of the offending law is pressing and substantial and the second being a determination of whether the means chosen to achieve the objective are reasonable and demonstrably justified.[38] In analyzing the first step, Madame Justice L'Heureux-Dubé was careful to note that, "it is the objective of the restriction of voting rights to band members ordinarily resident on the reserve that must be considered in this case…" [emphasis in original], though she agreed that the objective of ensuring that those with the most immediate and direct connection with the reserve have a special ability to control its future was pressing and substantial.[39] It seems unlikely that the federal government would be able to define a similarly pressing and substantial objective for restricting the provision of First Nation-specific social programs to on-reserve First Nation members.

Having found a pressing and substantial objective for the restriction of voting rights and agreeing that there was a rational connection between the restriction and the objective, the Supreme Court decided that the restriction failed the section 1 test on the ground that a complete exclusion of off-reserve members from voting in band elections did not minimally impair their equality right.[40] It is interesting, when one considers how the Court might react to a section 15 challenge to the federal restrictions on the provision of social programs, that the Court soundly rejected the federal government's claim that the cost and administrative complexity of alternatives made a complete exclusion of off-reserve members from voting a minimal impairment of their equality right. Justices

[35] Ibid., 267-9.
[36] Ibid., 269-71.
[37] Ibid., 278.
[38] *R.* v. *Oakes* [1986] 1 S.C.R. 103, 138-9.
[39] *Corbiere*, 275.
[40] Ibid., 277-8.

McLachlin and Bastarache commented that, "they [the federal government] present no evidence of efforts deployed or schemes considered and costed, and no argument or authority in support of the conclusion that costs and administrative convenience could justify a complete denial of the constitutional right."[41] In a similar vein, Madame Justice L'Heureux-Dubé commented that:

> Even assuming that such costs could legitimately constitute a s. 1 justification, these arguments are unconvincing. … Change to any administrative scheme so it accords with equality rights will always entail financial costs and administrative inconvenience. The refusal to come up with new, different, or creative ways of designing such a system, and to find cost-effective ways to respect equality rights cannot constitute a minimal impairment of these rights. …the possible failure, in the future, of the government to provide Aboriginal communities with additional resources necessary to implement a regime that would ensure respect for equality rights cannot justify a violation of constitutional rights in its legislation.[42]

Residency and Difference in the Provision of Social Programs

The *Law* and *Corbiere* cases established the analytical framework for equality jurisprudence and established that Aboriginality-residence is an analogous ground of discrimination, but they did not address the specific issue of whether off-reserve First Nation members are discriminated against in being denied access to federal government social programs. The Supreme Court of Canada itself seems to have recognized, however, in its decision in *Lovelace* v. *Ontario*, that some Aboriginal peoples suffer disadvantage because of the limitations on the federal provision of social programs. In that case, the Court noted that the claimants, non-status Aboriginal communities, suffered disadvantages because of their non-participation in the federal regulatory regime created by *Indian Act*. [43] Such disadvantages included vulnerability to cultural assimilation, a lack of access to culturally-specific health, educational, and social service programs and a chronic pattern of being ignored by both the federal and provincial governments.[44] The Court also found that these claims were supported by the findings of the Royal Commission on Aboriginal Peoples, and quoted two telling passages from the Commission's Final Report:

> Registered (or status) Indians living on-reserve (sometimes also those living off-reserve) and Inuit living in the Northwest Territories have access to federal health and social programs that are unavailable to others. Since federal programs and services, with all their faults, typically are the only ones adapted to Aboriginal needs, they have long been a source of envy to non-status and urban Indians, to Inuit outside their northern communities, and to Métis people.[45]

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[41] Ibid., 225.
[42] Ibid., 277-8.
[43] *Lovelace*, 991-2.
[44] Ibid., 992.
[45] Royal Commission on Aboriginal Peoples, Vol. III, p. 204.

and:

> Equity, as we use the term, also means equity among Aboriginal peoples. The arbitrary regulations and distinctions that have created unequal health and social services provision depending on a person's status as Indian, Métis or Inuit (and among First Nations, depending on residence on- or off-reserve) must be replaced with rules of access that give an equal chance for physical and social health to all Aboriginal peoples.[46]

The Court's use of these quotes in finding that the claimant Aboriginal communities in *Lovelace* suffered pre-existing disadvantage, stereotyping, and vulnerability suggest that the Supreme Court of Canada may be inclined to view sympathetically a challenge to the federal social program regime, which for the most part only provides services to First Nation members living on reserves. To determine if a distinction actually results in a disadvantage that could ground a discrimination claim, though, one needs to understand the situation of First Nation persons in need who live off-reserve. As I reside in Saskatchewan, I intend to use the federal policies in place in Saskatchewan for this purpose. While there are some variations across the provinces in what the federal government provides to off-reserve (and even on-reserve) First Nation members, a conclusion based on the situation of off-reserve First Nation people in Saskatchewan should be applicable across the country.

While the single biggest exclusion of First Nation peoples from federal social programs was the federal government's unilateral decision in 1993 to exclude off-reserve First Nation members from federal social welfare, serious problems have arisen more recently with First Nation members being denied access to federally funded services when disabled First Nation people leave reserves to receive long-term care and assistance to avoid institutionalization. This is a matter of significant concern, as flexible program responses to an individual's actual needs are both more effective for the individual and often less costly to the government providing the service. What often happens to First Nation people, though, is that the Government of Canada uses rigid policy interpretations to deny them access to the flexible services that would be of greatest benefit to their well-being.[47] Thus, for example, a First Nation person who originally moved off a reserve into a full-time group home but progressed to the point where they could make the transition to a supported living program (in which they can live in their own apartment and receive support services for tasks that they are unable to perform themselves), at a cost savings of some $35,000 per year, would be denied access to the

[46] Ibid., 225.

supported living program by Indian and Northern Affairs Canada and would, instead, have to remain in the group home.[48]

Similar situations exist in other fields as well. For example, sports and recreation programs for on-reserve children are fully funded by the Government of Canada, while off-reserve parents have to pay for their children's sports and recreation programs themselves.[49] This can often be an insurmountable barrier to the participation of off-reserve children in sports. As well, because the Government of Canada only funds First Nations for the cost of educating on-reserve students in First Nation-run schools, an off-reserve member's children could be denied access to an education in the First Nation's school, in spite of the member's desire to have their children educated by their First Nation. First Nation housing programs also operate the same way; funds are provided only for the on-reserve population, and no housing programs are provided for off-reserve members. Further, in the health care field, Health Canada funds some primary health care services on reserve, at least some of which are strictly for reserve residents, and reserve residents also have the option of receiving services from the provincially-funded health care system.[50] One could make the argument that giving on-reserve First Nation members a greater choice of service providers than off-reserve members discriminates against off-reserve First Nation members, even if the services themselves are equivalent on- and off-reserve.

Judicial Attitudes Toward Distinctions in Social Program Design

The strict application of the logic of the *Law* and *Corbiere* cases to the facts surrounding the provision of social programs to First Nation members suggests that there is a strong argument to be made that the federal government's limitation on its provision of social programs is unconstitutional. To make an accurate prediction of the outcome of such an argument, however, one must also consider the Supreme Court of Canada's general attitude to distinctions created in social programs when they have been the subject of equality rights challenges.

While they make the predictable reference to the seminal case of *Andrews* v. *Law Society of British Columbia*,[51] *Law*, *Corbiere* and the subsequent equality rights cases generally focus on the development of equality jurisprudence since 1995. In this period there have been several equality

[47] Interview with Saskatchewan Department of Community Resources and Employment official, January 23, 2004.
[48] Interview with Saskatchewan Department of Community Resources and Employment official, January 22, 2004.
[49] Interview with Saskatchewan Department of Community Resources and Employment official, January 23, 2004.
[50] Interview with Saskatchewan Department of Health official, January 19, 2004.
[51] [1989] 1 S.C.R. 143.

rights cases in the Supreme Court of Canada that have been based on claims of discrimination in the provision of a public benefit: *Egan* v. *Canada*, a 1995 decision on the federal government's refusal to provide Old Age Supplement spousal benefits to partners in same-sex relationships;[52] *Eldridge* v. *British Columbia (Attorney General)*, a 1997 decision on the British Columbia government's failure to provide sign-language interpretation for deaf people seeking to receive insured medical services;[53] *Law* itself, which was about the federal government's refusal to provide Canada Pension Plan survivor benefits to widows under 35;[54] *Granovsky* v. *Canada (Minister of Employment and Immigration)*, a 2000 decision about limitations on the provision of Canada Pension Plan disability benefits;[55] *Lovelace* v. *Ontario*, a 2000 decision on Ontario's agreement to limit the benefits of its First Nation Fund to First Nation bands;[56] *Lavoie* v. *Canada*, a 2002 decision about the federal government's preference for citizens in staffing civil service positions;[57] and *Gosselin* v. *Quebec (Attorney General)*, a 2002 decision on the reduction of benefits to social assistance recipients under 30 as part of a "work-for-welfare" scheme.[58] For a First Nation person seeking to carry a discrimination claim against the federal limitation of its social programs to reserve residents, the fact that, of all these cases, only in *Eldridge* did the Supreme Court of Canada find discrimination that was not saved by section 1 as a reasonable limit on the claimant's *Charter* rights, would likely be depressing news.[59] Of the other cases, the Court sometimes found that there was no discrimination and, at other times, found the discrimination to be saved by section 1. It is interesting to note, however, that in three of the cases where the *Charter* claim failed, the Court was divided.[60] As well, there are factual grounds for distinguishing these cases from a challenge to the federal limitation on the provision of social programs and credible critiques of the Court's analysis in these cases that should leave room for optimism.

In *Egan*, the first of the cases listed above and a case decided before *Law* established the current analytical framework for section 15 decisions, the key factor for Chief Justice Lamer and

[52] [1995] 2 S.C.R. 513.
[53] [1997] 3 S.C.R. 624.
[54] *Law*.
[55] [2000] 1 S.C.R. 703.
[56] *Lovelace*.
[57] [2002] 1 S.C.R. 769.
[58] [2002] 4 S.C.R. 429.
[59] It will be interesting to see how the Supreme Court of Canada decides the pending case of *Auton* v. *British Columbia*, a case involving the denial of public funding for intensive treatment of autistic children and, thus, in many ways similar to *Eldridge*. The British Columbia Court of Appeal decided that this did constitute a breach of section 15 of the *Charter* and was not saved by section 1 (2002 B.C.C.A. 538), so treatment had to be provided. The Supreme Court of Canada granted leave to appeal this decision on May 15, 2003.
[60] *Egan*, *Lavoie*, and *Gosselin*.

Justices La Forest, Major, and Gonthier in finding that there was no discrimination was that the "biological and social realities" of heterosexual couples, and the important social benefits of protecting those couples and supporting family units, made government's differentiation between them and homosexual couples non-discriminatory.[61] The other five Justices, however, found that not extending spousal benefits to homosexual partners did constitute discrimination.[62]

Egan generated a debate that would reappear in other decisions on the provision of public benefits and that would likely affect the outcome of any challenge to federal limitations on the provision of social programs. A significant part of the reason Mr. Justice Sopinka concluded the discrimination could be saved under section 1 was out of deference to an argument about the cost of extending benefits. He stated in his reasons that:

> I agree with the respondent the Attorney General of Canada that government must be accorded some flexibility in extending social benefits and does not have to be pro-active in recognizing new social relationships. It is not realistic for the Court to assume that there are unlimited funds to address the needs of all. … It [a Legislature] must be given reasonable leeway to deal with problems one step at a time…and to take account of the difficulties, whether social, economic or budgetary, that would arise if it attempted to deal with social and economic problems in their entirety, assuming such problems can ever be perceived in their entirety.[63]

On the other hand, Madame Justice L'Heureux-Dubé stated that:

> It can be argued that the primary salutary effect of the distinction…is the savings it ostensibly entails to the public purse. … I would nonetheless make three observations in relation to this argument. First, by the government's own account, these sums account for only between two and four percent of the total cost of the old age supplement program. Second, I have referred to these savings as "ostensible" because if the affected persons had been in heterosexual relationships instead of homosexual relationships, the government would have to have paid out this money anyway. Finally, I note that the majority of this Court recognized in *Schachter* v. *Canada* [1992] 2 S.C.R. 679, at p. 709, that budgetary considerations should not be determinative of a s. 1 analysis, and should more properly be considered when attempting to formulate an appropriate remedy.[64]

Similarly, Mr. Justice Iacobucci stated, in his dissenting analysis of section 1, that:

> The jurisprudence of this Court reveals, as a general matter, a reluctance to accord much weight to financial considerations under a s. 1 analysis. … This is certainly the case when the financial motivations are not, as in the case at bar, supported by more persuasive arguments as to why the infringement amounts to a reasonable limit.[65]

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[61] *Egan*, 536-9.
[62] Ibid., 566-8, 572, 603-4.
[63] Ibid., 572-3.
[64] Ibid., 571.
[65] Ibid., 609.

The degree of deference to be afforded to governments' fiscal pressures continues to be a live issue in equality rights decisions and, of course, was dismissed as an argument in *Corbiere.*

In the next decision, *Eldridge*, the Court expressed strong views about the need for governments to take positive action to allow disadvantaged groups to benefit equally from government services and to do so in a way that does not make government a source of further inequality.[66] The Court also avoided determining to what degree fiscal considerations could ground a section 1 justification by stating that it assumed, without deciding, that controlling health care expenditures was a pressing and substantial objective but finding that the refusal to provide sign language interpretation more than minimally impaired section 15.[67] Mr. Justice La Forest did, however, comment, in the Court's analysis of the "minimal impairment" issue, that:

> It is also clear that while financial considerations alone may not justify *Charter* infringements, governments must be afforded wide latitude to determine the proper distribution of resources in society. This is especially true where Parliament, in providing specific social benefits, has to choose between disadvantaged groups. … At the same time, the leeway to be granted to the state is not infinite. Governments must demonstrate that their actions infringe the rights in question no more than is reasonably necessary to achieve their goals.[68]

One could suggest that the Supreme Court has, in recent years, focussed too much on the first part of this statement and too little on the second part, thereby replacing *Law*'s analytical rigour with confusion and results-oriented logic. One must also wonder whether, if the federal government provides benefits to First Nations people as part of their treaty obligations, they have any right to choose between the disadvantaged groups of on- and off-reserve First Nation members.

The third of these cases was *Law*. The Supreme Court found that the federal government did not violate equality rights by not providing Canada Pension Plan survivor benefits for those under 35, largely because the Court felt that the limitation correlated with the actual ability of able-bodied survivors under 35 who do not have dependent children to meet their long-term financial needs.[69] The limitation, therefore, did not operate by stereotype or stigmatize younger survivors as less worthy of society's concern or respect and so did not create substantive discrimination against younger survivors.[70] The decision in *Law* was, however, based in part on an acceptance of an

[66] *Eldridge*, 678.
[67] Ibid., 685-7.
[68] Ibid., 685-6.
[69] *Law*, 558-60.
[70] Ibid., 562.

ameliorative purpose, a factor that would become the subject of questionable interpretations in later cases. In *Law*, the survivors' benefits rules were found to have an ameliorative purpose for older survivors, who are more economically vulnerable to the long-term effect of the death of a spouse and therefore suffer greater disadvantage than younger survivors.[71] The importance of assessing relative disadvantage in analyzing an ameliorative purpose argument would be thrown into question by the Court's decision in *Lovelace*, but it is clear that, at the time *Law* was decided, this was essential to demonstrating an ameliorative purpose. There are some compelling reasons to argue for a return to this rigour, which would likely have an effect on the outcome of any challenge to the limitations in the federal provision of social programs to First Nation members.

As with *Law*, the challenge to the Canada Pension Plan disability benefits scheme in *Granovsky* failed because the Court did not find any pre-existing disadvantage or stereotyping of the group "the temporarily disabled" and found, instead, that the limitations on the provision of disability benefits reflected an actual difference in the capacity of the temporarily and permanently disabled to meet their needs through employment.[72] As the purpose of the scheme was to replace employment income for those permanently disabled, this distinction, and the requirement to demonstrate some prior workforce attachment, did not suggest discrimination against the temporarily disabled.[73] Further, the Court found that the scheme sought to ameliorate the situation of the permanently disabled, a more disadvantaged group, and reiterated the *Law* statement that:

> An ameliorative purpose or effect which accords with the purpose of s. 15(1) of the *Charter* will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation.[74]

The Supreme Court's next decision about equality in the context of the public provision of benefits was *Lovelace*. I would assert that this case was decided correctly, but the analysis of whether a distinction serves an ameliorative purpose sufficient to counter a claim of discrimination is inconsistent with both *Law* and statements made elsewhere in the *Lovelace* decision itself. The root of the problem is the Court's apparent desire to avoid determining whether the claimants' group suffers disadvantage in comparison to the identified comparator group when the comparator group itself suffers disadvantage in comparison to another group.

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[71] Ibid., 559-60.
[72] *Granovsky*, 735-7.
[73] Ibid., 708-9.
[74] *Law*, 539.

In looking at the ameliorative purpose issue, the Court found that both the claimants' group and the comparator group were equally disadvantaged.[75] This, however, is inconsistent with the Court's finding that non-status Aboriginal communities suffer from pre-existing disadvantage, stereotyping, and vulnerability unique to them, as well as disadvantages common to all Aboriginal peoples.[76] As well, the suggestion that a distinction can have a valid ameliorative purpose when it excludes one of two equally disadvantaged groups seems inconsistent with the language in *Law*. The fact that the First Nations Fund served some ameliorative purpose seems inadequate, as all legislation presumably ameliorates the conditions of someone or some group. The *Lovelace* analysis would allow otherwise discriminatory legislation which is designed to aid a group that suffers "disadvantage" to escape *Charter* scrutiny, a result clearly at odds with the *Law* test. In essence, this would import the judicial deference towards legislative incrementalism, which was accepted by Mr. Justice Sopinka in *Egan*, for example, as a section 1 justification, into the section 15 analysis.

Further, the Court stated that, "one must recognize that exclusion from a targeted or partnership program is less likely to be associated with stereotyping or stigmatization or conveying the message that the excluded group is less worthy of recognition and participation in the larger society."[77] Giving this assertion the status of a general principle could easily be challenged. To support this assertion, one needs to undertake the "correspondence" analysis and demonstrate that there is an adequate correspondence between the distinction being made between the claimant and comparator groups and their actual capacities, needs, and circumstances. I accept that a government should have some discretion, when seeking to form a contract or negotiate another type of agreement, to determine which of several potential parties to the agreement would be best able and most willing to assist the government in fulfilling the objectives that led it to want to negotiate an agreement in the first place.[78] This is, essentially, a form of "correspondence" analysis. On the other hand, to assume such a correspondence in the absence of evidence to this effect, as the Court seems to suggest in *Lovelace*, would further weaken the rigour applied to the discrimination enquiry in section 15 cases.

The last two cases I will review may yet help to rescue the rigour of the Supreme Court of Canada's *Law* analysis from the analytical weakness demonstrated by the Court in *Lovelace*, though

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[75] *Lovelace*, 999.
[76] *Corbiere*, 223-4.
[77] *Lovelace*, 1000.
[78] I would note that the Supreme Court of Canada also decided, in *Native Women's Association of Canada* v. *Canada* [1994] 3 S.C.R. 627, that the Government of Canada did not violate equality rights by funding certain organizations, but not others, to participate in the 1992 constitutional negotiations. This would seem to support my view that governments should have some freedom in choosing with whom they establish contractual-type relationships.

Gosselin, in particular, is not without its own problems. In *Lavoie*, the majority decided that the federal government did breach section 15 of the *Charter* by instituting a preference for citizens in federal civil service hiring, but that this was a reasonable limit saved by section 1. In their analysis of whether this preference constituted substantive discrimination, the majority reiterated the "more disadvantaged group" language of *Law*'s ameliorative purpose analysis and noted that the challenged citizen preference did not aim to ameliorate the predicament of a more disadvantaged group.[79]

In the most recent case, *Gosselin*, the Supreme Court was divided, as it had been in *Egan* and *Lavoie*, though the majority found that Quebec's 1980s welfare scheme was constitutional. This is based largely on a misunderstanding of the challenges that faced young people in attempting to enter the workforce in the 1980s, as well as a stereotypical view on the part of the majority that young people needed to be forced, through a reduction in welfare benefits, to seek out opportunities to improve their skills and chances for permanent workforce attachment. In fact, Mr. Justice Bastarache, in his dissenting judgment, stated that the distinction between welfare recipients under and over 30 was based on a stereotypical view of young welfare recipients that was not grounded in fact.[80]

In its analysis of whether there was an ameliorative purpose to the limitation of benefits, the majority judgment is internally inconsistent. The majority reiterated the need to find the comparator group more disadvantaged than the claimant group if an "ameliorative purpose" argument is to be made out.[81] On the other hand, they also commented that, because older and younger welfare recipients are "differently disadvantaged" (without stating that older workers are more disadvantaged) and have different degrees of long-term employability, Quebec's limitation had a reasonable basis.[82] The majority's analysis thus seems to attempt to gloss over the "ameliorative purpose" analysis, and put in its place a "correspondence" analysis that is based on untested assertions (disputable "facts" about the relative difficulty of older and younger welfare recipients in finding work of which the Court in *Gosselin* decided it could take judicial notice).

Mr. Justice Bastarache was quite critical of this "ameliorative purpose" analysis in his dissent. He commented that:

> The respondent argues that the purpose of this legislation was ameliorative in that it was meant to improve the situation of unemployed youths through academic and experiential benefits, as

[79] *Lavoie*, 807.
[80] *Gosselin*, para. 235.
[81] Ibid., paras. 59-60.
[82] Ibid., para. 61.

> opposed to exclusively pecuniary assistance. Quite simply, this is not a useful factor in determining whether this legislation's differential treatment was discriminatory. … Groups that are the subject of an inferior differential treatment based on an enumerated or analogous ground are not treated with dignity just because the government claims that the detrimental provisions are "for their own good". If the purpose and effect of the distinction really are to help the group in question, the government should be able to show a tight correspondence between the grounds upon which the distinction is being made and the actual needs of the group. Here, no correspondence has been shown between the lower benefit and the actual needs of the group, even though it may have been established that the programs were themselves beneficial.[83]

Using Mr. Justice Bastarache's analysis would ensure that the "correspondence" and "ameliorative purposes" analyses identified in *Law* remained two separate analyses. It should, therefore, be preferred for being truer to the intent of the *Law* test than is the majority judgment.

A further problem with the majority judgment is that it imports legislative intentions into the section 15 analysis, thereby weakening the focus on the actual adverse effects of the limitation of welfare benefits on welfare recipients under 30. The majority noted, in seeking to justify the distinction, that the scheme was aimed at ameliorating the situation of welfare recipients under 30.[84] For example, in analyzing the nature and scope of the interest affected by the limitation, the majority commented that:

> The trial judge, as noted, was unable to conclude that the evidence established actual adverse effects on welfare recipients under 30. The legislature **thought** it was helping under-30 welfare recipients… Assessing the severity of the consequences also requires us to consider the positive impact of the legislation on welfare recipients under 30. The evidence shows that the regime set up under the *Social Aid Act* **sought to** promote the self-sufficiency and autonomy of young welfare recipients through their integration into the productive work force, and to combat the pernicious side effects of unemployment and welfare dependency. [emphasis added][85]

When this portion of the section 15 analysis was first articulated by Mr. Justice Iacobucci for the Court in *Law*, he stated that, "The more severe and localized the **consequences** of the legislation for the affected group, the more likely that the differential treatment responsible for these consequences is discriminatory within the meaning of s. 15(1)." [emphasis added][86] Thus, the analysis of the interest affected by the limitation on welfare benefits should be restricted to the *effect* of the limitation, not Quebec's intention in creating it. Madame Justice L'Heureux-Dubé strongly criticized this importation of legislative intention into the analysis of adverse effects discrimination in her

[83] Ibid., para. 250.
[84] Ibid., para. 62.
[85] Ibid., paras. 64-5.
[86] *Law*, 552.

dissenting judgment. Early in her section 15 analysis, she commented that, "Blurring the division between the rights provisions and s. 1 of the *Charter*, by incorporating the perspective of the legislature in a s. 15 analysis, is at odds with this Court's approach to equality and surely does not serve the purposes of s. 15."[87] Later, she also stated that:

> By necessary implication, the fact that a legislature intends to assist the group or individual adversely affected by the impugned distinction also does not preclude a court from finding discrimination. Nor is it determinative, where a distinction produces prejudicial effects, that a legislature intends to provide an incentive for the affected individuals to alter their conduct or to change themselves in ways that the legislature believes would ultimately be beneficial for them. [citations deleted; emphasis in original][88]

Mr. Justice Bastarache, in his dissenting judgment, also criticized this aspect of the majority judgment. He commented that:

> It may be argued that a positive legislative intention might make some difference in the subjective-objective assessment of a distinction's impact on a claimant's human dignity, but the "principal concern", as McLachlin J. put it, remains the effect. … Indeed, giving too much weight here to what the government says was its objective in designing the scheme would amount to accepting a s. 1 justification before it is required. … At the s. 15 stage, it is not appropriate to accept at face value the legislature's characterization of the purpose of the legislation and then use that to negate the otherwise discriminatory effects. … In any case, as I have noted, the legislature's intention is much less important at this stage of the *Law* analysis than the real effects on the claimant. … The approach set out for us by *Law* is to ask how any member of the majority, reasonably informed, would feel in the shoes of the claimant, experiencing the effects of the legislation.[89]

He also stated, later in his judgment, that:

> I wish to reiterate that as this Court's jurisprudence makes clear, the fourth contextual inquiry focuses on the particular interest denied or limited in respect of the claimant, not the societal interests engaged by the legislature's broader program or another particular benefit purportedly being provided to the claimant.[90]

The dissenters' analysis is much more consistent with the Court's decision in *Law*. Therefore, unless one is challenging a law on the basis of a discriminatory purpose, the legislative intention of the government is a matter to be left to a section 1 analysis.

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[87] *Gosselin*, para. 104.
[88] Ibid., para. 112.
[89] Ibid., paras. 243-5.
[90] Ibid., para. 257.

Conclusion: Federal Discrimination and Policy Responses

Whether or not one believes the Supreme Court of Canada would find that the federal government is acting unconstitutionally in limiting the provision of social programs to on-reserve First Nation members is likely based on whether one sees, in the Supreme Court's equality jurisprudence to date, a stronger commitment to egalitarianism in the receipt of public benefits or to deference to legislative choices in the provision of public funds. If the Supreme Court has effectively established the rule that it will not find programs designed to provide a public benefit to be unconstitutional on equality grounds, even if this is unsupported by an appropriately rigorous analysis, the challenge in getting the Court to find the federal government to be acting unconstitutionally in limiting its provision of social programs to reserve residents could be great. On the other hand, there are good reasons, in the fact that the Court has often been divided in its decisions on equality and the provision of public benefits and in the content of the various judgments, to believe that the Court might find the federal limitation unconstitutional. A Supreme Court that was committed to observing the disciplined analysis it has set out in previous decisions would likely find the federal government's distinction between on- and off-reserve First Nation members discriminatory and would not consider it a reasonable limit demonstrably justified in a free and democratic society.

In the absence of a policy response to the situation of off-reserve First Nation members, a court challenge to the federal government's policy, on the basis that off-reserve members' equality rights are being discriminated against, is almost inevitable, even if the outcome is not clear. Eventually, a First Nation person will decide that the possibility of receiving benefits from the federal government by winning a court challenge is better than the certainty of not receiving them. The more responsible policy approach would be to avoid this question, and the prospect of a costly court challenge, entirely by having the federal government negotiate a resolution of the current conflict that would be acceptable to the provinces and First Nations people resident both on and off reserves. An essential condition of such a resolution would be that the federal government provides social programs and services to all First Nation members, no matter their place of residence, equally. As well, part of any negotiating agenda should be the negotiation of a reciprocal billing arrangement where there are multiple service providers (such as in the health and education fields), so that an individual could receive service from the provider of their choice.

While the proposed agreement would result in an increase in federal expenditures, this could be softened by, for example, negotiating a reduction in federal Canadian Health and Social Transfer payments to Saskatchewan equivalent to the proportion of First Nation people in the provincial population. As the provincial government would no longer be responsible for services to any First Nation member, this reduction in the transfer to pay for social programs would be a justifiable trade-off for the federal government accepting its responsibility to provide services to off-reserve First Nation members. Such a negotiated resolution would also give off-reserve First Nation members access to federal government programs and services, placing them on an equal footing with on-reserve members. This would allow them to reconstruct a relationship with the Government of Canada that more accurately reflects the terms of the federal government's constitutional jurisdiction[91] and allow them to again become full members of their First Nations.

These issues have been discussed for many years among officials of all governments in Saskatchewan. Thus, Saskatchewan would seem to be fertile ground for negotiating a resolution. All that is required is for the federal government to demonstrate the necessary political will. Let us hope that ending the bureaucratic wrangling that has created this public policy vacuum will be part of Prime Minister Martin's agenda.

[91] Section 91(24) of the *Constitution Act, 1867* gives the federal government jurisdiction over "Indians, and lands reserved for the Indians".

About the Author

IAN PEACH has been with the Government of Saskatchewan for approximately eight years, and has been Director of Constitutional Relations in the Department of Intergovernmental and Aboriginal Affairs and, for the last five and one-half years, a Senior Policy Advisor in the Cabinet Planning Unit of Executive Council. In his fourteen years of government service, Mr. Peach has been involved in numerous intergovernmental negotiations, including the Charlottetown Accord, the Social Union Framework Agreement, First Nation self-government agreements, and the Canada-Saskatchewan Northern Development Accord. He has also been involved in developing Saskatchewan's policies on a broad range of issues, including Saskatchewan's argument before the Supreme Court of Canada in the Quebec Secession Reference and key cross-government strategies to address the socio-economic disparity of Aboriginal people in Saskatchewan and northern economic development. Throughout, Mr. Peach has been a keen observer of the policy development process. Born in Halifax, N.S., Mr. Peach holds a Bachelor of Arts from Dalhousie University and a Bachelor of Laws from Queen's University.

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